I recommend this thesis for acceptance by the Honors Program
of Ball State University for graduation with honors.

Thesis Adviser

Department of Political Science

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Justification for Confusion

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It is safe to say if there were not so many circuitous routes taken to skirt the intent of the antitrust laws—the maintenance of a competitive society, we'd hear less complaints about the obscurities and misinterpretations of our antitrust laws. The burglar wouldn't have to worry about the complexities of a Yale lock if he didn't intend to break through in the first place.

--Emanuel Celler

Justification of Confusion

Introduction

In the face of mounting criticisms from many sides, corporate psycho-phantoms still laud the benign effects of our society's modern industrial organization—giantism. They explain that since the theoretically abstract and realistically impossible economic model of pure or perfect competition has never existed it cannot then be a goal worthy of attainment. Instead, they argue pragmatically that ours is an industrial structure of imperfect competition which succeeds (witness our living standards) and therefore it must be good. In fact, one member of the defense of bigness in business, arguing in "old fashioned" terminology so as not to offend anyone, writes that "competition" between the giants is of such a magnitude and carried on with such vigor as not to warrant concern. But by "competition" he apparently refers to advertising, growth, power advantage, or some other form of nonbeneficial competition. He certainly does not address himself to price competition, the primary benefit of the free-market system.

On the contrary, it is just because of the direct relationship between industrial concentration and the ability to administer price and to

avoid price competition that criticism has arisen. And it is because of this and our traditional belief in pure competition that Congress some three and one-half decades ago enacted legislation to help insure price competition, the Robinson-Patman Price Discrimination Law. From its very inception, however, arises a contradiction: the legislation regulates a portion of the transaction market in a free economy. Further, as an example, consider a small firm which sells a major portion of its output to one large buyer. The buyer is in a position to threaten to purchase from the small firm's competitor if the dependent seller does not lower his price. The problem here is one of degree. The two firms should be allowed to barter over the price, but should the small firm be allowed to become a satellite of the large firm as has been the observed result in cases similar to this?2 It is this matter of degree and, as Congressman Celler pointed out, businessmen's attempts to use their power to an exaggerated degree that have helped to turn the Robinson-Patman Amendment to the Clayton Act into the confused, uncertain, and contradictory status it holds today.

It is to an understanding of the price discrimination law that I turn my attention in this paper. In the first two parts of this effort, I point out that there is a real need for such a law and the legislative intention as interpreted by the courts and commentators. In the fourth part, I attempt to frame the interpretations of the various sections of the Robinson-Patman Act. I then finish with some conclusions concerning the corporate worshippers about whom I began and concerning this Act. I have also included in appendices a copy of the antitrust laws as they read today and

a list of court cases researched for this paper, all for the convenience of the reader.
Chapter 1

Needed for a Price Discrimination Law

In a pure or perfect competitive model, there are too many firms, all of which are too small, such that no one firm is individually able to affect price. As the number of firms decreases and the size of the firms increases, the degree of market imperfection increases until, at the opposite extreme of pure competition, we arrive at a monopoly where the industry is synonymous with the firm, that is, one seller. At the same time as market imperfection increases, the firms in the industry are more able to administer price—willfully able to establish price at whatever level they desire. Thus it is this phenomenon of bigness and consequent power which characterizes our modern industrial structure and the unwarranted and non-beneficial effects which result from such bigness that have necessitated a price discrimination law.

By "bigness" here I mean either big in absolute terms and/or a big share of some market.1 (See Table 1 for a representative sample of "bigness" as used here.) And it is the effects of such bigness on our economy against which critics raise their voices. One such critic, George Stigler, believes that a direct effect of big business is that it encourages bigness in labor and government and that all three act monopolistically vis-à-vis each other.2 And whereas there is a definite tendency for imperfect competition "to lessen the significance of short-term price competition,"3 it


2 Ibid., p. 5.

has also been shown that administrative bigness of corporate giants adds nothing to society's welfare. In fact, one economist has tried to prove

<table>
<thead>
<tr>
<th>Industry</th>
<th>Concentration Ratio</th>
<th>Asset Size</th>
<th>Number of Corporations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Motor Vehicles</td>
<td>80.8</td>
<td>$1,000 million and over</td>
<td>78</td>
</tr>
<tr>
<td>Tobacco</td>
<td>70.9</td>
<td>$250 million to $1,000 million</td>
<td>194</td>
</tr>
<tr>
<td>Petroleum Refining</td>
<td>50.3</td>
<td>$100 million to $250 million</td>
<td>257</td>
</tr>
<tr>
<td>Rubber</td>
<td>48.1</td>
<td>$50 million to $100 million</td>
<td>284</td>
</tr>
<tr>
<td>Aircraft</td>
<td>47.3</td>
<td>$25 million to $50 million</td>
<td>507</td>
</tr>
<tr>
<td>Dairy Products</td>
<td>42.9</td>
<td>$10 million to $25 million</td>
<td>1,117</td>
</tr>
<tr>
<td>Alcoholic Beverages</td>
<td>41.4</td>
<td>Total</td>
<td>2,437</td>
</tr>
<tr>
<td>Primary Iron and Steel</td>
<td>40.2</td>
<td>All Sizes</td>
<td>Approximately 200,000</td>
</tr>
</tbody>
</table>

Sources:


that monopoly induced resource misallocation in United States manufacturing in the late twenties resulted in the loss of consumer welfare of just a little more than one-tenth of one percent of national income. A similar study in 1954 by David Schwartzman concluded that "monopoly profits were 11.2 percent of total variable cost aggregated over all monopolistic industries ($43.6 billion), which comes to $4.9 billion, or 1.6 percent of the


national income." In another study of the economy made since World War II, William Leonard says,

Postwar experience has demonstrated that firms in concentrated industries holding substantial market shares have the power to maintain target rates of profit over a period of years. Where price leadership or other collusive practices exist, prices in these industries lag during a period of sharp inflation caused by excess aggregate demand, yet advance in periods of declining demand and underutilized capacity.

Mr. Leonard then concludes this argument with a believable proof that one-half of industrial price increases and one-third consumer price increases have resulted from the pricing policies of the steel oligopoly. Referring again to George Stigler, he summarizes the "Case Against Big Business" in this way:

1. Big businesses often possess and use monopoly power.
2. Big businesses weaken the political support for a private-enterprise system.
3. Big businesses are not appreciably more efficient or enterprising than medium-size businesses.

More specifically, a quite simple economic analysis with the aid of a graph (on page 7) reveal further unpleasant effects on the economy of monopoly control. It is readily evident that monopoly power results in higher prices, reduced output, and "dead weight loss" or "welfare loss." By a little consideration, it should also become evident that there is a redistribution of income to the monopoly owners, a misallocation of resources because of the restricted output, and that the higher costs of


8Stigler, op. cit., p. 6.
production imply less efficiency through lower marginal productivity. And despite the glowing words of the defenders of big business, the hard facts of the issue point a disparaging finger at monopoly power.

Not only is the economy harmed by the above effects, but also there is the matter of monopolistic pricing policies. First of all, almost every textbook on economic principles refers to price rigidity or price inflexibility as an essential aspect of concentrated industries. Further, it has been put forth that market power and price discrimination are strong inducements to become vertically integrated. In fact, one commentator has made a study of a firm that has taken to producing a part of each of its

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inputs just for the sake of the derived bargaining power. And as to
power and price fixing, it is argued that the results are restriction on
innovation or stagnation (contrary to the wonderful reports of technolog-
ical benefits of research and development which only big businesses can
afford to conduct), reduction in consumer choice, and immunity from market
forces. All of these criticisms hint at, directly or indirectly, the
two relevant effects of monopoly power and price discrimination: a) the
lessening of competition or tendency to create a monopoly, and b) injury
to or destruction or prevention of competition with either the grantor or
recipient of the benefits of price discrimination.

These are the effects of our modern industrial organization which the
price discrimination law has attempted to alleviate. An example from the
ninth district circuit court might help clarify the type of injury the law
is trying to prevent: "discrimination in the price of gasoline sold to
competing taxi or truck fleets could have the effect of injuring com-
petition with the purchaser receiving the lower price. Or injury could
result from the difference in price of machinery or other equipment sold
to competing firms for use in the production of other goods." In other
words, price discrimination from volume or quantity discounts in the sale
of gasoline or machinery could result in injury to competition either on

the seller's side of the market (primary line of commerce) or on the buyer's side of the market (secondary line of commerce).

Finally, there is one other type of pricing formula which derives from bigness in our economy and which deserves exclusive special mention, because above all other pricing policies it succinctly points out the need for a price discrimination law. That is the price discrimination inherent in the basing-point pricing system. It is injurious to competition because it is an attempt to fix and maintain prices and it can be an "instrument of oppression" to dominate weaker rivals. The economic consequences of basing-point pricing include price fixing, price discrimination, wastes in distribution, concentration of control, retardation of growth in the number of competitors, and distortion in location of capacity.¹⁴

Thus it was that as our business community began to grow large in absolute terms and to intensify concentration of power, and as the effects of size began to be felt and observed, that Congress took to task enactment of regulatory legislation to if not prevent, then at least alleviate, the injuries of price discrimination.

In the United States, there is a political tradition favoring action to correct what is perceived as excessive concentration of economic power. This tradition led to the passage of the Sherman Antitrust Act in 1890, which aimed to prevent the formation of trusts and monopolies. The act was intended to promote competition and prevent the abuse of business power.

The act was not immediately effective, however. The Supreme Court initially interpreted it narrowly, and it was not until the 1910s that the act began to be used more aggressively. The Federal Trade Commission was created in 1914 to enforce the act, and it began to bring more cases against businesses accused of violating the act.

The act has been amended several times since its passage, and it has been interpreted in a variety of ways. Some argue that it has been too lenient in allowing businesses to form partnerships, while others argue that it has been too strict in preventing them from doing so. The act remains a key part of U.S. antitrust law, and it continues to be used by the government to intervene in the economy when necessary.
among the several States, or with foreign nations, is declared
to be illegal. . . (Emphasis added.)

Section 2. Every person who shall monopolize, or attempt to
monopolize, or combine or conspire with any other person or
persons, to monopolize any part of the trade or commerce
among the several States, or with foreign nations, shall be
deemed guilty of a misdemeanor. . . (Emphasis added.)

Note first the underscored words of the text. These were the practices
which Congress wanted to prevent. These also are the effects of business
as discussed in Chapter One of this paper. And note, too, that it is not
unlawful for a firm to be a monopoly, but only to monopolize, for the
Supreme Court has said that "mere size" is not illegal. 2 And finally
note that not all restraints in trade are illegal, nor should they be.
As decided in Standard Oil Company v. United States, 4 only "unreasonable"
restraints violate the Sherman Act. In other words, the Supreme Court de-
developed the Rule of Reason by which to draw the line between varying degrees
of restraint of trade.

It was this same case in addition to one involving the tobacco in-
dustry which focused public attention once again on antitrust with the
revelation of numerous anticompetitive practices, including: a) acquir-
ing stock of allegedly independent companies through holding companies,
b) exclusive dealings to "tie up" products, and c) local price-cutting
campaigns to either destroy weaker competitors or at least force them to
follow the dictates of the trusts. 5 This was in 1911. But calls for ac-
tion became louder until Congress acted in 1914 with the Clayton Act 6 and

3 United States v. United States Steel Corporation, 251 U.S. 447 (1920).
4 251 U.S. 449 (1920).
5 Neale, op. cit., p. 185.
the Federal Trade Commission Act. 7 The Clayton Act, as enacted in 1914, read 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, which commodities are sold for use, consumption, or resale, . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, that nothing herein contained shall prevent discrimination in price between purchasers of commodities or account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for differences in the cost of selling or transportation, or discrimination in price in the same or different commodities made in good faith to meet competition. . .

(Emphasis added.)

Just as the Court added a Rule of Reason to the Sherman Act, Congress, by including that portion which I have underscored, added a meter by which to distinguish between varying degrees of price discrimination. Moreover, and quoting a British expert on United States antitrust policy, "the words 'may be' in the qualifying clause introduced an element of prophecy into the matter; they were in a sense a mortgage taken out against the expected expertise of the [Federal Trade] Commission."8

As already mentioned above, Congress in 1914 also passed the Federal Trade Commission Act which not only established an "expert" commission but at the same time declared that

Unfair Methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

What Congress attempted to accomplish with this piece of legislation is best summed up by the Court: "...it was the object of the Federal Trade Commission Act to relieve business of the restrictions of the Sherman Act and to provide a means of determining the effect of business practices on competition in the various lines of commerce, and to correct any competition that was found to be injurious to the public welfare. . ."9

8Neele, op. cit., n. 187.
Commission Act to reach not merely in their fruition but also in their
incipiency combinations which could lead to these and other trade re-
straints and practices deemed undesirable. 10

Twenty-two years passed before any new major antitrust legislation
was enacted. During that time, and especially during the Great Depression
of the early 1930's, it was concluded that the Clayton Act price discrim-
ination proviso was inadequate to protect small sellers from excessive
price concessions demanded by powerful buyers: "Mass distributors in the
form of chain stores and mail-order houses [a post-World War I growth phen-
onomenon] were thought to jeopardize independent wholesalers and retailers
in part because of discriminatory concessions extracted from suppliers by
these powerful buyers." 11 Congress once again was called upon to act, and
it did so by passing the controversial Robinson-Patman Amendment to the
Clayton Act which reads in part:

Section 13(c). It shall be unlawful for any person engaged
in 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 purchases in-
volved in such discrimination are in commerce, where such
commodities are sold for use, consumption, or resale, . .
and where the effect of such discrimination may be substan-
tially to lessen competition or tend to create a monopoly
in any line of commerce, or to induce, destroy, or prevent
competition with any person who either grants or knowingly
receives the benefit of such discrimination, or with cus-
tomers of either of them:
Provided, That nothing herein contained shall prevent dif-
ferrals which make only due allowance for differences in
the cost of manufacture, sale, or delivery resulting from
the differing methods or quantities in which such commodi-
ties are to such purchasers sold or delivered:

10Fashion-Criticizing-Guild-v.-Federal-Trade-Commission, 312 U.S.
457,465 (1941).

11Report of the Attorney General's National Committee to Study the
Antitrust Laws, Stanley M. Barnes and S. Chesterfield Oppenheim, co-chair-
Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce,

And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade:

And provided further, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(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.

(c) It shall be unlawful for any person engaged in commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting for the or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities
manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.\(^1\)

Section 13a. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.\(^2\)

First of all, it has been pointed out numerous times that the purpose of the Robinson-Patman Act was not to maintain competition but to protect the small competitors.\(^3\) Further, it can be noticed that the amendment narrowed the available justifications for a price discrimination by

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\(^1\) 15 U.S.C.A. 13, 49 Stat. 1526


specifically listing those allowable by law. And while the Broch case repeats what was said earlier about protecting small sellers from powerful buyers, in Manville Island Farms v. American Crystal Sugar Company (1948), the Supreme Court interpreted the Robinson-Patman Act by saying, "The Statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these... The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whoever they may be perpetrated." And then twenty years later, in 1968, after criticizing the Act as being no "exemplar of legislative clarity," the Court concluded that any cases of doubt about its interpretation should be construed in keeping with the broad goals envisaged by Congress. And finally, in the Automatic Cartoon case, the Court explained the Act as a defense which a small seller could throw up in the face of a threatening large buyer.

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17 324 U.S. 219


Chapter 2

Interpretation

In the first two chapters of this paper I have attempted to establish, first of all, that corporate practices may have nonbeneficial and even detrimental effects upon the United States' economy, and secondly, that Congress has taken steps to limit such effects, especially those resulting from corporate pricing policies, through passage of the Clayton Act and its amendment, the Robinson-Patman Act. This price discrimination law has already been outlined (the full text may be found in Appendix B), but without interpretation of the meaning of the law by the courts, and without active enforcement of the law by the Federal Trade Commission, it would remain useless and totally unintelligible. However, the Commission has endeavored to effectuate the law, and so I should like to devote this chapter to an explanation of the resulting court cases, while at the same time pointing out some of the legal intricacies and subtle changes that have been read into the Acts.

Section 2(a)

There has occurred in the large body of literature dedicated to price discrimination an unfortunate development about terminology which immediately leads to confusion for a novice who might be interested in learning the primary statutory basis for prosecution. The most controversial provision of the law is repeatedly referred to as "Section 2(a)." If one were to search for this section in the annotated codes of United States law, he would not find any mention of the price discrimination law. In fact, he would not find a Section 2(a). It does not exist. The price discrimination law should correctly be referred to by Section 13(a), and so it will be by this author.
Before I present a case-study interpretation of the position taken by the courts concerning the law, I think it would be appropriate to define the phrase "price discrimination." But as the reader shall see, even reaching agreement on this has been an impossibility for commentators, Congress, and the courts. From a purely economic point of view, Fritz Machlews defined price discrimination as "the practice of a firm or group of firms selling (leasing) at prices disproportionate to the marginal costs of the products sold (leased) or the buying (hiring) at prices disproportionate to the marginal productivities of the factors bought (hired)."¹ This definition includes nearly all prices because it is one that is implied by imperfect competition and a description of our economy. Also, it makes no moral judgments of the matter, and therefore is in line with the definition put forth by the court in the Cement Institute² case in 1943 and again in the Anheuser-Busch case in 1960: "We are convinced... there are no overtones of business buccaneering in the [Section] 2(a) phrase 'discriminate in price.' Rather, a price discrimination within the meaning of that provision is merely a price difference."³ Whereas this certainly must be taken as the legal definition as developed since 1936, it is not what Congress intended, for one of the major supporters of the Robinson-Patman Act defined it as much more than that:

In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the

word is the idea that some relationship exists between the
parties to the discrimination which entitles them to equal
treatment, whereby the difference granted to one casts some
burden or disadvantage upon the other. If the two are com-
peting in the resale of the goods concerned, that relation-
ship exists. There, also, the price to one is so low as to
involve a sacrifice of some part of the seller's necessary
costs and profit as applied to that business, it leaves that
deficit inevitably to be made up in higher prices to his
other customers; and there, too, a relationship may exist
upon which to base the charge of discrimination. But where
no such relationship exists, where the goods are sold in
different markets and the conditions affecting those markets
set different price levels for them, the sale to different
customers at those different prices would not constitute
a discrimination within the meaning of this bill.\(^{5}\)

If the courts have reduced Congressman Utterback's definition to a
mere difference in price, when is a price differential unlawful according
to Section 2(a)? Judge Hinton of the 7th Circuit said in 1943 that the
Federal Trade Commission cannot expect to enforce a cease-and-desist order
by a showing of price discrimination alone. There must also be evidence
"to prove in what respects the acts of price discrimination substantially
lessen competition or promote monopoly."\(^{5}\) But such a qualification evi-
dently was too stringent and not in keeping with Congressional intent, for
two years later the Supreme Court said, "It is to be observed that [Section]
2(a) does not require a finding that the discriminations in price have in
fact had an adverse effect on competition. The statute is designed to
reach such discriminations 'in their incipiency,' before the harm to com-
petition is effected."\(^{6}\) Consequently, as the law now reads the Commission
has the duty to prevent injury before the fact. This, of course, has

\(^{5}\)Congressman Utterback, Congressional Record, Vol. 80, Pt. 9, p. 9416,
as quoted in Conwin D. Edwards, The Price Discrimination Law (Washington,

\(^{5}\)A. E. Staley Mfg. Co. v. Federal Trade Commission, 135 F.2d 453 (7th
Cir. 1943).

\(^{6}\)Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726
(1945).
alarmed many businessmen because only in rare cases has the United States 
adopted preventive law, and each time it has, voices in opposition cry out 
against a police state. But with the discretion shown by the Federal Trade 
Commission, and because of the defenses for discrimination allowed under 
the law, I doubt that one needs to be overly concerned about exaggerated 
price regulation.

**Section 13(b).**

A second important part of the Robinson-Patman Act which has come 
under attack is Section 13(b). This section is of two parts, the first 
concerns itself to the burden of rebutting a prima facie case of price 
discrimination, and the second is addressed to the "good faith meeting of 
competition" defense.

When the Federal Trade Commission proves discrimination without more, 
it makes out a prima facie case, and the respondent then has the burden 
of rebutting this prima facie case by showing justification. This is call-
ed the "presumption doctrine" and first made its appearance in Samuel H. 
Moss, Inc. v. Federal Trade Commission (1945). This doctrine has been 
repeated several times, but once the accused brings himself within the 
exculpatory provision of Section 13(b), he then has an "absolute" defense.

However, vis-a-vis other sections of the Act, the courts have ruled 
differently. Section 13(b) has been ruled applicable as a defense to

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7140 F.2d 376

8 See, for example, Federal Trade Commission v. Morton Salt Co., 293 
U.S. 37 (1940), Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 

charges brought under Sections 13(a)\(^{10}\) and (d) and (e),\(^{11}\) the proportionality clauses (see Appendix B). On the other hand, Section 13(h) may not be submitted as defense against charges brought under the brokerage provision (Section 13(c)).\(^{12}\) In fact, with respect to this brokerage clause, the Attorney General's National Committee to Study the Antitrust Laws said about the lack of defense against a Section 13(c) charge that it creates a "virtual legal monopoly" for the middleman position which "closes competition in the channels of distribution, and exacts tribute from the consumer for the benefit of a special business class."\(^{13}\) Nevertheless, Congress saw a need to prevent hidden price concessions and did so by including this section. Further, it is perhaps the clearest and least controversial section of the Act.

After that bit of digression, I should like to go on to the "good faith" provision of the Section 13(h) defense. By this phrase the court has meant that a firm can justify its price concession when that firm is meeting a competitor's lawful price.\(^{14}\) At the same time the Court said that a firm can lower its price to meet a lower price of his competitor to retain old customers but not to obtain new customers.\(^{15}\) The Court said

\(^{10}\) Ibid.

\(^{11}\) Exquisite Form Brassiere, Inc. v. Federal Trade Commission, 301 F.2d 400 (D.C. Cir. 1961), Cert. denied.

\(^{12}\) Modern Marketing Service, Inc. v. Federal Trade Commission, 149 F.2d 970 (7th Cir. 1945).


\(^{14}\) Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 (1951)

\(^{15}\) Ibid.
this in 1961. However, in 1962 Judge Covert of the 7th Circuit Court said in the Sunshine Biscuit case that if "sellers could grant good faith competitive price reductions only to old customers in order to retain them, competition for new customers would be stifled and monopoly would be fostered."\^{16} However, one antitrust commentator has written that the Federal Trade Commission rejected this court's interpretation.\^{17} One more point needs to be made under "good faith", and that is that the court does not consider raising one's price to meet a higher price of a competitor to be in good faith.\^{18}

About the phrase "equally low price of a competitor" the courts have had much to say. First, in the Standard Brands case the phrase was interpreted to mean "an equally low price for a given quantity."\^{19} This idea was at least implicit in the law, but it took a court case to spell out Congressional intent to a company which attempted to sell a smaller quantity at the same low price as its competitor. Second, in Standard Oil Co. v. Federal Trade Commission (1961), the Supreme Court ruled that a seller could lower his price to one customer to meet a competitor's price while concurrently not lowering its price to its other customers.\^{20} Evidently, then, the Section 13(b) defense also applies to the local price-cutting clause of Section 13e. And finally, the Court ruled in the 1963 Sun Oil case that a Section 13(b) defense is not available to a gasoline

\^{16}Sunshine Biscuits, Inc. v. Federal Trade Commission, 306 F.2d 68, 52 (7th Cir. 1962).


refiner-supplier who made a price concession to a retailer so that the retailer could equally meet the lower prices of its competitor when its competitor did not receive a price concession from his supplier. 21 These cases seem to make it clear how the courts have interpreted "equally meeting a competitor's lower price."

"Unfair Methods of Competition"

An interesting development seems to have taken place with this phrase from the Federal Trade Commission Act, Section 5 (see Appendix E). On occasion, the Federal Trade Commission has brought charges against companies under this provision, even though the facts of the case seemed to warrant charges under the Clayton Act as well. For example, a large food refusal to deal is a provision of Section 13(a). But when it was alleged as violated by the Crock-But Packing Co., the Commission filed charges under Section 5 as an unfair method of competition. 22 Again, price discrimination is inherent in a basing-point pricing system, but the Commission charged the Cenrest Institute with having violated the Federal Trade Commission Act, not the Clayton Act. 23

It was because of this turn of events that "unfair methods of competition" becomes an important provision of the price discrimination law. It seems appropriate, therefore, to include here a definition of the phrase as used by the courts. Such a definition may be found in Federal Trade


\[\text{Federal Trade Commission v. Conest Institute, 233 U.S. 683, 690 (1914).}\]
Commission v. Motion Picture Advertising Service Company (1951) in summary form as follows:

"Unfair methods of competition" are not confined to those which were illegal at common law or that were condemned by the Sherman Act, Federal Trade Commission v. Lenwal & Trans., 281 U.S. 393. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business, id., pp. 310-312. It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman and Clayton Act (see, Federal Trade Commission v. Beech-Nut Co., 297 U.S. 348, 467) -- to stop in their incipiency acts and practices which when in full bloom, would violate these acts (see, Fashion Guild v. Federal Trade Commission, 312 U.S. 452, 460, 466), as well as to condemn as "unfair methods of competition" existing violations of them. See, Federal Trade Commission v. Cement Institute, 333 U.S. 663, 669, 70.

The problem of definition and interpretation faced by the Commission is again one of degree. As the Court said in the same case, "The point where a method of competition becomes "unfair" within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question."

Delivered Prices

Finally, I should like to round out this chapter with a brief discussion of the basin-point pricing system. Fritz Nachlos, in his excellent coverage of this pricing formula in The Basin-Point System, clearly and concisely presents the legal issues involved in such a scheme, and I would like to quickly list them as follows:

1. The basin-point system is a "result of agreement" which may be inferred from the effects of identical delivered

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2\footnote{Federal Trade Commission v. Motion Picture Advertising Service Co., 394 U.S. 252, 396 (1953).}
prices—violates the Sherman Act, Section 1.

2. Each participant has knowledge that the system is one of "concerted action"—violates the Sherman Act, Section 1.

3. Price leaders who determine mill-base prices "attempt to monopolize"—violates the Sherman Act, Section 1.

4. The basic-point system is the "result of agreement" to "avoid price competition"—violates the Federal Trade Commission Act, Section 5.

5. The parties follow a "common course of action" which results in a "limitation of price competition"—violates the Federal Trade Commission Act, Section 5.

6. A participant of the basic-point system agrees to follow a "conscious parallel action" resulting in a "limitation of price competition"—violates the Federal Trade Commission Act, Section 5.

7. The basic-point system results in different prices unjustified by different costs and "lessening competition"—violates the Clayton Act as amended by the Robinson-Patman Act, Section 2.

8. Different prices unjustified by costs impede "substantial reductions in income [of smaller rivals] [creating] the continuance of effective competition by these sellers"—and this equals "price discrimination"—violates the Clayton Act as amended by the Robinson-Patman Act, Section 2.

9. Different prices unjustified by costs may result in reductions in profits of different buyers and therefore "reduce competition among the buyers" and this equals "price discrimination" injurious to competition—violates the Clayton Act as amended by the Robinson-Patman Act, Section 2.

10. Systematic discrimination which eliminates or reduces competition cannot be justified as meeting competition in good faith and therefore equals "prices discrimination"—violates the Clayton Act as amended by the Robinson-Patman Act, Section 2.

Most of these issues have been discussed in some form already, except that of combination or conspiracy which comes under the Sherman Act. And, as Justice Clark said in the Theatre Patrons case, the issue of the delivered pricing system is whether the quoted prices were arrived at by

independent decision or from an agreement, tacit or expressed. This has proven to be a highly controversial issue, too.

Chapter 6

The Fine Line

The basic conflict of this entire paper is, of course, that business has been able to derive economies of scale from business and thus to provide the citizens of the United States with the "best of all possible worlds" while at the same time that business is a source of power which can be used both to grow bigger and to engage in acts and practices which have nonbeneficial effects on the economy. Congress has attempted to limit the ability of large corporations to engage in price discrimination by enacting the Clayton Act, Robinson-Patman Act, and the Federal Trade Commission Act.

These Acts have necessarily been somewhat vague for a number of reasons. First of all, Congress could never have written a law which outlawed specific trade practices in order to regulate price discrimination. For over the years, these practices have changed with new innovations, and Congress would have been tasked with always trying to catch up. That Congress chose to write the law in a fashion similar to the Constitution to allow for Federal Trade Commission and court interpretation I think shows wisdom on the part of those responsible for the legislation. And secondly, as has been stated several times before, the entire range of business practices involved here turn on the question of degree and how to draw that fine line between acceptable and unlawful business practices. I believe it would have been a drastic mistake if Congress had attempted to steadfastly draw that line, deciding thirty-five years ago a question of degree that can only be answered in the present by considering prevailing circumstances.
Although that fine line has never been sharply drawn, I hope that I have succeeded in showing that whatever questions have arisen as to just where the line is, is because businesses have in the past undertaken to move it closer to the unacceptable than what society wishes. Herein lies the gray area, the incongruities, and the misconceptions, as Samuel Coller so aptly phrased it.
Appendix A

Cases Researched for This Report

Aluminum Company of America v. United States
148 F. 2d 416 (2d Cir. 1945)

American Can Company v. Bruce's Juices, Inc.
187 F. 2d 910 (5th Cir. 1951)

American Column and Lumber Company v. United States
257 U.S. 377 (1921)

American Linseed Oil Company v. United States
262 U.S. 771 (1923)

American Tobacco Company et al. v. United States
328 U.S. 721 (1946)

Anheuser-Busch, Inc. v. Federal Trade Commission
362 U.S. 536 (1960)

Atlanta Trading Corporation v. Federal Trade Commission
258 F. 2d 365 (2d Cir. 1958)

Atlas Building Products Company v. Diamond Block & Gravel Company
260 F. 2d 950 (10th Cir. 1958), Cert. denied.

Automatic Canteen Company of America v. Federal Trade Commission
346 U.S. 61 (1953)

Beech-Nut Packing Company v. Federal Trade Commission
257 U.S. 441 (1921)

Binderup v. Pathe Exchange, Inc.
263 U.S. 291 (1923)

The Borden Company v. Federal Trade Commission
383 U.S. 637 (1966)

Henry Broch & Company v. Federal Trade Commission
363 U.S. 166 (1960)

Brown Shoe Company, Inc. v. Federal Trade Commission
374 U.S. 316 (1963)

Kenneth A. Burke et al. v. Clarence Ford and Kunc et al.
380 U.S. 320 (1965)

Mary Carter Paint Company et al. v. Federal Trade Commission
382 U.S. 46 (1964)
Cement Institute v. Federal Trade Commission
273 U.S. 693 (1928)

Cement Manufacturers' Protective Association v. United States
268 U.S. 389 (1925)

Colgate & Company v. United States
250 U.S. 300 (1919)

Columbia Broadcasting System v. Amana Refrigeration
295 F.2d 375 (7th Cir. 1961), Cert. denied.

Columbia Steel Company v. United States
334 U.S. 405 (1948)

Container Corporation of America, et al. v. United States
393 U.S. 333 (1969)

Corn Products Refining Company v. Federal Trade Commission
374 U.S. 226 (1963)

Dean Foods Company et al. v. Federal Trade Commission
384 U.S. 507 (1966)

Doctor Miles Medical Company v. John D. Park & Sons, Company
220 U.S. 373 (1911)

E. I. DuPont De Nemours Company v. United States
348 U.S. 806 (1944)

Eastern States Retail Lumber Dealers Association v. United States
234 U.S. 600 (1914)

Eastman Kodak Company v. Southern Photo Materials Company
273 U.S. 359 (1927)

Exquisite Form Brassiere, Inc. v. Federal Trade Commission
301 F.2d 499 (B.C. Cir. 1961), Cert. denied.

Fashion Originators Guild v. Federal Trade Commission
312 U.S. 457 (1941)

Frankfort Distilleries v. United States
324 U.S. 293 (1945)

Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center,
219 F. Supp. 400 (W.D. Pa 1963)

General Dynamics Corporation v. United States
258 F. Supp. 36 (S.D. N.Y. 1966)

General Motors Corporation et al. v. United States
384 U.S. 127 (1966)
Gratz v. Federal Trade Commission
253 U.S. 421 (1920)

The Hanover Shoe, Inc. v. United Shoe Machinery Corporation
392 U.S. 481 (1968)

Hartley & Parker, Inc. v. Florida Beverage Corporation
307 F. 2d 916 (5th Cir. 1962)

International Business Machines Corporation v. United States
298 U.S. 131 (1936)

International Salt Company v. United States
332 U.S. 392 (1947)

Kiefer-Stewart v. Seagram & Sons
340 U.S. 211 (1951)

Marneville Island Farms v. American Crystal Sugar Company
334 U.S. 219 (1948)

Maple Flooring Manufacturers’ Association v. United States
268 U.S. 563 (1925)

Fred Meyer, Inc., et al. v. Federal Trade Commission
390 U.S. 341 (1968)

Millinery Creators’ Guild v. Federal Trade Commission
312 U.S. 469 (1941)

Moore v. Mead’s Fine Bread Company, 190 F.2d 540 (10th Cir. 1951), 208 F.2d
777 (10th Cir. 1953), 348 U.S. 115 (1954)

Morton Salt Company v. Federal Trade Commission
334 U.S. 37 (1948)

Samuel H. Moss, Inc. v. Federal Trade Commission
148 F.2d 378 (2d Cir. 1945)

Motion Picture Advertising Service Company v. Federal Trade Commission
344 U.S. 392 (1953)

Mueller Company v. Federal Trade Commission
Trade Reg. Rep. 1963 Trade Cas., Para. 70,880 (7th Cir. September 6, 1963)

Trade Cas., Para. 70,869, on remand (N.D.No. June 13, 1963)

New York Great Atlantic & Pacific Tea Co. v. United States
173 F.2d 79 (7th Cir. 1949)

Old Dearborn Distributing Company v. Seagram Distillers Corporation
229 U.S. 183 (1936)
Pabst Brewing Company et al. v. United States
384 U.S. 546 (1966)

Paramount Pictures v. United States
334 U.S. 131 (1948)

Clyde A. Perkins v. Standard Oil Company of California

Perma Life Mufflers, Inc., et al. v. International Parts Corporation et al.
392 U.S. 134 (1968)

The Procter & Gamble Company v. Federal Trade Commission
386 U.S. 568 (1967)

Rubberoid Company v. Federal Trade Commission
343 U.S. 470 (1952)

Schwegmann Brothers v. Calvert Distillers Corporation
314 U.S. 384 (1941)

Shreveport Macaroni Manufacturing Company v. Federal Trade Commission
Trade Reg. Rep., 1963 Trade Cas., Para. 70,850 (5th Cir. July 18, 1963)

Sinclair Refining Company v. Federal Trade Commission
261 U.S. 463 (1923)

Socony-Vacuum Oil Company v. United States
310 U.S. 150 (1940)

A. E. Staley Manufacturing Company
135 F.2d 453 (7th Cir. 1943), 324 U.S. 746 (1945)

Standard Fashion Company v. Marsee Houston Company
258 U.S. 346 (1922)

Standard Oil of California v. United States
337 U.S. 293 (1949)

Standard Oil Company v. United States
221 U.S. 1 (1911)

Standard Oil Company v. Federal Trade Commission
340 U.S. 231 (1951)

Standard Brands, Inc. v. Federal Trade Commission
189 F.2d 510 (2d Cir. 1951)

Student Book Company v. Washington Law Company
232 F.2d 49 (D.C. Cir. 1955)

Sugar Institute v. United States
297 U.S. 553 (1936)
Sun Oil Company v. Federal Trade Commission  
371 U.S. 505 (1963)

Sunshine Biscuits, Inc. v. Federal Trade Commission  
305 F.2d 48 (7th Cir. 1962)

Texaco, Inc., et al. v. Federal Trade Commission  
393 U.S. 223 (1968)

Theatre Enterprises, Incorporated v. Paramount Film Distributing Corporation et al.  
346 U.S. 572 (1954)

Times-Picayune Publishing Company v. United States  
345 U.S. 594 (1953)

remanded, Trade Reg. Rep. 1962 Trade Cas., Para. 71,059 (9th Cir. March 18, 1964)

United Shoe Machinery Corporation v. United States, 258 U.S. 451 (1922),  
391 U.S. 204 (1968)

United States Steel v. United States  
251 U.S. 447 (1920)

Universal-Purdle Corporation v. Federal Trade Commission  
387 U.S. 244 (1967)

Utah Pie Company v. Continental Baking Company et al.  
386 U.S. 685 (1967)

Van Camp and Sons v. American Can Company  
273 U.S. 245 (1929)

Vivaudou, Inc. v. Federal Trade Commission  
54 F.2d 273 (2d Cir. 1931)

Von's Grocery Company et al. v. United States  
384 U.S. 270 (1966)

Appendix B

A Summary of Important Antitrust Legislation

Para. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 35 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Para. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Para. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, as declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
Para. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Para. 5. Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Para. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this title, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Para. 7. The word "person", or "persons", wherever used in sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Para. 8. Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.
Para. 12. "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possession or other place under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States. Provided, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Para. 13. (a) 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 purchases 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:

Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from
selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(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.

c. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is active in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

d. It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

e. It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

f. It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.
Paragraph 13a. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like trade, quality, and quantity, to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Paragraph 13b. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, 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, or fix a price charged therefor, or discount from, or rebate upon, such price, or the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale of such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Paragraph 15. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Paragraph 15a. Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit.

Paragraph 15b. Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Paragraph 16. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated
said laws shall be prima facie evidence against such defendant in any
action or proceeding brought by any other party against such defendant
under said laws or by the United States under section 15a of this title,
as to all matters respecting which said judgment or decree would be an
estoppel as between the parties thereto: Provided, That this section shall
not apply to consent judgments or decrees entered before any testimony
has been taken or to judgments or decrees entered in actions under section 15a
of this title.

(b) Whenever any civil or criminal proceeding is instituted by the
United States to prevent, restrain, or punish violations of any of the
antitrust laws, but not including an action under section 15a of this title,
the running of the statute of limitations in respect of every private right
of action arising under said laws and based in whole or in part on any mat-
ter complained of in said proceeding shall be suspended during the pendency
thereof and for one year thereafter: Provided, however, That whenever the
running of the statute of limitations in respect of a cause of action arising
under section 15 of this title is suspended hereunder, any action to
enforce such cause of action shall be forever barred unless commenced either
within the period of suspension or within four years after the cause of ac-
tion accrued.

Para. 25. The several district courts of the United States are invested
with jurisdiction to prevent and restrain violations of this Act, and it
shall be the duty of the several United States attorneys, in their respec-
tive districts, under the direction of the Attorney General, to institute
proceedings in equity to prevent and restrain such violations. Such pro-
ceedings may be by way of petition setting forth the case and proving that
such violation shall be enjoined or otherwise prohibited. When the parties
complained of shall have been duly notified of such petition, the court
shall proceed, as soon as may be, to the hearing and determination of the
case; and pending such petition, and before final decree, the court may
at any time make such temporary restraining order or prohibition as shall
be deemed just in the premises. Whenever it shall appear to the court be-
fore which any such proceeding may be pending that the ends of justice re-
quire that other parties should be brought before the court, the court may
cause them to be summoned whether they reside in the district in which the
court is held or not, and subpoenas to that end may be served in any dis-
trict by the marshal thereof.

Para. 44. The words defined in this section shall have the following mean-
ing when found in sections 41-46 and 47-58 of this title, to wit:

"Commerce" means commerce among the several States or with foreign
nations, or in any Territory of the United States or in the District of
Columbia, or between any such Territory and another, or between any such
Territory and any State of foreign nation, or between the District of Co-
lumbia and any State or Territory or foreign nation.

"Corporation" shall be deemed to include any company, trust, so-called
Massachusetts trust, or association, incorporated or unincorporated, which
is organized to carry on business for its own profit or that of its members,
and has shares of capital or capital stock or certificates of interest, and
any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" includes all documents, papers, correspondence, books of account, and financial and corporate records.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce", approved February 14, 1887, and all Acts amendatory there- and supplementary thereto and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto.

"Antitrust Acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890; also sections 73-77, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1904; also the Act entitled "An Act to amend sections 73 and 76 of the Act of August 27, 1904, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes'", approved February 12, 1913; and also the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", ap- proved October 15, 1914.

Para. 45. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing mini- mum or stipulated prices, or requiring a vendor to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, of- fering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so adver- tising, offering for sale, or selling is or is not a party to such a con- tract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.
(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 222(e) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
Bibliography


