Price Discrimination - Good Faith Meeting of Competition

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Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol19/iss1/35
In addition to passing on the question of prescription unnecessarily, the decision appears to be in conflict with the well-established principles underlying Louisiana mineral law. It is illogical to say that the very same right to explore for and produce minerals may be *leased* for more than ten years, without exercise, but may not be sold for more than ten years, without exercise.\(^2\) Unless mineral leases are made subject to liberative prescription, control of the minerals will be separated from the ownership of the surface beyond ten years without user. This result would be tantamount to establishing a system of separate ownership of minerals and would be an obvious departure from the established public policy of the non-ownership theory.\(^4\)

*Earl E. Veron*

**PRICE DISCRIMINATION — GOOD FAITH MEETING OF COMPETITION**

Standard Oil Company was selling gasoline to four large purchasers in the Detroit area at a lower price than it was selling to other purchasers in the same area. Because of this difference in price the Federal Trade Commission, under authority of the Robinson-Patman Amendment to the Clayton Act, instituted price discrimination proceedings against Standard. In spite of defendant’s offer to show that the price reductions were made in good faith to meet competition, the Commission issued a cease and desist order based solely upon proof of injury to competition.\(^1\) The court of appeals affirmed.\(^2\) The Supreme Court, holding that a good faith meeting of competition was an absolute defense, reversed and remanded for a finding on this issue.\(^3\) The Commission then found the price reductions not to have been made in good faith, but pursuant to a price system\(^4\) utilized to meet unlawful competition.\(^5\) The circuit court, on examination

\(^{43.}\) Frost-Johnson Lumber Co. v. Salling’s Heirs, 150 La. 756, 91 So. 207 (1922).
\(^2.\) Standard Oil Co. v. F.T.C., 173 F.2d 210 (7th Cir. 1949).
\(^3.\) 340 U.S. 231 (1951).
\(^4.\) A price system is a sales setup designed to give, regularly, one purchaser or group of purchasers the advantage of a lower price than that charged other purchasers. Price systems have been held to be *per se* violations of the Robinson-Patman Act. FTC v. Cement Institute, 333 U.S. 683, 725 (1948); FTC v. Staley Mfg. Co., 324 U.S. 746 (1945). See Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* 96 (1950).
of the entire record, reversed the findings of the Commission.\(^6\) Granting certiorari, the Supreme Court held affirmed, with four Justices dissenting. The court of appeals made a fair assessment of the record when it found that there was no basis for a finding that the oil company's reductions were pursuant to a price system; and in the absence of such evidence the Commission's suit falls. *Federal Trade Commission v. Standard Oil Co.*, 78 Sup. Ct. 369 (1958).

Antitrust legislation has as its purpose the preservation of competitive enterprise. The Sherman Act of 1890\(^7\) was the first of the principal antitrust laws; it condemned monopolies and combinations in restraint of trade. The language used in the statute, however, was too vague to encompass many practices which undoubtedly restrain trade.\(^8\) Two important remedial acts followed in 1914. The Federal Trade Commission Act\(^9\) condemned all "unfair methods of competition" and set up the Federal Trade Commission as a continuous agency of inquiry and warning on the legitimacy of competitive methods. The Clayton Act\(^10\) supplemented the Sherman Act by making illegal certain steps in the growth of monopoly and restraint of trade; it was designed to check such practices before they gained too firm a foothold.

Price discrimination is one of the most effective methods of restraining trade and, accordingly, a section of the Clayton Act was devoted to the subject. But virtually no use was made of this section.\(^11\) The early emphasis of antitrust was in the field of production; litigation was thus centered around other sections of the act. By the time injurious discriminatory buying and selling tactics by chain stores and other mass distributors became prevalent the price discrimination section of the Clayton Act had become almost a dead letter.\(^12\) The Federal Trade Com-

\(^6\) Standard Oil Co. v. FTC, 233 F.2d 649 (7th Cir. 1956).


\(^11\) During the period of extensive growth of the chain stores the courts held that discrimination which injured only competitors of the buyer and not of the seller was not subject to the act. Mennen v. FTC, 288 Fed. 774 (2d Cir. 1923), cert. denied, 262 U.S. 759 (1923); National Biscuit Co. v. FTC, 229 Fed. 733 (2d Cir. 1924). But see George Van Camp and Sons Co. v. American Can Co., 278 U.S. 245 (1929).

\(^12\) Proviso allowing quantity discounts was regarded as so weakening Section 2 of the Clayton Act as to "render it inadequate if not a nullity." House Committee Report on Robinson-Patman Act, H. Rep. No. 2237, 74th Cong., 2d Sess. 7 (1936). See also FTC *Final Report on the Chain Store Investigation*, Sen. Doc. No. 4,
mission, however, did conduct an extensive investigation of chain-store practices and this investigation led to a senate resolution which ultimately culminated in the passage of the Robinson-Patman Act in 1936.\textsuperscript{18}

The Robinson-Patman Act in amending the Clayton Act was designed particularly to give life to the price discrimination section of that act.\textsuperscript{14} The amendment greatly facilitated enforcement of this provision. It effects its purpose by providing that a \textit{prima facie} case is made against a defendant by proof of a relatively uncomplicated set of facts: that the defendant did in fact sell, in interstate commerce, commodities of like grade and quality at different prices and that this discrimination substantively injured competition.\textsuperscript{15} The existence \textit{vel non} of the necessary facts to meet these criteria is easily determined. Once these facts are shown the burden shifts to the defendant to bring forward proof with which to rebut the initial findings or to bring himself within an affirmative defense.\textsuperscript{18} This shifting of the burden has greatly augmented the effectiveness of the act in that it tends to eliminate the very real problem of non-availability of internal, confidential records and statistics of a defendant.

With the act set up as it is, the applicability of the affirmative defenses is the key issue in many, if not most, price discrimination cases. Subsection 2(a) of the act provides that a defendant may make an affirmative defense by showing that the


\textsuperscript{14} The Robinson-Patman Act also prohibits commissions, brokerages, allowances, or discounts, except for services rendered, in connection with sales (§ 2(c)). Also, according to this act, terms of contracts of sale must be on a proportionately equal basis (§ 2(d), (e)). Section 2(f) prohibits inducing or receiving discriminations in price prohibited by the act. Section 3 makes it unlawful to be a party to or assist in any discriminations, rebates, discounts, and granting of merchandising services made unlawful by the other sections of this act.

\textsuperscript{15} The exact extent which competition must be injured is as yet undetermined. But injury to competition will not be inferred from a mere showing of difference in price. Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), cert. denied, 344 U.S. 206 (1952). See FTC v. Morton Salt Co., 334 U.S. 37 (1948); FTC v. Cement Institute, 333 U.S. 683 (1948). See also REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 160-66 (March 31, 1955).

\textsuperscript{16} "Upon proof being made . . . that there has been discrimination in price . . . the burden of rebutting the \textit{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." 15 U.S.C. § 13(b) (1937).
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difference in prices was due to (1) different supply or delivery costs,\textsuperscript{17} or (2) changing conditions affecting the market,\textsuperscript{18} for example, as found in dealings with perishable or seasonal goods. A third defense, provided in Subsection 2(b), allows a seller to rebut the \textit{prima facie} case by showing that he lowered his price in good faith to meet an equally low price of a competitor.\textsuperscript{19} It had originally been thought that a \textit{prima facie} case could be made without a showing of injury to competition, and that the good faith meeting of competition requirement of Subsection 2(b) was merely a procedural provision which, when exercised, would shift to the plaintiff the burden of going forward with the evidence showing that the discrimination did in fact injure a substantial amount of competition.\textsuperscript{20} That theory was exploded, however, when the instant case was before the Supreme Court in 1951.\textsuperscript{21} There the court found that good faith meeting of competition was an absolute defense to price discrimination. Thus this defense can now become the focal point in a discrimination case instead of being a mere responsive tactical maneuver.

To bring oneself within the other defenses allowed in the act is ordinarily a difficult undertaking. Proof of cost justification, if existent, is often hard to accumulate and very expensive in large enterprises.\textsuperscript{22} The defense as to changing conditions of

\textsuperscript{17} The cost defense has proved largely illusory in practice. After one successful cost defense before the Commission in 1937, Bird & Son, 25 FTC 58 (1937), it was not until seventeen years later that an accused seller in a fully contested proceeding succeeded in a complete cost defense. B. F. Goodrich Co., FTC Docket 5677 (1954) and Sylvania Elec. Products Co., FTC Docket 5728 (1954). See Standard Brands Inc., 29 FTC 121 (1939); E. B. Muller & Co., 33 FTC 24 (1941); Morton Salt Co., 39 FTC 35 (1944).

\textsuperscript{18} This proviso exempts "price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as, but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." (§ 2(b)). See Huber v. Pillsbury Flour Mills Co., 30 F. Supp. 108 (S.D.N.Y. 1939); Moore v. Meade Service Co., 190 F.2d 540 (10th Cir. 1951).

\textsuperscript{19} Other than the instant case, leading cases interpreting this provision are FTC v. Cement Institute, 333 U.S. 683 (1948); FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945); Samuel H. Mons, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945); American Can Co. v. Lodaga Canning Co., 44 F.2d 763 (7th Cir. 1930).

\textsuperscript{20} "Congress adopted the common device in such cases of shifting the burden of proof to anyone who sets two prices, and who probably knows why he had done so, and what has been the result. If he can prove that the lower price did not prevent anyone from taking away the business he will succeed." Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945), cert. denied, 326 U.S. 734 (1946). See FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945); Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949). See also Oppenheim, PRICE AND SERVICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 35-37 (1949).

\textsuperscript{21} 340 U.S. 231 (1951).

\textsuperscript{22} The Supreme Court acknowledged "the intricacies inherent in the attempt to show costs in a Robinson-Patman Act proceeding" and observed the "elusive-
marketability applies only to the narrow field of perishable seasonal commodities where the highly fluctuating supply results in unstable prices. Now that good faith meeting of competition is an absolute defense, decisions determining the scope of this defense will greatly influence the continued practicality and workability of the Robinson-Patman Act.

The full extent and boundaries of the term "good faith" as used in the Robinson-Patman Act are as yet undetermined, but certain activities are known to preclude good faith. A reduction in price must be no more than necessary to meet competition, that is, for a reduction to be made in good faith the price must not be set lower than the competitor's. The competitor's price which a defendant meets must be a lawful price; an unlawful price could not make another price lawful. Also negating good faith is a price system which constantly results in the seller receiving a higher price for like goods from some customers than from others. Similarly, where a seller adopts his competitors' higher prices as well as their lower prices and makes no effort to undersell them in markets where he has a competitive advantage, his lower prices will not be allowed as a good faith meeting of competition. Thus, since it is known that certain pricing activities per se preclude good faith, it would seem to follow that a seller who regularly grants a quantity discount could not justify the discount merely by showing that the purchaser could have obtained the same discount on purchases in like quantities from other suppliers.

In the instant case defendant designated four of its 362 Detroit customers as "jobbers" and sold gasoline to them at 1 1/2 cents per gallon less than the price charged other customers. The distinguishing characteristics of these four "jobbers" were: They could store gasoline in "tank car" quantities; they had


24. A defendant would only be held to a businessman's reasonable knowledge of his rival's pricing data in a competitive economy. Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953); FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945). He need not prove the competitor's price was actually lawful. Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956).


facilities to deliver gasoline to other retailers; they had established businesses sufficient to insure purchases of from one to two million gallons a year; and they had adequate credit responsibility. The term "jobber," as used here, was purely arbitrary since many of defendant's other Detroit customers resold gasoline to retailers. Since defendant did not prove cost justification the court expressly proceeded on the assumption that the difference in price was not entirely justified by the difference in cost of delivery. Thus, as perishable goods were not involved here, the only defense available to defendant was that of good faith meeting of competition.

The decision that defendant had brought himself within this defense is illuminating in that it embraces findings which affirmatively fulfill the requisites for "good faith meeting of competition." Findings sufficient in the instant case were: (1) The recipients of the lower price had achieved a volume of distribution within the range recognized as entitling them to a reduced price under the commonly accepted standards of the industry. (2) Defendant was "pressured" by the buyer to meet more attractive price offers made by other suppliers; in fact, three of defendant's other large customers had been "pirated" away by the competition. (3) There was lengthy haggling, including an "ultimatum," as to the amount of the proposed reduction in price. (4) No basis was found in the record for a finding that Standard's reduced prices were made pursuant to a price system. That these findings were considered sufficient for the defense to obtain is a step toward a more complete knowledge of the meaning of the term "good faith," as used in that defense. Although the extreme minimum requirements for coming within this defense are not known, the findings in the instant case present a set of facts which may be analogized or set as a goal by future defendants.

The instant decision shows that certainly the task of coming within the good faith meeting of competition defense is not an insurmountable one. Reduction in price solely because of a volume of sales (without a corresponding proven cost saving)

27. The court acknowledged that this term was not an accurate description of an economic function but was merely used to placate customers who were not receiving the lower prices. See FTC v. Standard Oil Co., 78 Sup. Ct. 369, 371, n. 2 (1958).
29. "Pressured" is the term used by the court. 78 Sup. Ct. 369, 373 (1958).
30. See the express statement to this effect. Id. at 370.
is not in itself an adequate justification, but rather has been condemned in price discrimination disputes.\textsuperscript{31} Offers by competitors, haggling, and ultimatums appear as weighty facts, but upon reflection it is realized that facts such as these can be easily shammed or can become formalities quickly fulfilled by parties desiring to avoid the law. The loss of customers is, of course, a more objective criterion. But regardless of the quality or quantity of the findings here shown to be sufficient for the defense, this decision is primarily noteworthy because of its negative aspects: the court did not make the defendant affirmatively prove that its pricing activities were free from certain elements that are known to preclude good faith.

The mere fact that a competitor offered a lower price does not necessarily mean that a defendant can lawfully meet it; one unlawful price should not justify another.\textsuperscript{32} Prior to the instant decision it had been believed that before a defendant could come within the good faith meeting of competition exception he would have to show affirmatively that he had a reasonable belief that the price he met was itself lawful.\textsuperscript{33} Here the court made no mention of such a showing, or the lack thereof, thus implying that the burden of proving such elements rested on the Commission. Similarly, in the last of the findings, that there was no showing of a basis for a finding that defendant's reduced prices were made pursuant to a pricing system, the court apparently put the burden of proving the existence of a price system on the Commission. But the Commission at the initial hearing, apparently believing it unnecessary,\textsuperscript{34} did not show that the four (of 362) Detroit customers had been given the same reduced rate according to a pricing system. Apparently, the court's refusal to place the burden on the defendant to show the lawfulness of the met price as well as to show that it was not employing an unlawful pricing system presents a procedural scheme heretofore unknown in price discrimination cases. By these re-


\textsuperscript{32} See note 24 supra.

\textsuperscript{33} "The burden is upon defendant to prove the price of its competing refiner if defendant seeks to rely on this defense... [T]he price of the competitor might not be a lawful price." Enterprise Industries v. Texas Co., 136 F. Supp. 420 (D. Conn. 1955). That competitors are engaged in similar violations of this section is no defense or justification. Butterick Co. v. FTC, 4 F.2d 910 (2d Cir. 1925), cert. denied, 267 U.S. 602 (1925). See note 24 supra.

\textsuperscript{34} The court of appeals remarked that they suspected the contention of the FTC that defendant was employing a price system was merely an afterthought, and the Commission itself asserted that it was. 233 F.2d 649, 653 (7th Cir. 1956).
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Fusals of the court, this area of the Robinson-Patman Act is seen to be at least partially without the effective device, the shifting of the burden of proof, that gives effect to other areas of the act. The Commission now, in this limited area must resume, after over two decades of rest, the unwieldy burden of gaining “secret” information and searching for inaccessible records with which to prosecute a defendant.

But it should be said that the area in which the burden is to be resumed is indeed limited. It is only after the defendant has come forward and shown affirmative elements of good faith, as exemplified by the findings in the instant case, that the plaintiff need take a turn. It would be up to him then to show elements negating good faith. This is certainly a very sensible situation; otherwise, as more and more activities which per se preclude good faith become known in the jurisprudence, a defendant would be required to show affirmatively the absence of dozens, perhaps hundreds, of activities. Such a burden would surely be unreasonable.

The decision in the instant case, then, gives more than merely an example of affirmative facts sufficient to come within a defense; it unfolds an equitable see-saw procedure for presentation of proof under the Robinson-Patman Act.

Philip E. Henderson

TORTS — CONSTRUCTION AND REPAIR CONTRACTORS — LIABILITY TO THIRD PERSONS AFTER ACCEPTANCE OF WORK BY OWNER

Two recent cases reflect rapid changes in the tort liability of construction and repair contractors to third persons. In Marine Ins. Co. v. Strecker, the Louisiana Supreme Court held that a contractor could be liable for damages to a tenant’s glassware caused by negligence in the installation of a cabinet under a contract with the building owner, even though the damage occurred several months after the acceptance of the work by the building owner. The California Supreme Court went even further in Dow v. Holly Manufacturing Co. The court held that a general contractor was liable to a third person for the negligence of his subcontractor, who had improperly installed a heater during the

1. 234 La. 522, 100 So.2d 493 (1957).