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Regulation of Business - Robinson-Patman Act - Injury to Competition Between Buyers of Auto Parts

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REGULATION OF BUSINESS—ROBINSON-PATMAN ACT—INJURY TO COMPETITION BETWEEN BUYERS OF AUTO PARTS—Petitioner manufactured and sold automobile parts to distributors who resold them to jobbers in interstate commerce. The products were classified into three lines: leaf spring line, coil action line, and piston ring line. A progressive, cumulative discount was given in each line, based upon the aggregate yearly purchases of either a single buyer or a group-buying organization. The Federal Trade Commission charged petitioner with price discrimination in violation of the Robinson-Patman Act.[1] Every customer who testified at the hearing denied that he had been injured competitively by the petitioner's pricing practices.[2] Nevertheless, in view of the substantial price differentials,[3] the small margin of profit[4] and the highly competitive nature of the trade, the commission ruled[5] that the effect of peti-

1 Section 2 (a) of the Clayton Act, 49 Stat. 1256 (1936), 15 U.S.C. (1952) §13 (a).

2 The commission conceded that all of petitioner's other customers would so testify, if called.

3 For example, of the 1200 purchasers of the coil action line in 1949, 793 received no rebate at all, 352 received a rebate of only 5%, and the remaining 55 received rebates ranging from 7½% to 19%.

4 Evidence indicated that a buyer's over-all net profit was 4%.

5 Moog Industries, CCH Trade Reg. Rep. ¶25,444 (Transfer Binder, 1955).

tioner's pricing policies may be substantially to lessen, injure, destroy or prevent competition between customers of the petitioner. On appeal, *held,* affirmed. There was substantial evidence from which the commission could properly infer the requisite injury to competition notwithstanding direct testimony to the contrary. *Moog Industries v. Federal Trade Commission,* (8th Cir. 1956) 238 F. (2d) 43.[6]

The principal case follows the doctrine established by the Supreme Court in *FTC v. Morton Salt Company*[7] in holding that price differentials resulting from cumulative discounts[8] granted to competing customers raise a presumption of substantial injury to competition. In that case, the Court held that a detailed inquiry into market effects of the price differentials was not necessary to establish prima facie a probability of

[6] In appeals by other manufacturers of auto parts, the commission's findings on similar facts of unlawful price discrimination have also been affirmed. E. Edelmann & Co. v. FTC, (7th Cir. 1956) 239 F. (2d) 152; Whitaker Cable Corp. v. FTC, (7th Cir. 1956) 239 F. (2d) 253; C. E. Niehoff & Co., (7th Cir. 1957) 1957 CCH Trade Cas. ¶68,587. In the Niehoff case, the court suspended the commission's cease and desist order until the petitioner's competitors are subjected to similar orders, on the ground that the petitioner's business would be ruined if he were forced to refrain from discriminatory pricing practices which his competitors were permitted to use.

The commission's enforcement procedures will be impaired if it must proceed separately against every member of an industry before an illegal practice can be stopped. The court's decision, in effect, calls for the establishment of Trade Practice Conference Rules with respect to price discrimination in the auto parts industry. Whether Trade Practice Conferences are an effective means of coping with particular problems should be left to the discretion of the commission and not determined by the courts. Moreover, a violation of a Trade Practice Conference Rule is not illegal per se and obedience to it can be compelled only by the usual formal proceedings. The issuance of a cease and desist order against one member of an industry should serve as notice to other members of the industry who follow similar practices that they are violating the law and subject to appropriate action. The petitioner in the Niehoff case has a fairly effective weapon against his competitors who continue discriminatory pricing in his right to bring a treble damage action for injuries sustained. 38 Stat. 731 (1936), 15 U.S.C. (1952) §15.

After judgment in the principal case had been rendered, petitioner, relying on the Niehoff decision, requested the court to hold its judgment in abeyance until its competitors had been subjected to similar judgments. The court denied the motion, and thereby created a conflict with the Seventh Circuit. The United States Supreme Court granted certiorari, limited to the question of the denial of petitioner's supplemental motion. 25 U.S. L. Week 3277 (1957).

[7] 334 U.S. 37 (1948).

[8] While cumulative discounts are not unlawful per se, they have consistently been condemned. They do not necessarily reflect any actual savings in the cost of sale or delivery and ordinarily are not functionally available to all customers. Similarly, cumulative discounts based upon the combined purchases of a group of buyers with sales and delivery being made on an individual basis have regularly been held unlawful. See H. C. Brill Co., 26 F.T.C. 666 (1938); Simmons Co., 29 F.T.C. 727 (1939); Caradine Hat Co., 39 F.T.C. 86 (1944); FTC v. Morton Salt Co, 334 U.S. 37 (1948); American Can Co. v. Bruce's Juices, Inc., (5th Cir. 1951) 187 F. (2d) 919. But see Kraft Phenix Cheese Corp., 25 F.T.C. 537 (1937). See generally, "Symposium on the Robinson-Patman Act," 49 N.W. UNIV. L. REV. 196, 237, 251 (1954). In the principal case, no attempt was made to cost justify the price differentials. The difficulties involved in cost justification are discussed in Dawkins, "Quantity and Cumulative Volume Discounts," UNIV. OF MICHIGAN LAW SCHOOL SUMMER INSTITUTE 109 (1953). See also Haslett, "Price Discriminations and Their Justification under the Robinson-Patman Act of 1936," 46 MICH. L. REV. 450 at 463 (1948).

injury to competition in the secondary line of commerce.[9] A broader test based on market analysis has on the other hand, been employed in cases involving injury to the competitors of the seller.[10] Although the commission applies the same standard of illegality, i.e., the reasonable probability of substantial injury to competition, to both primary and secondary line cases,[11] the principal case renders it clear that in the latter situation the commission need not substitute a market analysis for the presumption of injury approved in *Morton Salt*.[12] The commission interpreted the buyer's testimony of lack of injury to mean that the favored purchasers had not used the lower prices to undersell their competitors.[13] It is clear that the favored purchaser obtains a competitive advantage by virtue of his larger margin of profit[14] even though the seller's price differentials are not reflected in the resale prices.[15] In the principal case the court did not specifically rely on this theory, however, but discounted the buyers' testimony on the ground that simple mathematics proved that the disfavored buyers were injured.[16] The court's refusal to give any weight to such direct and highly probative evidence as the testimony of petitioner's customers is questionable. Even though the large price

9 Note 7 supra, at 46, 50. See also H. C. Brill Co., note 8 supra; Simmons Co., note 8 supra; Caradine Hat Co., note 8 supra.

10 General Foods Corp., CCH Trade Reg. Rep. ¶25,069 (Transfer Binder 1954); Minneapolis-Honeywell Regulator Co. v. FTC, (2d Cir. 1951) 191 F. (2d) 786, cert. dismissed 344 U.S. 206 (1952).

11 General Foods Corp., note 10 supra.

12 In Minneapolis-Honeywell, note 10 supra, the court refused to apply a presumption of injury and found no injury to competition at the customer level attributable to the seller's price differentials, because the price of the seller's control unit was only a small portion of the cost of the finished product sold by the purchasers. Perhaps Minneapolis-Honeywell can be viewed as a type of fact situation to which Morton Salt is inapplicable. It has been consistently held, however, that the fact that the price differential affects items which constitute only a small part of one's business is immaterial (see note 16 infra) and it would seem that this principle should also apply to cases where the item is bought not for resale, but for purposes of incorporating it into a new product. Perhaps this is the explanation of Justice Black's dissent. Minneapolis-Honeywell, note 10 supra, at 213. In adopting a market analysis approach, Minneapolis-Honeywell represents at most only a departure from the Morton Salt case and not a new doctrine. Thus, in applying a presumption of injury the principal case is in no sense returning to a former doctrine but is merely following what has always been the rule for secondary line cases, established in Morton Salt. But see Rowe, "Price Differentials and Product Differentiation: The Issues under the Robinson-Patman Act," 66 YALE L.J. 1 at 20 (1956).

13 The buyers generally adhered to the petitioner's suggested resale prices.

14 Russelville Canning Co. v. American Can Co., (W.D. Ark. 1949) 87 F. Supp. 484 at 493 revd. for lack of proof of damage (8th Cir. 1951) 191 F. (2d) 38. See also Haslett, "Price Discriminations and Their Justification Under the Robinson-Patman Act of 1936," 46 MICH. L. REV. 450 at 467 (1948).

15 The mere existence of price differentials though not presently reflected in resale prices constitutes a threat to competition in violation of §2(a). Corn Products v. FTC, 324 U.S. 726 at 742 (1945).

16 Each buyer carried many lines and thousands of items. If a buyer's testimony means that the petitioner's price differentials alone did not cause him substantial injury, then clearly this fact is no defense. The price differential is judged in the light of its cumulative effect if similar price advantages were also obtained from other sellers by the favored purchaser. FTC v. Morton Salt Co., note 8 supra; H. C. Brill Co., note 8 supra.

differentials, the small profit margins and the highly competitive nature of the business certainly raise a strong presumption of injury to competition, markets are complex and have peculiarities and countervailing factors which may negate the injurious effects of price differentials and render false the normal presumptions with respect to injury to competition.[17] Basically, it is a question of how much and what kind of evidence is required to rebut the presumption of injury[18] and to shift to the commission the burden of proving actual or potential injury to competition by means of market analysis or other direct evidence. While the weight to be given to any particualr piece of evidence is a question for the factfinder, it would seem that direct testimony of lack of injury by those persons allegedly being injured should at least rebut the presumption. Such testimony is potent and probative. If it is deemed insufficient to rebut the presumption, the court has in effect raised a presumption of law, not of fact. It seems neither reasonable nor just to sustain a finding of substantial injury solely on inferences based upon mechanical application of simple mathematics in the face of direct testimony to the contrary.[19] It is submitted that *Morton Salt* recognized only the validity of a *rebuttable* presumption of injury, and that it does not authorize the view taken by the principal case to the effect that injury is *conclusively* established once there is proof of a substantial price differential between competing buyers of goods of like grade and quality.

The principal case also raises some interesting problems with regard to the statutory requirement of like grade and quality. The individual auto parts cannot all be said to be of like grade and quality for they are neither physically identical[20] nor functionally interchangeable.[21] The court reasoned, however, that since the cumulative discounts were based upon the aggregate purchases of an entire line and not individual items, the price differentials resulted in unlawful discrimination whether the individual items purchased by competing customers were interchangeable or not. While it was permissible for the commission to infer that competing customers did in fact handle similar items,[22] it is to be questioned whether the commission and court should have held inadmissible petitioner's

[17] See Kraft-Phenix Cheese Corp., note 8 supra.

[18] In a few cases the defendant has succeeded in rebutting the presumption of injury. Kraft-Phenix Cheese Corp., note 8 supra; Minneapolis-Honeywell Regulator Co. v. FTC, note 10 supra. For a general discussion of the difficulty of proving lack of injury, see "Symposium on the Robinson-Patman Act," 49 N.W. UNIV. L. REV. 196 at 204 (1954).

[19] See the dissenting opinion of Commissioner Mason, Moog Industries, note 4 supra at 35,555.

[20] Boss Mfg. Co. v. Payne Glove Co., (8th Cir. 1934) 71 F. (2d) 768; Hansen Inoculator Co., 26 F.T.C. 303 (1938).

[21] Bruce's Juices v. American Can Co., (S.D. Fla. 1949) 87 F. Supp. 985, 987, affd. (5th Cir. 1951) 187 F. (2d) 919 at 924, modified on rehearing (5th Cir. 1951) 190 F. (2d) 73 at 74, cert. dismissed 342 U.S. 875 (1951); Sylvania Elec. Products, Inc., CCH Trade Reg. Rep. ¶25,181; ¶25,197 (1953); E. Edelmann & Co. CCH Trade Reg. Rep. ¶25,445 (1954).

[22] In situations where the purchasers buy only a few of the items in each line, it would be illogical to presume that competing customers did in fact carry competing items.

evidence that competing buyers did not in fact carry the same or interchangeable items. The mere fact that a seller establishes separate lines should not conclusively prove that the individual items within each line are sufficiently comparable to come within the terms of the statute.

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