St. John's Law Review

Volume 36
Number 1 *Volume 36, December 1961, Number 1*

Article 4

Antitrust Law--Price Discrimination--Defense of "Meeting Competition" Under Robinson-Patman Act (Sun Oil Co. v. FTC, Trade Reg. Rep. (1961 Trade Cas.) ¶ 70083 (5th Cir. July 24, 1961))

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RECENT DECISIONS

ANTITRUST LAW — PRICE DISCRIMINATION — DEFENSE OF "MEETING COMPETITION" UNDER ROBINSON-PATMAN ACT. — Gilbert McLean was one of thirty-eight Sun Oil Company retail dealers in Jacksonville, Florida. His filling station was located across the street from a station operated by the Super Test Oil Company, a vertically integrated competitor of the Sun Oil Company. In August 1955, the Super Test station began a series of price cuts which substantially reduced McLean's sales. After extensive study of the situation, Sun gave in to McLean's pleas and granted him a discount of 1.7 cents a gallon. Despite this aid, McLean was forced to go out of business less than two months later. In September 1956, the Federal Trade Commission filed a complaint charging Sun with a price discrimination violation of Section 2(a) of the Robinson-Patman Act. Sun asserted that its allowance to McLean was a good faith price reduction to meet competition, as provided for by section 2(b) of the act. The Commission adopted the findings[1] and conclusions of the hearing examiner and issued a cease and desist order against Sun. The Court of Appeals for the Fifth Circuit set aside the Commission's order and *held, inter alia,* that the defense of meeting competition in good faith is available to a supplier of gasoline when the supplier reduces the price of its gasoline to one of its filling stations engaged in a price battle at the consumer level with a station owned and operated by a competing supplier. *Sun Oil Co. v. FTC,* TRADE REG. REP. (1961 Trade Cas.) ¶ 70083 (5th Cir. July 24, 1961).

The prime issue in the *Sun Oil* case revolved around the Robinson-Patman Act,[2] which was enacted in 1936 with the general purpose of preventing discriminations in price and other business practices injuriously affecting free competitive enterprise.[3] The act contains four sections,[4] but of importance here is section 1

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[1] The examiner also found that Sun and McLean entered into a price fixing agreement which both destroyed the good faith defense and violated Section 5 of the Federal Trade Commission Act.

[2] 49 Stat. 1526 (1936), 15 U.S.C. 13 (1958).

[3] AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 1 (2d rev. ed. 1959) [hereinafter cited as AUSTIN].

[4] Section 1 is discussed in the text; section 2 contains saving provisions as to the effect of the amendments made by section 1 on pending litigation and on Commission orders previously issued under Section 2 of the Clayton

which contains the federal law of price discrimination as administered and enforced in civil proceedings by the Federal Trade Commission and the courts.[5] Section 1 amended Section 2 of the Clayton Act by enlarging it into six subdivisions: 2(a) to 2(f).[6] The problems of the *Sun Oil* case can be illuminated by focusing on two of these subdivisions, *viz.*, 2(a) and particularly, 2(b). Section 2(a) is the basic section, prohibiting direct and indirect discrimination in price having any of the specified adverse effects on competition; section 2(b) permits a seller to defend against price discrimination charges by showing that his lower, discriminatory[7] price was made in good faith to meet the equally low price of a competitor.[8]

The good faith defense of 2(b) was formerly considered procedural.[9] The Commission took the position that a successful defense of meeting competition under 2(b) merely rebutted a prima facie violation under 2(a) and called for proof of actual, not merely potential, competitive injury.[10] However, in *Standard Oil Co. v. FTC*,[11] the Supreme Court rejected this view and held that the meeting competition proviso of 2(b) affords an *absolute* defense to a charge of a violation of 2(a), even where incidental injury might occur. The Court, however, did seem to add one qualification: the competitor's price met had to be a "lawful" one.[12] The *Standard Oil* decision brought outcries from those who feared [13]

Act; section 3 (Borah-Van Nuys Bill) is a criminal section, imposing penalties of fine or imprisonment for violation; section 4 contains an exemption relating to co-operative associations. See AUSTIN 1-4.

[5] AUSTIN 1.

[6] *Ibid.*

[7] See FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960), where the Supreme Court decided that any difference in price is a "discrimination in price."

[8] AUSTIN 1-2.

[9] AUSTIN 2; Haslett, *Price Discriminations and their Justifications Under the Robinson-Patman Act of 1936*, 46 MICH. L. REV. 450, 476-77 (1948). For the legislative history of the "meeting competition" proviso, see AUSTIN 93-95.

[10] Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 965-66 (1951); Haslett, *supra* note 9.

[11] 340 U.S. 231 (1951).

[12] *Ibid.* This qualification, not found in the statute itself, raised new uncertainties, among them whether the seller had the burden of proving that the price met was not unlawful. See AUSTIN 2 n.2; Moorhead, *Meeting "An Equally Low Price of a Competitor": A Plea For Judicial Clarification of a Judicial Construction*, 5 ANTITRUST BULL. 439 (1960). Two circuit courts have answered this question in the negative. Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 366 (9th Cir. 1955), *cert. denied*, 350 U.S. 991, *petition for rehearing denied*, 351 U.S. 928 (1956); Standard Oil Co. v. Brown, 238 F.2d 54, 58 (5th Cir. 1956).

[13] It would appear that the fears were somewhat unfounded. In 1955

that approval of the Court's view would reduce the price discrimination law "to an empty and useless shell." [14] They took issue with groups who felt that the *Standard Oil* holding was "consonant with the Nation's antitrust policy." [15] However, despite the controversy and despite attempts to alter its legal effect,[16] section 2(b) retains its character as an absolute defense.

Through the years, the Robinson-Patman Act has been criticized for its inept draftsmanship and ambiguities.[17] The problems caused by unclear wording and meaning are not absent from the section 2(b) defense.[18] First, the Commission must establish its prima facie case consisting of sufficient proof, absent any rebutting evidence, of a price discrimination violative of section 2(a).[19] Not every price discrimination is a violation. Therefore, the following matters must be proved: (1) jurisdiction, (2) commerce, (3) discrimination in price, (4) use, consumption or resale in the United States or any Territory, (5) injury to competition.[20] The difficulty arises when we try to interpret the portion of the statute which permits the seller to rebut this prima facie case by showing that his lower price was made in "good faith to meet an equally low price of a competitor."

At the outset it must be kept in mind that the Commission has always given the narrowest and most restricted interpretation to the defenses provided by the statute.[21] Many of the restrictions have formulated themselves around the element of "good faith" meeting of competition and have been used to deny the defense.[22]

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the Attorney General's Committee appointed to study the antitrust laws reported that up to that date not a single seller in a recorded case had succeeded in finally justifying a challenged discrimination by recourse to the section 2(b) defense of "meeting competition." ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 181 (1955). See also EDWARDS, THE PRICE DISCRIMINATION LAW 578 (1959).

[14] *Price Discrimination, The Robinson-Patman Act, and the Attorney General's National Committee to Study the Antitrust Laws,* H.R. REP. No. 2966, 84th Cong., 2d Sess. 76 (1956).

[15] ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 181 (1955). However, this view was not shared by all the members of the Attorney General's Committee. *Id.* at 185-86.

[16] See EDWARDS, *op. cit. supra* note 13, at 569-80.

[17] See AUSTIN 5. The Act was primarily aimed at chain stores, but the universal expressions contained in the statute caused decisions affecting all sectors of industry. See Rowe, *supra* note 10, at 929, 942. See also Sun Oil Co. v. FTC, TRADE REG. REP. (1961 Trade Cas.) ¶ 70083, at 78345 n.28 (5th Cir. July 24, 1961).

[18] See Haslett, *supra* note 9, at 473.

[19] AUSTIN 85.

[20] See AUSTIN 86-89. In the area of injury to competition a prima facie case may involve gradations of proof. *Id.* at 89-92.

[21] See Barton, *Defenses in Price Discrimination Cases,* 17 A.B.A. ANTITRUST SECTION, 389 (1960).

[22] *Id.* at 391. The author notes that the Commission has made use of

Hence, in *FTC v. A. E. Staley Mfg. Co.*,[23] where it was found that the price discriminations were part of a general pricing system and not adopted in response to an individual competitive situation, good faith was precluded and the defense denied. In the *Staley* case the respondent sought to justify its pricing system on the basis of one employed by the Corn Products Manufacturing Company [24] which had been determined to be a violation of section 2(a). The Court emphasized that the defense was not available to one who was merely adopting a competitor's unlawful practice.[25] Thus, as later indicated in the *Standard Oil* case, the "lawfulness" [26] of a competitor's prices can enter into the good faith of a respondent who meets them.[27] The wording of the statute itself, which permits a seller in good faith to *meet* an equally low price of a competitor, has provided the Commission with another limitation. Thus the seller, to prove his good faith, must show that his purpose was defensive rather than aggressive.[28] In *Enterprise Indus., Inc. v. Texas Co.*[29] the Commission advanced still another restriction which helped to defeat the seller's good faith defense: the competitor had to offer his low price to the seller's customer before the seller could lower his price.[30] The district court in the *Enterprise* case emphasized that the act did not permit

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these restrictions especially where, as in the *Sun Oil* case, the injury was alleged and found in the secondary line, *i. e.*, between customers of the seller.

[23] 324 U.S. 746 (1945).

[24] See Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945) which decision was handed down the same day as the *Staley* case.

[25] 324 U.S. 746 (1945). The Court stated that it was the clear intent of Congress "not to sanction by 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another." *Id.* at 754.

[26] The Attorney General's Report felt that by "lawful" the Court merely wished to exclude prices established pursuant to a conspiracy or an illegal basing-point system, or otherwise unrelated to potential differences in rival seller's cost. ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 182 (1955). See also Barton, *supra* note 21, at 394.

[27] ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 182 (1955); EDWARDS, THE PRICE DISCRIMINATION LAW 562-63 (1959).

[28] See EDWARDS, *op. cit. supra* note 27, at 552; Sun Oil Co. v. FTC, TRADE REG. REP. (1961 Trade Cas.) ¶ 70083, at 78350 n.43 (5th Cir. July 24, 1961). For a criticism of this restriction, see Barton, *supra* note 21, at 394-95. See also Rowe, *Price Discrimination, Competition, and Confusion: Another Look At Robinson-Patman*, 60 YALE L.J. 929, 970 (1951).

[29] 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).

[30] *Id.* at 421. See also Barton, *supra* note 21, at 391. The *Enterprise* view is attacked in Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 YALE L.J. 935 (1957), where the author regards it as "not only ill-designed to remedy the evils of the gasoline industry, but actually opposed to the policies of the Robinson-Patman Act and other antitrust legislation." *Id.* at 938.

price discrimination "to enable a *buyer* to meet price competition, but only to enable the seller to meet . . . the *seller's* competitor." [31]

Relying on the *Enterprise* case, the Commission took the same stand in the principal case: it contended that Sun should be denied the 2(b) defense as Super Test had not offered any price to McLean.[32] The Fifth Circuit Court refused to follow the *Enterprise* case, permitted the defense, and set aside the cease and desist order. The Court pointed out that the nature of the gasoline industry made the Commission's approach unrealistic. The retailer's business is built around pumps which can be used for only one brand of gasoline—that of his supplier.[33] Therefore it was a "fiction" [34] to speak of competition at the oil company sale to the station level. The record showed that Sun's action was not intended to allow a *buyer* to meet competition. Sun reduced its prices to McLean to help itself; to meet lower prices that were inducing customers into buying Super Test instead of Sunoco.[35] The Court felt that the Commission was overlooking the factor that Super Test was vertically integrated and that the effect of its view would be to force Sun to combine direct retailing with its other operation,[36] thereby injuring McLean and Super Test [37] as well. Recalling the *Standard Oil* case, the Court stated the core of the defense to be that a seller could lower his price whenever a competitor's lawful price "threatens to deprive a seller

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[31] Enterprise Indus., Inc. v. Texas Co., 136 F. Supp. 420, 421 (D. Conn. 1955). Thus, in the instant case, the FTC adopted the *Enterprise* theory and argued that the defense would be available to the seller only to enable him to meet direct competition for the business of his customer.

[32] Sun Oil Co. v. FTC, *supra* note 28, at 78341-42. It is interesting to note that in the *Standard Oil* case, the respondent, in attempting to show its good faith, introduced evidence of competitive offers received by the four jobbers (who were permitted the discriminatory prices) from distributors of both major and minor brands of gasoline. The Commission argued that this made no difference where actual competitive injury was shown. Matter of Standard Oil Co., 41 F.T.C. 263, 281 (1945).

[33] Sun Oil Co. v. FTC, *supra* note 28, at 78346. The Vice-President of the Sun Oil Co. testified as to the rarity and inadvisability of "split pump stations," *i. e.*, stations handling more than one brand. *Id.* at 78343 n.19.

[34] *Id.* at 78346. Note the language of the district court in the *Enterprise* case: "In view of the short term station and equipment leases in effect with some stations, perhaps it is a *fiction* to speak of price competition at the oil company sale to the station level. That is the competitive level at which the justification is provided . . . in the Act, however." Enterprise Indus., Inc. v. Texas Co., 136 F. Supp. 420, 421 (D.Conn. 1955). (Emphasis added.)

[35] Sun Oil Co. v. FTC, *supra* note 28, at 78347.

[36] *Id.* at 78347. Compare Note, *supra* note 30, at 943.

[37] Super Test Oil Co., though vertically integrated, was considered a non-major (independent) competitor of Sun's. Therefore, any further integration by a major company such as Sun would be detrimental to Super Test.

of a customer. . . ." [38] Thus Sun, to retain its customer, McLean, was entitled to the defense.

The Court is careful to note the particular circumstances of this case, *viz.*, the make-up of the gasoline industry in general and the vertical integration [39] of Super Test in particular, but it seems that the well-reasoned opinion has provided at least two basic rules of construction concerning the applicability of section 2(b), which go beyond the bare facts of the decision. First, courts are not to adhere to a strict, literal interpretation of the wording contained in the defense. Instead, they are to look to the individual competitive situations and be bound rather by the spirit of the law and the overall national policy which fosters the competitive process. Secondly, the tribunals must be careful to keep in mind the economic realities of the market place: to realize, for example, that sellers of competing products may be very much in competition with each other even though they do not sell to the same retailers.

While the Court's dismissal of the *Enterprise* restriction clearly seems warranted in the *Sun Oil* case, the conclusion of the Fifth Circuit cannot be applied arbitrarily to any competitive situation so as to permit every seller to go to the aid of a struggling customer. The Robinson-Patman Act still forbids unwarranted favoritism among customers, and despite its numerous shortcomings, it remains the law. The present case, however, is perhaps an indication that a more realistic application of its sections will be forthcoming.

CONSTITUTIONAL LAW—EVIDENCE—EVIDENCE ILLEGALLY SEIZED BY STATE OFFICERS HELD INADMISSIBLE IN STATE COURT.—On May 23, 1957 Cleveland police officers sought admittance to the Mapp home in search of a suspected criminal and "policy paraphernalia" believed hidden there. Miss Mapp refused them entrance without a warrant. Some hours later the police returned and forced their way into the Mapp home. When asked for a warrant they produced a piece of paper which Miss Mapp never had an opportunity to examine. She was then handcuffed and the house searched. During this search the police uncovered certain obscene material, for possession of which the appellant was

[38] Standard Oil Co. v. FTC, 340 U.S. 231, 242 (1951).

[39] Super Test's integration resulted in a competitive situation wherein a supplier-retailer was pitted against a supplier.