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Regulation of Business - Proof of Seller's Costs in Robinson-Patman Act Buyer Proceedings

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REGULATION OF BUSINESS—PROOF OF SELLERS' COSTS IN ROBINSON-PATMAN ACT BUYER PROCEEDINGS—The Robinson-Patman Act[1] was passed in 1936 as an amendment to the Clayton Act.[2] Its purpose was to strengthen section 2, which, as interpreted by the courts,[3] was ineffective as a weapon for combatting price discrimination.[4]

The threads of legislative policy which ultimately became the Robinson-Patman Act are traceable to several sources; although the original Patman House bill was written by the general counsel for the National Wholesale Grocers Association,[5] the act finally passed was a potpourri including ideas developed from other bills as well.[6] One policy in the act is the regulation of discriminatory pricing practices injurious to particular competitors.[7] Another policy is the prevention in their incipiency of offenses against the antitrust laws.[8] Perhaps the dominant policy to which the Robinson-Patman Act gives expression is that of equalizing the competitive opportunity of small, independent businesses[9] with that of the large chains.[10]

Experience in applying the act has demonstrated that its tangled threads of policy do not produce harmonious patterns in all situations. The conflict between the policy of "soft" competition through protecting particular groups of competitors which the Robinson-Patman Act reflects and the general antitrust policy of "hard" competition through protecting the competitive process as a whole is the reason for a part

[1] 49 Stat. L. 1526 (1936), 15 U.S.C. (1946) §13, amending §2 of the Clayton Act, 38 Stat. L. 730 (1914).

[2] See generally AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (1952); OPPENHEIM, UNFAIR TRADE PRACTICES: CASES, COMMENTS AND MATERIALS 1003 et seq. (1950): OPPENHEIM, PRICE AND SERVICE DISCRIMINATIONS UNDER THE ROBINSON-PATMAN ACT, Syllabus (1949); N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIA (1946, 1947, 1948); Haslett, "Price Discriminations and their Justifications under the Robinson-Patman Act of 1936," 46 MICH. L. REV. 450 (1948); PATMAN, THE ROBINSON-PATMAN ACT (1938).

[3] See Goodyear Tire and Rubber Co. v. FTC, (6th Cir. 1939) 101 F. (2d) 620, in which the old §2 of the Clayton Act was interpreted to allow price differentials based on differences in the quantities purchased whether or not they represented cost savings.

[4] See H. Rep. No. 2287, 74th Cong., 2d sess., p. 6 (1936).

[5] Hearing before the House Committee on the Judiciary on H.R. 8442, H.R. 4995, and H.R. 5062, 74th Cong., 1st sess., p. 9 (1935).

[6] For steps in the legislative incubation, see Freer, "Introduction to Section 2," CCH SYMPOSIUM ON THE ROBINSON-PATMAN ACT 5 (1946).

[7] See Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 at 1198 et seq. (1952).

[8] Id. at 1200.

[9] "The purpose of this proposed legislation is to restore, so far as possible, equality of opportunity in business. . . . Your committee is of the opinion that the evidence is overwhelming that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously periled. . . ." H. Rep. No. 2287, 74th Cong., 2d sess., p. 3 (1936).

[10] See FEDERAL TRADE COMMISSION, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. Doc. No. 4, 74th Cong., 1st sess. (1934).

of the interpretative difficulty.[11] Another part of the interpretative difficulty is caused by the omissions and inconsistencies present in the language of the statute;[12] these plus statutory ambiguities make reference to legislative history a necessary but not always fruitful part of construing the act.[13]

Although the courts have not had occasion to consider all of the questions which the language of the Robinson-Patman Act leaves unanswered, the Supreme Court's needle of judicial interpretation made some progress in knitting the threads of statutory policy together in the recent case of *Automatic Canteen Co. of America v. Federal Trade Commission*.[14] This is the first case in which the Supreme Court considered a section 2(f) buyer proceeding.

The purposes of this comment are to analyze the holding of the Court in the *Automatic Canteen* case and to relate the language of the opinion to the more general problem of defining the extent of buyer responsibility under section 2(f). As a preliminary matter, however, it is necessary to examine the pertinent statutory provisions.

Section 2(f) of the Robinson-Patman Act makes it unlawful for buyers in interstate commerce ". . . knowingly to induce or receive a discrimination in price which is prohibited by this section."[15] In other words, it prohibits buyers from knowingly inducing or receiving the benefit of price discriminations as they are defined by the rest of the section.[16]

[11] Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 at 1198 (1952). See Learned and Isaacs, "The Robinson-Patman Law: Some Assumptions and Expectations," 15 HARV. BUS. REV. 137 (1937).

[12] "You might as well know that the bill finally agreed upon by the conferees . . . contains many inconsistencies, and the courts will have the devil's own job to unravel the tangle." Representative Celler, 80 CONG. REC. 9419 (1936). ". . . precision of expression is not an outstanding characteristic of the Robinson-Patman Act. . . ." Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 65, 73 S.Ct. 1017 (1953). See the dissent of Justice Jackson in FTC v. Ruberoid, 343 U.S. 470 at 483-487, 72 S.Ct. 800 (1952), and the dissenting opinion of Justice Frankfurter in FTC v. Motion Picture Advertising Service, 344 U.S. 392 at 405, 73 S.Ct. 361 (1953).

[13] For suggested changes in the language of the act, see Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 at 1198 et seq. (1952); Kelley, "Should the Law of Section 2 be Revised?" N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 114 (1948).

[14] 346 U.S. 61, 73 S.Ct. 1017 (1953).

[15] This subsection has been described as an integral part of the enforcement scheme of the act because it makes it easier for sellers ". . . to resist the demand for sacrificial price cuts coming from mass-buyer customers. . . ." Representative Utterback, 80 CONG. REC. 9419 (1936). See Forkner, "The Significance of Section 2(f)," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 66 (1948).

[16] The problems involved in relating §§2(c) (brokerage fees), 2(d) (payments to buyers for services and facilities), and 2(e) (furnishing services and facilities to buyers) to §2(f) is beyond the scope of this comment. For materials on these problems, see OPPENHEIM, UNFAIR TRADE PRACTICES: CASES, COMMENTS AND MATERIALS 1221 et seq. (1950).

Under section 2(a), it is unlawful for sellers engaged in interstate commerce to make price discriminations in interstate transactions. The price discriminations prohibited are those which apply to "commodities of like grade and quality"[17] which are sold for resale or consumption within the jurisdiction of the United States and where the effect of the discrimination "may . . . substantially . . . lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition[18] with any person who either grants or knowingly[19] receives the benefit of such discrimination, or with customers of either of them." This legislative definition is qualified by certain provisos. The most important proviso from the standpoint of buyer liability is the first,[20] which excepts "differentials" making "only due allowance for differences in . . . cost . . . resulting from the different methods or quantities in which such commodities are . . . sold or delivered."

Section 2(b)[21] puts the burden of rebutting a prima facie case of discrimination by showing justification on the "person charged with a violation." "Unless justification shall be affirmatively shown," the Commission is authorized to issue a cease and desist order.[22] This

[17] Cf. the difference in the language of §3, which uses the terms "like grade, quality, and quantity."

[18] Although the burden is on the Commission to show that a discrimination has the required effect on competition, it is sufficient if the Commission can show that the discrimination *may* injure competition. FTC v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822 (1948). The dissenting justices in that case said that the statutory language should be read to require a showing of the *probability* of an adverse effect on competition.

[19] For an explanation of the reason for inserting this word, see H. Rep. No. 2951, 74th Cong., 2d sess., pp. 5-6 (1936).

[20] The others are related to the fixing of quantity limits by the Federal Trade Commission, the selection of customers, and price changes reflecting market changes.

[21] For the circumstances of the incorporation of this subsection into the bill, see 80 CONG. REC. 6435 (1936).

[22] Buyers also may be subject to proceedings brought by the Department of Justice to impose the criminal sanctions of §3 of the Robinson-Patman Act, or to enjoin violations of the Clayton Act or the Sherman Antitrust Act. Private persons may bring actions to enjoin violations of the antitrust laws in the federal courts, 38 Stat. L. 736 (1914), 15 U.S.C. (1946) §26, or may seek treble damages under §4 of the Clayton Act. For a successful treble damage suit against a seller, see Elizabeth Arden Sales Corp. v. Gus Blass Co., (8th Cir. 1945) 150 F. (2d) 988, cert. den. 326 U.S. 773, 66 S.Ct. 231 (1945). See American Cooperative Serum Assn. v. Anchor Serum Co., (7th Cir. 1946) 153 F. (2d) 907, in which successful treble damage actions were brought against both seller and buyer for violations of §§2(a), 2(c), 2(d), and 2(f) of the Robinson-Patman Act. For the purpose of an action by a private person, a final judgment or decree in a proceeding by the federal government is prima facie evidence of the violation. 38 Stat. L. 731 (1914), 15 U.S.C. (1946) §16. For an unsuccessful attempt to use a Robinson-Patman Act violation as a defense in a suit to recover on promissory notes, see Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 67 S.Ct. 1015 (1947).

subsection has a proviso which has been interpreted as providing for an affirmative defense by sellers.[23]

I. *The Automatic Canteen Case: Buyer Knowledge in Section 2(f) Proceedings*

The *Automatic Canteen* case involved a buyer proceeding instituted by the Federal Trade Commission under section 2(f) of the Robinson-Patman Act. The Commission introduced evidence to show that the Automatic Canteen Co., a large buyer of candy for resale through 230,000 automatic vending machines in thirty-three states and the District of Columbia, solicited prices which it knew were as much as thirty-three percent lower than prices quoted other purchasers.[24] The Commission did not attempt to show that the company's knowledge included the information that these price differences were not justified by cost savings,[25] and the Automatic Canteen Co. moved to dismiss on the ground that the Commission had failed to make out a prima facie case of violation of section 2(f). The Commission issued a cease and desist order,[26] the court of appeals affirmed,[27] and the Supreme Court, on certiorari, reversed. Speaking through Justice Frankfurter, the Court held that the Commission must introduce evidence of respondent's knowledge of the absence of cost justification as a part of its prima facie case against a buyer.[28]

[23] ". . . nothing . . . shall prevent a seller from rebutting" a "prima facie case . . . by showing that his lower price . . . was made in good faith" to meet competition. See Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 at 243, 71 S.Ct. 240 (1951).

[24] Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 62, 73 S.Ct. 1017 (1953).

[25] Since it previously had been held that one of the Automatic Canteen Company's largest sellers had made price discriminations violative of §2(a), it seems doubtful if all of the price differentials in this case could have been justified by cost savings. See Curtiss Candy Co., 48 F.T.C. 161 (1951). See also Drain, "A Buyer's View of the Robinson-Patman Act," 16 J.B.A. D.C. 245 (1949), which notes the "chain reaction series of proceedings" against suppliers of Curtiss (Corn Products Refining Co. and A. E. Staley Mfg. Co.), then against Curtiss, and finally against Automatic Canteen Co., the largest purchaser from Curtiss.

[26] Automatic Canteen Co. of America, 46 F.T.C. 861 (1950).

[27] Largely on the authority of FTC v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822 (1948). Automatic Canteen Co. of America v. FTC, (7th Cir. 1952) 194 F. (2d) 433.

[28] For a general discussion of the decision, see Baker, "The Automatic Canteen Case—Buyer Liability under the Robinson-Patman Act," UNIVERSITY OF MICHIGAN LAW SCHOOL, INSTITUTE ON FEDERAL ANTI-TRUST LAWS 140 (1953). In this paper, the two most significant aspects of the Canteen case are said to be (1) "a clear cut victory of hard versus soft competition" and (2) "decisive rejection of the 'simplified enforcement' sought to be established by the Commission." As a result of the Automatic Canteen decision, the Commission recently dismissed buyer proceedings against the Crown Zellerbach Corp. (F.T.C. Dkt. 5421), Safeway Stores, Inc. (F.T.C. Dkt. 5990), and the Kroger Co. (F.T.C. Dkt. 5991) on the ground that there was not sufficient evidence to satisfy the knowledge requirement. 3 CCH TRADE REG. REP., 9th ed., ¶¶11,466, 11,474, and 11,513 (1953).

Although the Court in the *Automatic Canteen* case expressly limited its decision to the narrow question before it,[29] the opinion included some suggestions as to what evidence the Commission might use to satisfy the knowledge requirement. Trade experience, size of the differential compared with differences in the quantities ordered, and a comparison of the prices and services received with those given other buyers all might be utilized in the proper circumstances to make a prima facie showing that the buyer either knew or should have known that the price differentials given him were not justified by cost savings. The general test of knowledge suggested by the Court was whether the buyer reasonably could have thought his price differential justified by cost savings.[30]

It is suggested in the *Automatic Canteen* opinion that the Commission had sufficient evidence to make a prima facie showing of knowledge had it seen fit to use the evidence in that way. The Court thought that a situation which might satisfy the knowledge requirement is one in which the buyer requests and receives large price differentials based upon what it tells its sellers that their cost savings will be. Although the Commission had recited such instances, it had not found that they would provoke inquiry in the mind of a reasonably prudent businessman. The Court therefore was not presented with a case in which the Commission had concluded that the circumstances warranted an inference of knowledge of lack of cost justification.[31]

II. *The Automatic Canteen Case: What the Court Did Not Decide*

Perhaps the questions which the Court discussed but did not decide in the *Automatic Canteen* case are as instructive from the standpoint of interpreting section 2(f) of the Robinson-Patman Act as its narrow holding.

A. *The Meaning of Discrimination.* The *Automatic Canteen* opinion leaves open the question of what is meant by the reference in section 2(f) to price discriminations "prohibited by this section." It still can be argued that that reference is made for the sole purpose of defining the term "price discrimination" and not for the purpose of spelling out a rule of procedure in buyer proceedings. If this is

[29] "We . . . think it imperative in this case to confine ourselves as much as possible to what is in dispute here." Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 65, 73 S.Ct. 1017 (1953).

[30] Id. at 80.

[31] Id. at 66.

true, it follows that the procedural provisions in the act are not necessarily applicable to section 2(f). A reference to legislative history indicating that the procedural section 2(b) was not intended to apply to section 2(f) at the time it was adopted[32] tends to support the view that it is inapplicable.[33]

B. *The Burden of Proving Costs.* The Court in the *Automatic Canteen* case did not decide that the burden of proving the existence of cost justification is on the buyer once the Commission has made a prima facie case. It did not decide that the *Morton Salt* decision,[34] a proceeding against a seller placing the burden of proving cost justification on the seller,[35] is a binding precedent on the question of burden of proof in buyer proceedings. In addition, the Court expressly did not decide that section 2(b) is applicable in section 2(f) proceedings.[36] Even if section 2(b) were held to be applicable in section 2(f) proceedings, the Court suggested that because of its ambiguity it should be construed as enacting the ordinary rules of evidence.[37]

One such rule is that the burden of proof is on the party having the affirmative of an issue.[38] Since section 2(f) requires a "discrimination" in order for there to be a violation in a buyer case, the application of that rule would place upon the Commission the burden of proving a "discrimination" as defined by the rest of the section; i.e., it would have to prove, among other things, the existence of a differential exceeding any cost savings.[39]

[32] The amendment which became §2(b) was proposed before §2(f) had been incorporated in the act, although the two subsections were included in the Senate bill almost contemporaneously by amendment from the floor. 80 CONG. REC. 6435, 7428 (1936).

[33] See Howrey, "The Buyer and a Prima Facie Case," N.Y. STATE BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM 87 at 88 (1948).

[34] FTC v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822 (1948).

[35] See Samuel H. Moss, Inc. v. FTC, (2d Cir. 1945) 148 F. (2d) 378. Cf. FTC v. Cement Institute, 333 U.S. 683 at 721, 68 S.Ct. 793 (1948).

[36] ". . . we do not decide that because we reach the same result without it. . . ." The Court further indicated that even if §2(b) were to be applied in §2(f) proceedings, its "infelicitous language" would be construed as enacting the ordinary rules of evidence. Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 78, 73 S.Ct. 1017 (1953). See also 80 CONG. REC. 8231 (1936).

[37] Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 78, 73 S.Ct. 1017 (1953).

[38] 9 WIGMORE, EVIDENCE, 3d ed., §2486 (1940). After stating the rule, the author further observes that there is no "general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations."

[39] A reference to legislative history makes it clear that "discrimination" and "differential" were not thought to be synonymous as they were used in the Robinson-Patman Act. See Representative Utterback's distinction in 80 CONG. REC. 9415 (1936). See also Haslett, "Price Discriminations and their Justifications under the Robinson-Patman Act of 1936," 46 MICH. L. REV. 450 at 454 (1948); note, 42 ILL. L. REV. 556 (1947). "The bill expressly exempts from its prohibitions, however, price differentials." 80 CONG. REC. 9417 (1936). Note also the non-violative use of "differential" in §2(a).

Although "discrimination" also is used in section 2(a) as part of the definition of seller responsibility and the Court in the *Morton Salt* case put the burden of proving cost justification on the seller, it can be argued that buyer proceedings should be distinguished from seller proceedings for the following reasons: (1) the legislative history indicates that placing the burden of proof on the seller was the result intended in seller proceedings,[40] but neglects to say anything conclusive about the procedure applicable to buyers; (2) section 2(b) clearly applies to sellers, but it is not so clear that it applies to buyers—and if it does apply to buyers, it is not clear that it should be applied in the same way;[41] (3) the presence of the cost savings justification in proviso form in section 2(a) gives it procedural as well as definitive significance in seller proceedings,[42] but the reference of section 2(f) to section 2(a) appears to be for definitive purposes rather than for procedural purposes; and (4) there are policy factors, to be considered below, which provide additional grounds for having a different rule of procedure applicable in buyer proceedings.

III. *Policy Considerations Distinguishing Buyer Proceedings*

Since the decision in the *Morton Salt* case placing the burden of cost justification on the seller was based largely on the effect of section 2(b), the refusal to hold section 2(b) applicable in section 2(f) proceedings seems to imply that other considerations pertinent to buyer cases might call for a different result in the view of the Supreme Court. It is possible to extract from the opinion in the *Automatic Canteen* case references to such considerations which the Court might find persuasive if the question was squarely presented to it.

A. *Convenience.* The *Automatic Canteen* opinion made reference to the importance of convenience as one reason for having a different procedural rule in buyer cases.[43] Although there apparently

[40] 80 CONG. REC. 8241 (1936).

[41] "Even if the buyer has the 'same' burden as the seller, the fact that a seller has the burden to show his costs does not automatically, by virtue of §2(f), become a buyer's burden to show the seller's cost." Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 78, n. 21, 73 S.Ct. 1017 (1953).

[42] In the Morton Salt case, the Court relied on the rule that the burden of proof is on the party seeking to come within a statutory exception. 334 U.S. 37 at 44-45, 68 S.Ct. 822 (1948).

[43] "Considerations of fairness and convenience operative in other proceedings must, we think, have been controlling in the drafting of §2(b), for it would require far clearer language than we have here to reach a contrary result. . . . If that is so . . . decisions striking the balance of convenience for Commission proceedings against sellers are beside the point." Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 78, 73 S.Ct. 1017 (1953).

was some dispute as to just how great would be the burden of showing cost justification, the Court assumed that the standard would be the same as that required by the Commission in seller proceedings and that a study showing exact costs therefore would be necessary.[44] The burden would have been particularly heavy for the buyer in the *Automatic Canteen* case, for the costs of approximately eighty different sellers were in issue.[45] It obviously is more convenient for a seller to obtain information about his costs than it is for a buyer to get information from his sellers about their costs.[46] As between the Commission and the buyer, the Commission is in a better position to obtain cost information than the buyer because of the investigatory powers delegated to it.[47]

B. *Antitrust Policy.* Another reason for distinguishing buyer cases on the burden of proof question is that requiring buyers to get cost information from their sellers would result in cooperation which might be adverse to general antitrust policy. The disclosure of the sellers' cost secrets would make future arm's-length bargaining difficult.[48]

C. *Consumer Interest in Cost Savings.* Perhaps the most important reason for distinguishing a buyer case from a seller case for the purpose of proving costs lies in the statutory policy of maintaining a system which encourages the passing on of cost savings to consumers.[49] The competitive bargaining process has been the main reliance of our economic system in the past for the passing on of such savings. To subject buyers to prosecution each time their bargaining results

[44] See Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948); 65 HARV. L. REV. 1011 (1952); FEDERAL TRADE COMMISSION, CASE STUDIES IN DISTRIBUTION COST ACCOUNTING FOR MANUFACTURING AND WHOLESALING, H. Doc. No. 287, 77th Cong., 1st sess. (1941).

[45] Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 69, 73 S.Ct. 1017 (1953).

[46] The Court suggested that the Commission in the future might want to join the seller and his buyers in the same proceeding. Id. at 79. For an example of this procedure, see Bird and Sons, Inc., Bird Floor Covering Sales Corp., Montgomery Ward and Co., 25 F.T.C. 548 (1937). Treble damage actions against the seller and buyer were heard and decided together in American Cooperative Serum Assn. v. Anchor Serum Co., (7th Cir. 1946) 153 F. (2d) 907.

[47] Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 79, 73 S.Ct. 1017 (1953). For investigatory powers of the Commission, see 38 Stat. L. 722 (1914), 15 U.S.C. (1946) §§46, 49.

[48] Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 69, 73 S.Ct. 1017 (1953).

[49] See H. Rep. No. 2287, 74th Cong., 2d sess., p. 17 (1936); see also the statement of Mr. Teegarden, Hearing before the House Committee on the Judiciary on H.R. 8442, H.R. 4995, and H.R. 5062, 74th Cong., 1st sess., p. 22 (1935).

in price differentials, an inevitable product of competitive bargaining, would undermine our "sturdy bargaining" system[50] and result in a rigid price structure offering little opportunity for ultimate consumers to enjoy the benefit of cost savings.

IV. *Conclusion*

The decision in the *Automatic Canteen* case places on the Commission the burden of introducing evidence tending to show knowledge that price differentials were greater than sellers' cost savings in proceedings against buyers. The Court did not answer the question of who has the burden of proving the sellers' costs once a prima facie case of violation of section 2(f) of the Robinson-Patman Act has been made against a buyer. The various considerations emphasized by the Court as important in distinguishing buyer cases from seller cases, taken together with the fact that the Court did not think the result reached in the *Morton Salt* case controlling, add strength to the proposition that a buyer does not have the burden of proving his seller's costs as justification in a section 2(f) proceeding against him.

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[50] Automatic Canteen Co. of America v. FTC, 346 U.S. 61 at 74, 73 S.Ct. 1017 (1953).

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