

THE GOOD FAITH DEFENSE OF THE ROBINSON-PATMAN ACT: A REALISTIC APPROACH TO THE PROBLEM OF MEETING COMPETITION

SECTION 2(a) of the Robinson-Patman Act prohibits discrimination in prices offered to different buyers of goods of a like grade and quality when such discrimination would "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. . . ." Section 2(b)² provides, however, that a seller who has made a price discrimination may rebut the prima facie case thus made against him by showing that the lower price was "made in good faith to meet an equally low price of a competitor. . . ." Thus, a good faith meeting of competition is an absolute defense³ to a violation of section 2(a).⁴

¹ 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958), provides: "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 purchasers 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, and 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. . . ."

² 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958), provides: "Upon proof being made, at any hearing on a complaint under this section, 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, and unless 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 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 or facilities furnished by a competitor."

³ Various limitations have been placed on the good faith defense. First, the seller has the burden of proof; second, the price met must itself be lawful; third, it must be an actual price which is met and not a hypothetical one; fourth, the seller can meet but not beat competition; fifth, the lower price must be in reaction to a specific competitor who has offered a specific price. See Stedman, *Twenty-Four Years of the Robinson-Patman Act*, 1960 Wis. L. REV. 197, 207.

⁴ *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951). In the *Standard Oil* case the Commission contended that the good faith defense is not an absolute one, but that it merely changes the procedural aspects of the case. It claimed that all that need be

A significant interpretation of the good faith defense was made in the recent case of *Sun Oil Co. v. FTC.*⁵ Sun Oil Company, a large domestic oil and gasoline supplier, marketed its product through thirty-eight retail outlets in the Jacksonville, Florida area, all of which were either independently owned or leased from the company. One of Sun's independent dealers, McLean, encountered competition from a nearby station owned and operated by Super-Test, a vertically integrated supplier-retailer. Immediately after opening the station, Super-Test began cutting prices and McLean lost sales. After four months of steady losses the Sun Oil Company gave McLean a price allowance which enabled him to lower his price and still maintain a reasonable margin of profit. This allowance was not given to the other Sun dealers in the area with whom McLean was found to be in competition.⁶ Suit was brought by the Federal Trade Commission against Sun Oil Company for violation of Section 2(a) of the Robinson-Patman Act and Sun pleaded the good faith defense of section 2(b).

The Commission issued a cease and desist order against Sun, ruling that the good faith defense was not available to a supplier who lowered his price to one of several buyers in a competitive area to permit that

shown is a discrimination in price and thereupon the burden shifts to the defendant, who by making a showing of good faith could shift the burden back to the Commission. The Commission could then show an injury to competition which would negate the contention of good faith by the defendant. The Court refused to accept this interpretation and held that good faith is an absolute defense.

After this decision was handed down, Congressman Patman and Senator Kefauver attempted to have Congress amend the act along the lines of the Commission's argument. H.R. 1840, 84th Cong., 2d Sess. (1956); S. 11, 84th Cong., 2d Sess. (1956). The House bill passed with only three dissenting votes. 102 CONG. REC. 10025 (1956). Congress adjourned before the Senate took action on the bill. Speaking of this bill Congressman Patman has said, "The intent of the bill is to accept the *Standard Oil of Indiana* opinion up to the point where the effects of a discriminatory price reach a certain degree of seriousness, but to put a limit on the good-faith defense, so that it will not be a bar to a cease-and-desist order where the effects of the discrimination go beyond this degree of seriousness." Patman, *For H.R. 11 and S. 11 To Strengthen the Robinson-Patman Act and Amend the Antitrust Law Prohibiting Price Discrimination*, 11 VAND. L. REV. 399, 450 (1958).

⁵ 294 F.2d 465 (5th Cir. 1961), cert. granted, 368 U.S. 984 (1962).

⁶ The examiner determined that there were four Sunoco dealers in the area with whom McLean was in competition. Two of these dealers lost sales to the extent of about 14.5% each after the allowance was given to McLean. A third dealer's records had been tampered with and consequently were disregarded as evidence to show to what extent his sales were affected. The fourth dealer suffered no loss at all. *In re Sun Oil Co.*, 55 F.T.C. 955 (1959).

buyer to meet competition at his level of marketing.⁷ Rather, the good faith defense would be available only to a seller who lowers his price to meet competition at his own level.⁸ The Commission suggested two alternative courses of action which Sun Oil Company could have pursued. First, Sun could have purchased all of its retail outlets and thereby become a supplier-retailer free to set any price it chose. Or, secondly, Sun could have lowered the price to all of its dealers.⁹

The Court of Appeals for the Fifth Circuit reversed the FTC and held that the good faith defense was available under the circumstances of the *Sun Oil* case.¹⁰ In so holding the court relied on the Supreme Court decision in *Standard Oil Co. v. FTC*.¹¹ In that case, Standard Oil, in order to meet a competitor's price, lowered its price to certain wholesalers in the Detroit area without a corresponding reduction to retail dealers. The wholesalers passed this saving on to their retail customers, thus enabling them to undercut those retailers buying directly

⁷ The examiner also held that even assuming the defense to be available to Sun, the decision could be based on alternative grounds. First, Sun Oil Company did not act in good faith in that the price discrimination was made to beat rather than meet competition. There was evidence showing that Super-Test's usual price was two cents below that of McLean's because, as a general rule, independent brands of gasoline such as Super-Test are competitive with name brand gasoline only with the aid of this differential. Therefore, the examiner felt that the allowance given McLean, which enabled him to set his price within one cent of Super-Test's, was beating competition. The second alternative ground was that Sun Oil Company had entered into a price fixing agreement with McLean. The examiner said that there was sufficient evidence to sustain a finding that, in order to get the allowance, McLean had to agree to set his price where he did. *In re Sun Oil Co.*, 55 F.T.C. 955, 965-66 (1959).

⁸ The Commission relied on *Enterprise Industries, Inc. v. Texas Co.*, a case in which the Texas Company had lowered its price to certain of its several dealers in the area of a gas war. The price charged was determined by the average price of gasoline in a dealer's immediate area. As a result, the dealers in town were charged a lower price than one located on a highway at the edge of town. The district court in that case found that the Texas Company was not in competition with any of the dealers and thus was not meeting competition within the meaning of the act. 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

⁹ *In re Sun Oil Co.*, 55 F.T.C. 955, 965 (1959).

¹⁰ As to the examiner's alternative ruling that Sun had not acted in good faith, the court held that there was not sufficient evidence to show that Sun and McLean intended to fix prices. A price fixing agreement may be established by circumstantial evidence, but the court said that this does not relax the rule requiring substantial evidence to support a finding by the examiner. Furthermore, the court held that the evidence failed to show that Sun was beating instead of meeting competition. 294 F.2d at 482.

¹¹ 340 U.S. 231 (1951).

from Standard. The FTC brought suit against Standard Oil for violation of section 2(a) of the act. In reviewing the case, the Supreme Court demonstrated a keen awareness of the competitive situation in gasoline marketing and said that the realities of economic life must be considered in each case. Although *Standard* was distinguishable on the facts, the Court of Appeals said that the same broad approach there taken should be applied in deciding the instant case.

The court considered the Commission's construction of section 2(b) unnecessarily narrow in that it would preclude a supplier from effectively meeting the lower prices of its vertically integrated competitor.¹² By way of demonstration, the court pointed to the anomalous and economically unrealistic results¹³ which would ensue if the Sun Oil Company were to follow the Commission's suggestions. If Sun were to purchase all of its retail outlets, already highly integrated oil companies would be forced to integrate still further, to the detriment of independent retailers. The act would thus become an instrument of injury to those for whose benefit it was originally passed.¹⁴ Further integration

¹² In the instant case the examiner felt that the good faith defense would be available to Sun only if another supplier made a direct offer of a lower price to McLean. If this had been the situation then Sun could have lowered the price to McLean without a corresponding reduction to the other dealers. It would seem that a seller's need to give a lower price is just as pressing whether the loss in retail sales comes from either a direct lower offer to his buyer or the buyer's inability to hold his share of the market because of competition from an integrated supplier-retailer. See Note, 66 YALE L.J. 935 (1957).

¹³ Indeed, the district court opinion in the *Enterprise* case had recognized the economic unreality of this result. The court was fully aware of the competitive situation in the oil and gasoline industry. Where a filling station operator is selling a brand-name gasoline, he does not buy from several competing oil companies. The district court judge speaking of competition in the oil and gasoline industry said: "[P]erhaps it is a fiction to speak of price competition at the oil company sale to the station level." *Enterprise Industries, Inc. v. Texas Co.*, 136 F. Supp. 420, 421 (D. Conn. 1955). The essential assumption of both the court in the *Enterprise* case and Commission in the *Sun Oil* case, is that although a supplier's products compete for the motorists' acceptance, the supplier is not in competition at the consumer level. The Commission in the instant case would extend the result to include even the supplier-retailer.

¹⁴ The Robinson-Patman Act was enacted against a background of a growing trend in chain stores which, because of their size, could coerce the supplier into giving them price concessions not available to the smaller independent merchants. Thus the purposes of the act were to secure the position of local ownership and to protect independent merchants. See AUSTIN, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1950); Ostberg, *The Meaning of the "Injury to Competition" Provision of the Robinson-Patman Act*, 32 ST. JOHN'S L. REV. 26 (1957); Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059 (1957).

would also tend to increase the monopolistic character of the oil and gasoline industry, a contravention of the policy of the antitrust law which the Robinson-Patman Act amended.¹⁵ Following the Commission's second suggestion would spread the harmful effects of price wars throughout the entire area of competition by requiring that Sun lower its prices to all dealers in order to assist the one dealer who needed help.¹⁶ Finally, the court *sua sponte* pointed out that if Sun did nothing, the full burden of the price war would be on the individual who could least afford it, the independent retailer attempting to compete with the vertically-integrated company.

Although the Commission reached a result not totally unwarranted under the existing language of the act, the result reached by the Court of Appeals was the only reasonable one under the circumstances presented in the *Sun Oil* case. The defect lies in the Robinson-Patman Act itself. By laying down an inelastic standard, the act fails to recognize the multiplicity of economic factors which may affect the competitive situation in each case.¹⁷ As the Fifth Circuit pointed out, the economic

¹⁵ The act was passed as an amendment to the Clayton Act, the stated purpose of which is to protect against the harmful effects of monopoly. AUSTIN, *supra* note 14. The Commission's suggestion that Sun buy all its retail outlets would foster vertical integration resulting in a concentration of more business in fewer hands.

¹⁶ Moreover, even if Sun did lower the price to all dealers in the area, the court recognized that it would risk being found in violation of the act under the principle of *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). In that case a brewery had lowered its price in the St. Louis area. The Court of Appeals had held that there had been no violation of the act, stating that "There must be some relationship between the different purchasers which entitles them to comparable treatment. . . ." The court went on to say that competition between purchasers would create this needed relationship. Thus there had been no violation because all the purchasers in St. Louis were being charged the same price and those purchasers throughout the rest of the country were not related to those in St. Louis. 265 F.2d 677, 681 (7th Cir. 1959). The Supreme Court reversed. Holding that the act might have been violated, the Court said that the injury to competition need not be at the buyer's level of competition, but could be found at the seller's own level. On remand the Court of Appeals held that there had been no injury shown to the seller's competitors. TRADE REG. REP. (1961 Trade Cas.) ¶ 69,904 (7th Cir. 1961).

Given the *Anheuser-Busch* holding, under the Commission's interpretation of the law, the effects of a price war could be spread beyond the area of competition. This result follows because a nationwide seller, such as Sun, would have to lower its prices throughout the United States in order to avoid the ruling of that case. *But see* *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956), where the price of ice cream was lowered throughout the Los Angeles area. The Court of Appeals held that Arden need not lower the price to purchasers in other western cities and that the act had not been violated.

¹⁷ See Robbins, *Is Competitive Pricing Legal?*, 35 HARV. BUS. REV., Nov.-Dec.

realities of each case should be considered so that where, as here, a producer-wholesaler competes for the consumer's acceptance through independently owned retail outlets handling only the producer's product, then the wholesaler and retailer will be considered a single competitive unit for purposes of the act.¹⁸ In this situation the best business interests of the producer will cause it to strike a fair balance between aiding the one dealer who needs help and not prejudicing its other independent dealers.¹⁹

Under the Fifth Circuit's interpretation of the "good faith defense," the FTC in future cases can go to the substance of the problem in price-discrimination cases, considering the realities of competition instead of looking at mere form.²⁰ More consideration will have to be given to the competitive practices and customs in each industry.²¹ Moreover, attention can now be focused on the effect on competition in general²²

1957, p. 83, 85. "The competitive impact clause of Section 2(a) can and must be read to incorporate a rule of reason; otherwise the law cannot take into account the many economic factors affecting the public's interest in competition. Each case requires its own analysis of market behavior. . . ."

¹⁸ By following this broader approach of looking at the competitive realities in each case one may find that different results occur within the same industry depending on the circumstances in each case. For example, here Super-Test was a producer-wholesaler. If the competition which McLean encountered had come from another independent retailer acting on his own initiative, without aid from his supplier, the court probably would not have upheld the meeting competition defense. Unless the supplier helped the independent retailer by giving him a price allowance, Sun Oil Company would have no competition on its own level. See *Antitrust and Trade Reg. Rep.*, Aug. 1, 1961.

¹⁹ Another factor complicating the competitive situation is the presence of quality as well as price competition. When people are buying shoes or automobiles, the quality of the product plays a large part in their selection; in buying gasoline, where each brand is about the equivalent of another, the price is the biggest factor in their selection. Therefore, in the cases where quality is a factor, it may be much harder for the defendant to show the need and the justification for having to lower the price.

²⁰ The court in the instant case looked beyond the mere formal functions of supplier, wholesaler and retailer and said that in the gasoline industry all of these are so inter-related and dependent on each other that it is impossible to say that there is competition at the supplier-to-dealer level. The substance of competition exists between suppliers seeking the motorist's trade. 294 F.2d at 476-77.

²¹ See generally Robbins, *supra* note 17, at 83. The Commission has in one case recognized that these factors should be taken into consideration. In Yale and Towne Mfg. Co., 52 F.T.C. 1580 (1956), discounts had been given to some but not all purchasers. The defendant brought forth evidence to show the reasons for such discounts and also the type of industry of which it was a part and how that industry operated. The examiner did consider these factors and held for the defendant.

²² In a competitive system each individual will necessarily be trying to divert the business of his competitor to himself and thus, in the process, someone is inevitably

rather than on the plight of individual competitors.²³ The act as interpreted protects against the harmful effects of price discrimination while remaining flexible enough to give proper consideration to the competitive conditions of the individual case.

going to suffer. See Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289 (1948). As Dr. John D. Clark, economic adviser to President Truman, said: "All competitive effort is burdensome and harmful to those who cannot keep pace, but if we said it must stop short before it hurts anyone we would abandon the policy of competition." *Hearings Before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 1st Sess., pt. 1, at 113 (1949). In *Standard Oil Co. v. FTC*, 340 U.S. 231, 250 (1951), the Court observed: "It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory."

²³ This approach has long been advocated by eminent authors. See Carlston, *Senate Bill No. 11 and Antitrust Policy*, 11 VAND. L. REV. 129 (1957); Simon, *Price Discrimination to Meet Competition*, 1950 U. ILL. L.F. 575. "It appears that the sponsors of the Robinson-Patman Act were not entirely aware of the paradox inherent in any attempt to protect individual competitors as well as competition." Ostberg, *supra* note 14, at 28. See generally Simon, *The Fantasy of the Phrase "Injury to Competition"*, 15 LAW & CONTEMP. PROB. 258 (1950). The recent Attorney General's Report also recommended this approach. "Consonant with these policies, this Committee recommends that analysis of the statutory 'injury' center on the vigor of competition in the market rather than hardship to the individual businessmen." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS, 164 (1955).