DELIVERED PRICES: DOING BUSINESS UNDER THE PRESENT LAW

Corwin D. Edwards
Federal Trade Commission

MICHIGAN LAW REVIEW

Vol. 47 APRIL, 1949 No. 6

DELIVERED PRICES: DOING BUSINESS UNDER THE PRESENT LAW*

*Corwin D. Edwards***

What is involved in doing business under the present law concerning delivered prices? Since the ease or difficulty of doing business in accord with the law depends upon what the law permits and prohibits, to answer this question requires an assumption about what the law is. I shall assume that the scope of legally permissible action is that envisaged in the statement which the Federal Trade Commission issued to its staff and released to the public last October 12.[1] This statement says, in effect, that businessmen are not required to sell f.o.b. mill or to adopt any particular form of pricing practice. They are free to meet competition individually or reciprocally so long as in doing so they are not endeavoring to create a monopoly or rigidly conforming to a trade practice to eliminate price competition. They are forbidden to engage in a price fixing conspiracy by use of a geographic pricing formula, to participate individually in the tacit continuance of such a conspiracy, and to use a pricing system which involves different delivered costs to buyers in different locations, if the result is to injure competition among sellers or buyers, and if the differences do not reflect differences in delivery expense. The law seeks to identify the point at which what is called meeting competition actually becomes a deliberate effort to get rid of competition. The law seeks to prevent price differences which injure competition but not to require that prices or mill net realizations shall be uniform.

In the controversy which has raged about the recent basing point decisions, one type of complaint has been that, although the law tech-

*Adapted from a speech delivered by Mr. Edwards before the Philadelphia Chamber of Commerce on January 25, 1949, at the Warwick Hotel in Philadelphia. In his speech, Mr. Edwards stressed that he was expressing his personal views and not necessarily the official views of the Federal Trade Commission. Footnotes have been added by the editors—Ed.

** Director, Bureau of Industrial Economics, Federal Trade Commission—Ed.

1 "Commission Policy Toward Geographic Pricing Practices," 3 C.C.H. TRADE REG. REP. ¶ 10,411 (1948).

nically considered may mean this, the freedom which it apparently leaves for business decision does not actually exist. As a practical matter, some argue that to meet competition is so risky that a wise businessman will seldom do it, and that the hazards which surround all geographic pricing practices except f.o.b. mill pricing are so great that in practice business is driven to the f.o.b. mill formula.

However, the distinction between meeting competition and what the Federal Trade Commission has often called matching prices is more than a verbal trap for the unwary; indeed, the two types of behavior are sharply different, so that it is hard to see how a businessman could inadvertently engage in one while thinking that he is engaged in the other. Recognizing this, what safeguards are available to business in determining how far and under what conditions freight may be absorbed and mill net realizations may be allowed to vary?

I. COMPETITION OR CONSPIRACY?

The first of the two problems to be discussed here is whether and how far a businessman can meet competition without being accused of conspiracy.

It is clear in the record that meeting competition is not outlawed. The commission said officially in October that it will not question the meeting of "readily foreseeable competition," either by a single competitor or by reciprocal price reductions, where the practice does not tend to create a monopoly and is not of such a scope "as to preclude variety of delivered prices and raise the problem of collusion."[2] The Supreme Court has specifically recognized that businessmen have the right to meet competition if the practice is not systematic.[3] In the two basing point cases in which the Court discussed this question, it rejected the defense that competition had merely been met, not because such a defense is insufficient, but because the facts showed that what had been done was not mere meeting of competition in good faith but was an expression of a quite different purpose than appears in meeting competition.[4] However, the Federal Trade Commission has made clear that it will challenge industry-wide programs of matching delivered prices; and the Supreme Court has indicated that it will not regard as merely meeting competition the concerted industry-wide use of a pricing formula or the adoption by one concern of prices based upon an-

[2] Id. at ¶ 10,500.

[3] F.T.C. v. Staley Mfg. Co., 324 U.S. 746, 65 S.Ct. 971 (1945).

[4] Id. at 758; F.T.C. v. Cement Institute, 333 U.S. 683 at 721-726, 68 S.Ct. 793 (1948).

other concern's plant where the result is a pattern of phantom freight and freight absorption maintained regardless of the presence or absence of competition at the various delivery points involved.

It is argued by those who express alarm on behalf of business that there is no clear distinction between what is sanctioned and what is forbidden and that the only safe practices are those which are not commercially practicable. The argument is as follows: an enterprise selling over a wide market area cannot in practice make new prices for each transaction at each point. It must have a general pricing policy. When one competing seller wishes to invade the market territory of another, the invader cannot charge more than the home producer is charging, does not wish to charge less, and does not have to do so in order to sell. Thus, it is said, the mark of competition is to meet the price of one's competitor. As a second, a third, and a fourth producer enters the market, it is contended, each encounters the same conditions, responds in the same way, and thus helps to create an identity of delivered prices exactly like that which the commission condemns. How, it is asked, can the businessman hope to avoid the charge of price conspiracy except by either confining himself to his own home territory or offering price reductions which he knows are too small to be effective or too large to be necessary?

If it is actually true that the identity of competitive prices looks just like the price identity which emerges from a price fixing conspiracy, the problem created by this resemblance is not confined to the basing point cases alone. The same problem arises in any price conspiracy. A corollary is that circumstantial evidence cannot fairly be used to prove price conspiracy[5] and, therefore, that as soon as the government relies upon anything other than direct proof of written agreements, meetings, and the like, every competitor is in as much danger under the law as a price-fixer. If this is true, it presents a grave dilemma, for the commission must either adopt a rule of evidence which jeopardizes the innocent along with the guilty or else so circumscribe admissible evidence that moderately careful conspirators may avoid being caught. To assert the reality of this dilemma is to break sharply with established legal doctrine and with the common-sense economic ideas upon which this legal doctrine rests. It is to reverse the precedents of nearly 60 years under the anti-monopoly laws. For these reasons this novel idea should not be accepted without very careful scrutiny.

[5] But see Triangle Conduit & Cable Co. v. F.T.C., 168 F. (2d) 175 at 180 (1948).

One element of truth should be recognized in this line of argument. This element is that an observer who attempts to form an opinion from outside by merely looking at the price structure of an industry at a given moment may be unable to distinguish between identical delivered prices originating in competition and identical delivered prices originating in conspiracy. There is a possibility, therefore, that a law enforcement agency suspicious of widespread price identities may inquire about a situation that is truly competitive. This possibility is no reasonable basis for alarm, for if the law is to be enforced there will necessarily be some investigations in which the persons investigated are found to be guilty of nothing. The significant question is whether a closer examination will reveal differences between competitive and collusive patterns of identical prices and whether these differences are of a kind which businessmen can bear in mind in order to keep out of trouble.

The notion that trouble is likely, though plausible at first glance, rests almost equally upon a misconception of the commission's attitude toward identical prices and a mis-statement of the character of competitive price behavior.

When the commission examines the prices and price policies of the members of a business group in a conspiracy case, it regards the information before it as evidence bearing on the question whether the members of the industry have conspired. Whether prices are identical, whether they are rigid, and how they move relative to each other are significant so far as they illuminate the ultimate question of conspiracy. The commission has no interest in identical prices that are accidental or that express intense competition. It has no interest in rigid prices that merely reflect unchanging economic circumstances. It has no interest in uniform price changes if circumstances arising in good faith competition explain these changes. The commission's concern is that each businessman shall feel free to set any price he wishes in his own interest, whether or not his action pleases his competitor, and that each businessman shall make up his mind independently as to the nature of his business interest. The commission desires to preserve the opportunity for buyers to protect themselves by choosing among several sellers who may diverge in their policies, instead of permitting variety of price policies to be eliminated, with the inevitable consequence that regulation by the state will be invoked as a substitute protection for the buyer. But in preserving variety of policy and the resultant possibility of variety in prices, the commission does not, of course, insist that prices shall be always different. Competition produces innocent uniformities, and the commission knows it; but competitive behavior, both in business and in other aspects of life, also shows varieties of response often enough to prevent patterns of conduct from becoming frozen.

This statement of the commission's objectives has been implicitly challenged by recent comment about the second count of the *Conduit* case.[6] Critics of the decision say that the commission tried to make a mere identity of prices a violation of law by each concern quoting the price, even if the identity was produced by competition. But the commission has explained what it means very differently, and the respondents in fact were found to be guilty of a price-fixing conspiracy. The effect of the second count was to enable the commission to order them not to continue the same prices and pricing practices as before on the pretext that each concern had individually and separately decided to perpetuate the effects of the conspiracy. Such claims have been made by respondents in other cases. Under count two the commission charged action which amounts to tacit conspiracy—that is, conformity to a pattern by each member of a group in the knowledge that the others were conforming also and in contemplation that price competition would be eliminated thereby. The point of the charge, therefore, is that an individual may not participate in a tacit conspiracy.[7] The commission has explained publicly that in its opinion this charge does not expose to legal action any practice which does not involve conspiracy or elimination of price competition.[8]

The question remains, however, whether the commission can distinguish the competitive situation it is trying to maintain from the collusive one it is trying to prevent.

The commission has no need to rely merely upon the way prices behave, for in the ordinary case it is possible also to develop evidence of joint action in adopting the plan, joint establishment and use of machinery to make the plan work, disciplinary measures used against persons who do not follow the plan, and economic effects such as the antimonopoly laws are designed to prevent. In the decided basing point cases there was evidence that the price formulas in use in the industry had been jointly adopted for the specific purpose of eliminating price competition and that the businessmen who used them had set up machinery for making sure that the participants conformed to the plan.[9]

[6] Ibid.
[7] Id. at 180.
[8] 3 C.C.H TRADE REG. REP. ¶ 10,411 (1948).
[9] F.T.C. v. Cement Institute, 333 U.S. 683 at 710, 68 S.Ct. 793 (1948).

In some of the cases there was evidence that anybody who did not conform was disciplined.[10] This is the customary pattern, and where it prevails there is no substance in the claim that those who took part in the conspiracy did so unwittingly. The present problem is likely to appear only in the rare case in which what starts out as a competitive pattern may evolve into a tacit conspiracy through the codification of business customs.

Even in such tacit conspiracies, however, there is a sharp distinction between competition and collusion, both in the way prices behave in the market and in the way in which businessmen who make the prices behave and think.

The difference in price behavior exists because under competition, though prices may be uniform for a time, they do not show continuous and rigid uniformity like that of a collusive scheme. True, competition tends to make prices identical if the goods sold are identical. However, there are relatively few industries in which the products of different sellers are actually the same from the point of view of buyers. Cement has often been cited as an instance; yet the evidence in the recent *Cement* case showed that the quality of cement differs substantially, and that to prevent this difference from affecting prices the cement companies found it necessary to agree not to disclose their quality differences.[11] Moreover, even if quality is the same at a particular moment, improvement of the product is not likely to take place simultaneously in all producing establishments. In a competitive market producers characteristically emphasize the superiority of what they have to sell, even to the extent of magnifying minute and unimportant differences. When they succeed in persuading buyers that their product is distinctive they often quote a distinctive price for it. By contrast, under price conspiracies producers may insist upon the uniformity of their product, deny the existence of quality differences which are actually important, and either refrain from making improvements or refrain from calling attention to them until the entire industry is ready to move simultaneously.

Even where a commodity is actually and continuously uniform regardless of its source, competition usually produces recurrent price differences as well as recurrent price uniformities. Though the product is uniform, the conditions under which business is done are never con-

[10] Id. at 714.
[11] Id. at 715.

tinuously uniform. Some concerns have an expanding volume of business and some a declining one. Some have high inventories, others have low. Some serve customers who are capable of making a product for themselves, while others serve customers who have no such option. For a host of reasons such as these, the importance of new business is likely to differ from one concern to another, and the amount of business which would be gained or lost if the price were changed is likely to differ also. Just as some buyers pay a premium for goods in time of shortage, so some sellers cut their prices below the rest of the market when they are overstocked and their sales are slow.

Moreover, enterprises do not always agree in predicting the trend of business; consequently, under competition, when one leads off with a price increase or decrease, there is no certainty that the others will follow. Sometimes the leader is allowed to experiment alone with the new price level, and after watching his experiment his competitors may decide to imitate him or to stand pat and wait for him to recognize that he was wrong.

Because of such elements of diversity, price differences frequently appear. Indeed in every anti-monopoly case I have ever examined in which documentary evidence proved there was a conspiracy to make prices identical the conspirators failed to prevent some departures from the agreed price structure. Though price uniformity for brief periods is characteristic of competition as well as of conspiracy, continuous price uniformity, rigidly adhered to over long periods, justifies an inference of conspiracy which grows in strength with each increase in the rigidity and duration of the structure. Moreover, since the rigidity is never complete, there is always a chance for the investigator to find out what happened when the structure was not followed. For this reason anti-monopoly cases do not rely merely upon inferences from price identity even when the conspiracy is tacit rather than overt.

In the conspiracies that use basing point formulas, the flow of goods in the market also tends to be different from the flow that might be expected under competition. Actual competitive markets, unlike the theoretical models of competition in a perfect market, usually show a certain amount of cross-hauling; it is impracticable in most cases for each buyer to turn to the nearest producer and each producer to the nearest buyers. Nevertheless, there is a tendency under competition for wasteful forms of cross-hauling to be held to a minimum. Goods flow readily from areas of surplus production to areas of deficit production, but there is not much flow from one deficit area to another or from one surplus area to another. There is very little flow indeed from deficit areas to surplus areas. By contrast, the basing point formulas which are used in conspiracies are typically arranged so that no buyer anywhere suffers any penalty if he purchases from the most distant source of supply in the industry; in consequence, the patterns of commodity flow are often perverse. Shipments from deficit areas to surplus areas, from one deficit area to another, and from one surplus area to another appear to be much more common than in competitive industries. The result is an amount of cross-hauling so large as to constitute a substantial economic waste and to give rise to expressions of concern by the sellers themselves. But even wastes so great that executives deplore them are not quickly corrected where there is a basing point conspiracy, for the sellers who find the price structure least appropriate to their own interests do not feel justified in changing their pricing practices unless the rest of the industry is willing to cooperate. This sacrifice of the interest of the firm for the sake of industry-wide uniformity in practice is not characteristic of competition.

The way businessmen behave about price policies under competition is also different from their behavior in conspiracy. Because of the uncertainties and recurrent diversities of competition, businessmen in a competitive market cannot confidently predict every price which their competitors will make in every transaction. In routine business transactions in markets where the flow of information is good, business predictions, though not perfect, may have a high degree of accuracy. But when a sale is unusually important and when the conditions of the market make information hard to get, uncertainty is common. By contrast, a tacit conspiracy carries an obligation not to depart from the established price formula; so long as the formula is used, each businessman may predict his competitors' prices everywhere, on large orders as well as small, in sealed bids as well as in open markets. When bids to the government are regularly found to be uniform from all bidders down to the last decimal point, conspiracy is a reasonable inference.

The accuracy of business predictions where there is a conspiracy rests upon decisions that are implicit in the undertaking to make identical delivered prices by formula. The first decision is that, although each member of the group may reduce his profits on a transaction substantially to meet the price of another member, he will forego the business rather than sell below the other member's price. Under competition there are, of course, many cases where businessmen merely meet a competitor's prices, but there are also cases where a seller sees that at the same prices he will lose the business and where he wants the order enough to beat a competitor's price instead of merely meeting it.

The second decision inherent in the collusive use of basing point formulas is that each member of the group will surrender all initiative in changing prices within the territory regarded under the formula as lying within the price-making area of some other member of the group. Conversely, each member of the group expects a similar surrender of initiative by the other members as to the making of price changes within his own territory. In a basing point system delivered prices are calculated from one or more basing points, and the territory in which the computation of delivered prices is governed by a particular base may be called the area of that base. Inherent in a conspiracy which uses such a formula is the presumption that price changes in any base area will be initiated by a seller located in the base area and that all other sellers will follow such changes but will not initiate them. In practice the seller at the base can consider changing his prices without worrying about the pricing plans of nonbase producers or of producers at other bases; in turn he surrenders his own initiative in price-making outside his base area. In a conspiracy which uses a freight equalization formula, each producing plant is a base. In this type of pattern each producer enjoys, in adjacent territory, an initiative in price-making which is not challenged by producers located elsewhere. The only exception to this general rule appears in the case in which someone has failed to abide by the price formula upon which other members of the group take the initiative in reducing prices in his home territory for disciplinary purposes. This type of mutual forbearance contrasts sharply with the initiative that is characteristic of a competitive market, for under competition a seller may take the initiative in reducing prices in distant localities in order to enlarge his business there. He is unlikely to refrain from changing his price in territory adjacent to his plant until the price there is changed by a distant producer, as is the practice of nonbase mills under a basing point system.

Equally striking is the difference between competition and conspiracy in the way businessmen react when they find that a competitor has not done what they expected. When differences appear in the prices of competitors, a difference large enough to divert trade is regarded as a business problem, to be considered and met in the same spirit as a change in the price of raw materials. An inconsequential difference is usually ignored. In a conspiracy an inconsequential difference due to some anomaly in the price formula is regarded as a serious matter, which top executives spend time and trouble to remove. Any difference due to failure to use the formula is considered a breach of faith. If there is no adequate explanation or apology, the concern which does not follow the formula is likely to be disciplined by devices ranging from social boycott of its executives to punitive price cutting.

This leads to the conclusion that, even where conspiracy has not been overt, as it usually is, there is a clear distinction between competition and conspiracy in the way businessmen think and act and in the way prices behave. The distinction can be recognized by businessmen even more readily than by government investigators, since the facts which the government must painstakingly discover are intimately known by members of an industry in making their day to day decisions. If there is a member of an industry who has accepted its trade practices without bothering about their effect on competition, a few minutes of self-analysis should be sufficient to enable him to be sure of what he is doing. Such persons must be rare; there cannot be such a thing as an industry-wide conspiracy of which all the participants are innocently unaware. Even if the commission were to regard circumstantial evidence from price behavior as a sufficient test of conspiracy—as has not been its practice—the chance that competition could be mistaken for conspiracy would be remote.

II. FREIGHT ABSORPTION AND PRICE DISCRIMINATION

The second problem to be discussed here is this: can a businessman absorb freight without being accused of unlawful price discrimination?

Under the law of price discrimination a prima facie violation depends upon two elements: difference in the prices which a seller charges different customers, and a resultant injury to competition.[12] If this is proved there are two defenses, either that the price difference merely reflects a difference in cost or that the difference has appeared merely because the seller, acting in good faith, met the equally low price of a competitor.[13]

The argument that f.o.b. mill pricing is necessary to avoid illegal discrimination runs as follows: a seller who serves many customers in many localities cannot be sure that none of his customers will be injured by differences between what they pay and what other customers pay. Therefore, if he is to avoid a prima facie violation he can do so

[12] Robinson-Patman Act, 49 Stat. L. 1526, 15 U.S.C. §13(a) 1936).
[13] Id., §13(b). See also 2 C.C.H. TRADE REG. REP. ¶¶ 2212-2217 (1948).

only by avoiding different prices to different customers. On the assumption that price means the net realization of the seller at the point of shipment, this means that to avoid differences in price one must keep all net realizations equal, a result which we are told is possible only under f.o.b. mill pricing. Moreover, so runs the argument, the courts have held that the meeting of competition in good faith is an adequate defense only in sporadic and isolated transactions, whereas a seller with many customers cannot afford to make new prices for each transaction. Since the defense of meeting competition is not adequate, the only safe course, if one is to sell at different prices, is to use a method of pricing under which all price differences are justified by differences in cost. But since the only pricing system in which geographic price differences correspond to differences in transportation costs is f.o.b. mill pricing, the search for an adequate defense comes out at the same place as the effort to avoid a prima facie violation—at f.o.b. mill pricing.

This argument is exaggerated and misleading. Its assumption that the commission is committed in all delivered price cases to a definition of price as the net realization at the mill flies in the face of the commission's own statement made last October.[14] The commission stated that in using methods of exposition in this and other basing point cases which treated the mill realization as the price, there was no intent to prejudge price uniformity of the postage-stamp type. The commission pointed out that, under a basing point price formula, price discrimination exists under any definition of price. This means, in effect, that the commission's definition of price is not the source of whatever problems business may now be facing with reference to geographic price discrimination.

Moreover, the implicit assumption that safety can be assured for business by defining price as the delivered cost to the buyer is manifestly untrue. Such a definition would mean that uniform nation-wide delivered prices on the postage-stamp model would be defined as nondiscriminatory, but all other methods of pricing—basing point, f.o.b. mill with or without freight equalization, c.i.f. one or more central markets, or delivered in two or more zones—would be thus defined as discriminatory and exposed to whatever legal hazards may be inherent in discrimination. If one accepts the common law definition of price as whatever the buyer and seller establish as the price in the particular transaction, industries like cement, in which the evidence showed that

[14] 3 C.C.H. TRADE REG. REP. ¶ 10,411 at ¶ 40,412 (1948).

legal title passed to the buyer at the mill, will still be analyzed as the cement industry was; any geographic pricing practice will be regarded as discriminatory or nondiscriminatory according to the accompanying circumstances. So long as the law of price discrimination applies even if the buyers are located in different places, there will be no possibility of solving the problems of all sellers by a definition of price.

With these preliminary matters cleared away, the business problem about discrimination through freight absorption can be stated thus: in considering geographic pricing practices that may be regarded as discriminatory, can business afford to take chances of discovering and avoiding these relationships that create injuries to competition or of defending itself where there is injury by pleading that competition was met in good faith? Or must business play safe by using only pricing methods in which price differences reflect differences in cost? Only in f.o.b. mill pricing, or in delivered pricing in which the delivered prices consist of a uniform mill net plus actual transportation expense, do the differences in price correspond to differences in cost. If, therefore, nothing but the cost defense gives reasonable safety, an f.o.b. mill pricing system is indicated, whereas if there is reasonable safety in other methods of pricing, there is scope for freight absorption.

The recent Court decisions make it clear that although meeting competition may justify a price discrimination this defense may be overworked. Under the circumstances of the *Staley* and *Cement* cases the Supreme Court rejected the plea that meeting competition was sufficient defense.[15] Some have argued that in the light of these decisions such a defense has no validity except in isolated transactions. This argument does not rest on the decided cases, for in each instance the ground of the decision was that the facts showed, not a mere meeting of competition in good faith, but a purpose and effect quite different. The claim rests merely upon certain incidental remarks in these cases, and these dicta themselves are capable of more than one interpretation. For example, one dictum often quoted says that the meeting of competition does not justify *systematic* price discrimination;[16] and the word *systematic* can be interpreted either as referring to an industry-wide reciprocal matching of prices, such as was the practice of the defendants before the Court, or to a regular practice by a single enterprise in all its marketing operations, as is usually assumed by persons who ex-

[15] F.T.C. v. Cement Institute, 333 U.S. 683 at 722 and 726, 68 S.Ct. 793 (1948); F.T.C. v. Staley Mfg. Co., 324 U.S. 746 at 757, 65 S.Ct. 971 (1945).

[16] F.T.C. v. Cement Institute, 333 U.S. 683 at 725, 68 S.Ct. 793 (1948).

press alarm about the statement. It is axiomatic that dicta are not binding upon the Court and cannot reasonably be used to predict the probable views of the Court in future cases except where the various dicta point in the same direction. By such common sense, the present emphasis upon dicta in the basing point cases is unjustified, for various dicta point in opposite directions. Dicta in the *Cement* case, for example, can be interpreted to condemn uniform delivered pricing,[17] but a much more explicit dictum in the *Staley* case appears to say that the practice is not discriminatory.[18]

If the dicta are recognized to be inconclusive, the rest of the picture should be reassuring to business. The commission's policy statement of last October says that the commission will not challenge price reductions by a single concern or by two or more concerns reciprocally, made to meet readily foreseeable competition, unless these reductions are of such scope as to preclude price competition and raise the problem of collusion.[19] Collusion aside, therefore, the commission has recognized the validity of the defense of meeting competition in such cases.

In so far as there are risks in basing one's whole pricing method upon discriminations that are not otherwise justifiable and hoping to defend these as a mere meeting of competition, the crux of the business problem is whether businessmen can adequately identify injuries to competition inherent in their pricing methods. The law recognizes three kinds of injury—one which arises among sellers by virtue of conspiracy to discriminate; another which is imposed by one seller upon another seller in an attempt by the first seller to obtain a monopolistic position; and a third which arises among buyers or their customers where the buyers who pay the high prices cannot compete effectively against the buyers who pay the low prices. [20]

The first two types of injury can be easily recognized and can scarcely exist without deliberate intent on the part of the seller. Therefore, they need not detain us. Since the third type of injury appears in competition to which the seller is not directly a party, it is less easy to detect. Whatever difficulties there may be in doing business under the present law cluster at this point.

The problem is not peculiar to geographic price relationships. It arises with reference to quantity discounts, volume discounts, and any

[17] Ibid.
[18] F.T.C. v. Staley Mfg Co., 324 U.S. 746 at 757, 65 S.Ct. 971 (1945).
[19] 3 C.C.H. TRADE REG. REP. ¶ 10,411 at ¶ 10,500 (1948).
[20] See 3 C.C.H. TRADE REG. REP. ¶ 10,412 (1948).

other price differences which a seller may establish. Some degree of difficulty is inherent in the statute so long as the illegality of a pricing practice depends not upon the nature of the practice but upon its effect, and so long as the effect in question appears in competition among customers, where the seller may be unable to foresee it.

Though the furor about freight absorption suggests that this type of difficulty is conspicuous in geographic price discriminations, the problem of unforeseen injury appears to be less in such discriminations than in most others. There can be no injury to competition among buyers in different localities unless the difference in the prices they pay is great enough to create an injury. This means that such an injury will not arise in the handling of freight charges for products for which the freight expense is relatively unimportant. As to other products, there can be no injury to competition among buyers unless the buyers are in competition with each other, and customers in different localities are less likely to compete against each other than are customers who merely buy different quantities. Moreover, if a low price is already available to a buyer merely because of his location, and through no exercise of quasi-monopolistic buying power, the mere absorption of freight by some distant seller to quote him the same price and thereby give him another potential source of supply is not likely to injure other buyers who compete with him. Thus injury to competition among buyers is difficult to perceive in many patterns of freight absorption.

Moreover, a method of establishing geographic price differences which may put a particular buyer at a disadvantage in the purchase of one of his raw materials may give him an advantage in the purchase of another. (In this respect geographic discriminations work quite differently from quantity discounts, which tend to create a cumulative advantage for large concerns and a cumulative disadvantage for small ones.)

Such peculiarities tend to make injuries to competition among buyers from geographic price discriminations much less probable than similar injuries from discounts for quantity or volume. Whereas the commission has found such injuries from discounts in many cases,[21] it has found them in only three basing point cases, and in all three instances there was reason to believe that the highly artificial price structures from which the discriminations arose had been established by conspiracy.[22]

[21] See 2 C.C.H. TRADE REG. REP. ¶ 2023 (1948).

[22] F.T.C. v. Cement Institute, 333 U.S. 683, 68 S.Ct. 793 (1948); F.T.C. v. Staley Mfg. Co., 324 U.S. 746, 65 S.Ct. 971 (1945); Triangle Conduit & Cable Co. v. F.T.C., 168 F. (2d) 175 (1948).

The commission has found injury to competition among buyers from geographic discrimination only in basing point cases. It has publicly announced that such injury is improbable in uniform delivered pricing because it is improbable that buyers will be injured simply because they acquire products at the same delivered cost. The same principle obviously applies to buyers within any single zone of a zone pricing system. The risk of unlawful injury to buyers appears to be confined, for practical purposes, to the basing point industries and to the zone differentials of zone pricing systems.

Even with these qualifications considered, there is still some possibility that injuries will arise in competition among buyers through freight absorption by a seller who serves a wide market area and who sells to many different customers. The problem is one of the least of the business problems inherent in the Robinson-Patman Act, but it is a problem nevertheless.

But there is no more need for business, for this reason, to flee to a geographic price structure designed rigidly to reflect cost differences than there is for business to meet its problems as to quantity discounts and other aspects of the price structure by basing all price variations upon cost variations. The practical safeguard for businessmen with regard to freight absorption, as with regard to other methods of varying prices, lies in customers' complaints upon being hurt. The first complaints against a seller's prices go to the seller. It is when the customer obtains no relief by private complaint that he turns to the government. Accordingly, in practice a seller has opportunity to identify the injuries to competition among his customers if he pays reasonable attention to their complaints, analyzes those parts of his pricing practices which they call to his attention, and makes such changes as his analysis suggests. The Federal Trade Commission does not, in fact, receive complaints about price discrimination from buyers of goods based merely upon the seller's absorption of part or all of the freight in selling to their competitors. From this absence of complaints made to the commission, it would seem there are relatively few complaints to sellers also, and that injury to competition among buyers from this practice, unaccompanied by phantom freight, is rare. Whether this assumption is correct businessmen probably can decide on the basis of experience, for their customers' complaints afford an opportunity to avoid being surprised by unforeseen charges that they have discriminated in violation of the law.

The discrimination problem may be summarized thus: under the law of price discrimination, illegality depends upon the effect of a practice, and therefore there is no perfect certainty that any practice cannot possibly be challenged. F.o.b. mill pricing is safe because if it causes injury the defense of cost can always be used. Apart from collusion or effort to create a monopoly, uniform delivered pricing is reasonably safe, for practical purposes, because of the improbability that it will create an unlawful injury to competition among buyers. Freight absorption in good faith to meet competition is reasonably safe for the same reasons, and so long as it does not preclude price competition and raise the problem of collusion the commission will not attack it. Basing point systems and zone systems with price differentials between zones involve risk, though probably less than appears in connection with quantity discounts. The risk in using such systems can be substantially reduced by a seller who analyzes the complaints of his customers and changes his prices to remove any injury that appears.

All this means that recent developments do not force businessmen who wish to avoid an unreasonable risk to do so by adopting f.o.b. mill pricing. A concern which is willing to protect its customers from injurious discriminations can do so without being limited to one kind of pricing practice. Neither do recent developments prevent businessmen from meeting competition. A businessman who is not and has not been party to a price conspiracy can meet competition freely, with no more danger of being falsely accused of price fixing than of being falsely accused of any other breach of law. The law means what it meant before the controversy started: that business must avoid conspiracies to fix prices and discriminations that injure competition. American business has been able to thrive within the limits set by these principles. Under the recent basing point decisions it can continue to do so.