

# Trade Regulations: Price Discriminations: Good Faith Defense

Erwin James Keup

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Erwin James Keup, *Trade Regulations: Price Discriminations: Good Faith Defense*, 42 Marq. L. Rev. 119 (1958).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol42/iss1/14>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

## RECENT DECISIONS

Trade Regulations - Price Discriminations - Good Faith Defense—Respondent, a corporation primarily engaged in the manufacture, distribution, and sale of a national alcoholic beverage beer, reduced its regular premium price to the level charged by competitive producers of “local” beer while maintaining regular prices in the rest of the country. Respondent was charged with price discrimination in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act.<sup>1</sup> Respondent based its defense on Section 2(b) of the act, contending that the price reduction was made in good faith to meet an equally low price of a competitor. *Held*: A nation-wide brewer’s reduction of its “premium” price in the St. Louis area to the level of prices charged by local breweries in competition with which it has already been steadily increasing its share of the beer market cannot be justified as a good faith reduction to meet competition and therefore exempt from the Robinson-Patman Act’s<sup>2</sup> price discrimination ban. Respondent ordered to stop reducing beer prices in any market where it competes with others unless it promotionally reduces prices everywhere. *Anheuser-Busch, Inc.*, CCH Trade Reg. Rep., para. 26,705 (1957).

Federal Trade Commissioner Tait found that respondent, by not making price reductions anywhere else in the United States similar to those made in the St. Louis area, had discriminated in price as between purchasers differently located. An injurious effect on competition within the meaning of Section 2(a)<sup>3</sup> was found in evidence that during the price reduction period, total St. Louis market area sales increased by only 9.2% while respondent enjoyed an increase of 201.5% (a tripling of its previous sales) at the expense of its three main competitors who suffered losses in their volume of sales of 41%, 33%, and 1% respectively. There was also evidence that respondent’s share of the total St. Louis market rose from 12.5% to 39.3% during the eight month price reduction period.

---

<sup>1</sup> 49 Stat. 1526 (1936), 15 U.S.C. §13(a) (1946). Section 2(a) provides in part as follows: “That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . .”

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

The principal issue raised was whether respondent was entitled to a finding that its price reductions were made in good faith to meet the equally low price of a competitor within the meaning of the defense provision of Section 2(b) of the Robinson-Patman Act.<sup>4</sup>

The commissioner found that respondent's price reductions in the St. Louis market were not made in good faith to meet an equally low price of its competitors. This finding was based on two separate grounds: first, that the price reductions were not made in self-defense against *competitive attacks*. None of the St. Louis competitors constituted any threat to respondent's relative position in the St. Louis market. Secondly, respondent's beer could and previously did command a "premium price" in the St. Louis market as well as in most of the other markets in the nation and therefore any price cut that would lessen this "established price differential" would not be a meeting of competition but an undercutting of competition:<sup>5</sup>

"The test in such a case is not necessarily a *difference in quality* but the fact that the public is willing to buy the product at a higher price in the normal market. Clearly, therefore, respondent's reduction from the premium price to match the prices of regional beers on the market was not a meeting of competition. *The effect was to undercut competition.*" [Emphasis Added.]

The instant decision lays down a negative answer to the question of whether the defense within the meaning of Section 2(b) of the Robinson-Patman Act is available to a seller who meets a competitor's lower price in order to obtain new customers. Yet nothing in the language of Section 2(b) restricts the defense only to situations where price reductions are necessary to retain existing customers. The Commissioner relies on dicta in *Standard Oil Co. v. FTC*<sup>6</sup> for his interpre-

<sup>4</sup> 49 Stat. 1526 (1936), 15 U.S.C. §13(b) (1952). Section 2(b) provides as follows: "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the 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: *Provided*, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

<sup>5</sup> Anheuser-Busch, Inc., CCH Trade Reg. Rep., para. 26,705 at p. 36,332 (1957).

<sup>6</sup> *Standard Oil*, to meet a competitor's price, sold gasoline to four wholesalers in the Detroit area at a lower price than it charged retail dealers. The wholesalers passed on much of this saving to their customers who were then able to undercut the retail dealers purchasing directly from Standard Oil. The Commission originally held that Section 2(b) merely prescribed the sequence of evidence and was not a subsequent justification of an otherwise illegal price discrimination. 41 F.T.C.253 (1945), *modified*, 43 F.T.C. 56 (1946), *aff'd*, 173 F.2d 210 (7th Cir. 1949). On appeal, however, the Supreme Court held that Section 2(b) is a subsequent defense to a charge of price discrimination and remanded the case for a finding on Standard Oil's good faith. 340 U.S. 231 (1951).

tation of the section. Limiting this defense in such a manner places a difficult burden upon a seller attempting to come within Section 2(b) of proving who are his "existing customers." This entails the presentation of past records such as contracts, vouchers, and bills of sale.<sup>7</sup> In many circumstances, such as those in the instant fact situation where existing customers are a multitude of individual purchasers, presentation of such evidence becomes extremely difficult if not impossible. After establishing his existing customers, the seller must then prove that the loss of their patronage was due to the lower price of a competitor. Under this interpretation, an ambitious nation-wide seller who is not hurt by a lower price of his local competitor can improve his market position only by a proportional reduction of prices across the nation or through the use of non-price competition such as increased advertising. It is not only uneconomical and impractical for a nation-wide reduction but such an action may also raise the possibility of other anti-trust violations.<sup>8</sup> Non-price methods of competition are very often ineffective. The instant action is an example of the inequities which arise from restricting the defense within Section 2(b) to the retaining of existing customers. Respondent, prior to its price reductions, ranked last in the relative share of the St. Louis market. This fact in itself makes the Commissioner's denial of the Section 2(b) defense on the ground that none of respondent's competitors constituted any threat to respondent's relative position in the St. Louis market, an inequitable decision. The Commissioner evidently overlooked respondent's last place position when rendering his opinion. Respondent's total sales volume was slowly improving, but so was the sales volume of one of its main low priced competitors. Respondent, probably finding that a nation-wide price reduction would be impractical and non-price methods of competition were ineffective, chose to lower its prices to that of its local competitors, thereby allowing the quality of its product to improve its last place market position. While the sales of two competitors who had previously been experiencing sales declines, fell 33% and 41% respectively, the third competitor showed slightly less than a 1% decrease during the price reduction period. Although there is no specific

---

Thereupon, the FTC held that Standard Oil had not acted in good faith and the Section 2(b) defense was precluded, because of the Commission's determination that Standard's reduced prices were made pursuant to a price system rather than being "the result of departures from a non-discriminatory price scale." 49 F.T.C. 923. The Court of Appeals found, however, that there was no basis in the record for such a finding and vacated the order of the commission, holding that Standard's good faith defense was firmly established. 233 F. 2d 649 (7th Cir. 1956). The United States Supreme Court affirmed the decision. 355 U.S. 396 (1958).

<sup>7</sup> Aspey, *Establishing Meeting of Competition Defense to A Charge of Price Discrimination Under the Robinson-Patman Act*, 3 Practical Lawyer 56 (1957).

<sup>8</sup> See Austern, *Inconsistencies in the Law*, CCH Business Practices Symposium 158, 163-164 (1951).

indication why the one competitor suffered no substantial injury, speculation suggests that the answer was in the quality of his product. This conclusion is strengthened by the fact that the lower priced competitor immediately shot ahead into the lead in the St. Louis market upon the Commissioner's disallowance of respondent's aggressive price reduction. Assuming the truth of the speculation, it would seem that a price reduction by a higher priced competitor who could not prove his price reductions were necessitated for the purpose of retaining existing customers would substantially injure only low priced competitors with products somewhat inferior in quality.

The Attorney-General's Committee favored extending the defense of Section 2(b) to price discriminations made to obtain new customers.<sup>9</sup>

The instant decision also spotlights the fact that even if respondent could prove it reduced prices to retain *existing* customers, it still must come within the Commissioner's interpretation of the Section 2(b) clause "to meet an equally low price of a competitor." According to the Commissioner, the clause is not to be taken literally by the "premium price" sellers. Such sellers are not allowed to reduce their prices to the same level as that of their low price competitors but must maintain the "established price differential" previously existing between their products. If we carry this interpretation to its converse extension, a non-premium priced seller who is hurt by a price reduction of a premium price seller should be allowed to reduce his price *below* that of the premium price seller by the amount of the previously established price differential. Prior to the instant decision, the Federal Trade Commission has only as dicta indicated that the premium priced seller is not acting in good faith if he lowers his price to the same level as that of a lesser known competitor.<sup>10</sup>

This writer believes that the "established price differential" interpretation as laid down in the instant decision should be reversed. Unless the Commissioner is willing to create exceptions in abnormal markets, if a premium price seller would lose existing customers through an extrinsic economic cause such as a general depression wherein the majority of the buyers could only afford the lower priced product, said seller would not be able to regain former customers since he would be forced to maintain the established price differential. In addition, there may be much merit in one author's theory that a low priced seller can in effect set the prices of the premium-priced seller, under the commissioner's present interpretation, thus achieving the undesirable objectives of conspiratorial price fixing.<sup>11</sup> By allowing a premium-priced

<sup>9</sup> Report of Attorney General's Committee To Study the Anti-Trust Laws at p. 184.

<sup>10</sup> Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, at 396-397 (1948). Also see F.T.C. v. Standard Brands, 189 F.2d 510, at 514 (1945).

<sup>11</sup> Simon, *Legal Price Fixing*, CCH Business Practice Symposium 83 at 86 (1951).

seller to reduce his prices to the exact level of his low priced competitor, quality of product would be the chief factor of competition to the benefit of the general public. This is compatible with the policy embodied in our anti-trust laws of maintaining flexible prices within the economy.

#### CONCLUSION

There is a definite need for an amendment to the defense contained within Section 2(b) of the Robinson-Patman Act. The defense should be made available to a seller who uses price discrimination to obtain a new customer as well as to a seller who uses such price discrimination to retain existing customers. This writer suggests the test should be whether the seller asserting the defense has shown his good faith in that he acted as a reasonably prudent businessman in securing the new buyer and was not motivated by a desire to drive competition out of the market. Section 2(b) should also be amended to allow a seller to meet the equally low price of a competitor without regard to the maintenance of customary price differentials.

ERWIN JAMES KEUP

---

**Section Three of the Robinson-Patman Act Held Not An Anti-Trust Law** — Plaintiff alleged that it was injured by defendant's sales at unreasonably low prices, and that defendant's conduct violated Section Three of the Robinson-Patman Act. Plaintiff sued for treble damages and injunctive relief under Section Four and Section Sixteen of the Clayton Act, claiming that the defendant had violated an anti-trust law. The United States Supreme Court, in a five to four decision, *Held*: that Section Three of the Robinson-Patman Act was not an anti-trust law, and the plaintiff, therefore, could not maintain under Sections Four and Sixteen of the Clayton Act a private civil action for treble damages and injunctive relief. *Nashville Milk Co. v. Carnation Co.*, 78 Sup. Ct. 352 (1958).

The above problem has been before the courts for the past twenty years. Some decisions have agreed with the majority in the present case and other decisions have sided with the dissenting opinion holding that Section Three of the Robinson-Patman Act is an anti-trust law. Considering the importance of this issue and the amount of authority on either side, it is surprising that the Supreme Court did not pass on this sooner.

Section Four of the Clayton Act<sup>1</sup> permits one who is injured by reason of anything forbidden in the anti-trust laws to bring a suit for treble damages, and Section Sixteen<sup>2</sup> of the Clayton Act allows the claimant to obtain injunctive relief against threatened loss or damage

<sup>1</sup> 15 U.S.C. §15 (1914).

<sup>2</sup> 15 U.S.C. §26 (1914).