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QUANTITY DISCOUNTS UNDER THE CLAYTON ACT

by

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&

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The suppression of price discrimination through the granting of quantity discounts has been a major problem of the Federal Trade Commission since the passage of the original Clayton Act, on October 15, 1914.¹ Although much progress has been made in the past thirty-nine years in curbing this type of unfair trade practice, price discrimination is still rampant in many lines of commerce. The Supreme Court has clarified the powers of the Commission in this field from time to time, with beneficial results, but has also placed stumbling-blocks in its path of progress. We shall review here the progress made by the Commission in suppressing price discriminations through quantity discounts, and more particularly, the difficult enforcement problems presently confronting the Commission under recent decisions of the Supreme Court.

The original Clayton Act, supplementing existing laws against unlawful restraints and monopolies, was directed against price discriminations granted by sellers to their competing customers. The Act, however, contained a proviso that "discrimination in price . . . on account of differences in the grade, quality, or *quantity* of the commodity sold," should not be unlawful. This proviso of the original Act was construed to permit quantity discounts without regard to the amount of the sellers' actual savings in cost resulting from quantity deliveries,² with a resulting continuance of price discriminations.

This gave rise to the passage of the Robinson-Patman Act of June 19, 1936.³ The purpose of the Act, as outlined in the House Committee Report,⁴ was to amend the Clayton Act in such manner as to limit "the use of quantity price differentials to the sphere of *actual* cost differences." This purpose is expressed in Section 2 (a) of the amended Clayton Act as follows:

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¹ 38 Stat. 730 (1914).

² *Goodyear Tire & Rubber Co. v. F. T. C.*, 101 F. 2d 620 (6th Cir. 1939), *cert. denied* 308 U. S. 557 (1939).

³ 49 Stat. 1526 (1936).

⁴ H. Rep. 2287, 74th Cong. 2d Sess. (1936).

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 to such purchasers sold or delivered.

With the passage of the Robinson-Patman amendments the Federal Trade Commission instituted a flood of price discrimination investigations against sellers, and in the first four years the law was in effect, the Commission docketed sixty-eight price discrimination cases.⁵ These proceedings fell into several categories: (1) simple price discriminations involving outright price preferences to some customers, not disguised by discounts, delivery terms, customer classification or other devices, (2) discounts granted on quantity purchases in excess of demonstrable savings in the cost of manufacture, sales or delivery, (3) cumulative discounts on the aggregate business done over a given period of time, (4) discrimination through classification of customers according to size of potential purchases, (5) discrimination against competing retailers, through reduced prices to wholesalers who also sell at retail, i.e., "functional discounts", and (6) discrimination through absorption of freight and delivery costs, i.e., the "basing point cases".

Through the intervening years price discrimination cases have represented a substantial part of the Federal Trade Commission activity. In the Annual Report of the Commission for the fiscal year ended June 30, 1949, it was stated at p. 31, "Price discrimination, in violation of Section 2 (a), continued to be the most frequent charge involved in investigations under this Act." It is little wonder then, that the courts have been called upon so often in the past seventeen years to interpret Section 2 (a) of the Clayton Act and to determine what constitutes a discrimination in price "between different purchasers of commodities of like grade and quality" which tends to lessen, injure, prevent or destroy competition.

WHAT IS A "DISCRIMINATION IN PRICE"

In *Moss v. Federal Trade Commission*⁶ it was held that a price

⁵ 8 Geo. Wash. L. Rev. 507 (1940).

⁶ 148 F. 2d 378 (2d Cir. 1945), *cert. denied* 326 U. S. 743 (1947).

differential in itself constitutes a "discrimination in price" where the resulting competitive injury is between competitive *sellers*.

In *Federal Trade Commission v. Morton Salt Company*⁷ the Supreme Court held:

We think that the language of the Act, and the legislative history just cited, show that Congress meant by using the words "discrimination in price" in paragraph 2 that in a case involving competitive injury between a *seller's customers* the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors. (italics supplied)

In *Bruce's Juices, Inc. v. American Can Company*⁸ the Supreme Court set down a further criterion for determining when a discrimination occurs:

No single transaction can constitute a discrimination in price. At least two transactions must take place. Thus, a contract may be made which has no present legal defect under the Robinson-Patman Act, but a week later another sale may be made at a different price or at a different discount, and the latter taken into consideration with the former may establish a discrimination.

PROTECTION OF COMPETING SELLERS FROM PRICE DISCRIMINATION

The original Clayton Act was used primarily as an adjunct to the Sherman Anti-Trust Act and was designed to prevent competing sellers from destroying one another competitively through the granting of price concessions to their customers. This course of action was consistent with the whole theory of unfair trade legislation in effect up to 1938. The underlying purpose of the original Federal Trade Commission Act,⁹ effective September 26, 1914, was to "prevent unfair methods of competition in commerce."¹⁰

Competing sellers of goods, rather than their customers, were the users of Interstate Commerce channels and, generally speaking, their customers were not in commerce and were not even in competition with one another. The original Clayton Act of 1914, however, failed even in its limited objective of preventing competing sellers from destroying one another competitively, through price discrimination, because, (a) it allowed unlimited and unrestricted quantity discounts, regardless of cost savings, and (b) the whole system of retail merchandising changed, with marked effect upon competition between sellers.

Chain stores replaced local independent retailers and expanded their operations to the point where retail chains became larger enter-

⁷ 334 U. S. 37 (1948).

⁸ 330 U. S. 743 (1947).

⁹ 38 Stat. 717 (1914).

¹⁰ The jurisdiction of the Federal Trade Commission was extended to cover "unfair or deceptive acts or practices in commerce" by the Act of March 21, 1938, 52 Stat. 111.

prises than the manufacturers who supplied them. These chain stores demanded large price concessions and played one source of supply against another to the point where individual suppliers, in order to gain large retail accounts, or hold them, made discriminatory price concessions, often secret, with resulting serious injury to their competitors. The destruction of competition at the source of supply was thus accelerated by the chain store movement as is well illustrated in the *Goodyear Tire and Rubber*¹¹ case, wherein secret price discriminations as high as 40% were granted to the Sears-Roebuck Company on tire sales.

This situation gave impetus to the passage of the Robinson-Patman Act and it was not until after the Act was passed that any effective action was taken to curtail price discrimination. Although the vast majority of cases under Section 2 (a) of the Robinson-Patman Act deal with injury to competing customers of the seller, i.e., large buyers versus small buyers, some cases have arisen under the Act which have the old anti-trust flavor, i.e., large sellers against small sellers. An example of such a case is *Mueller & Company v. Federal Trade Commission*.¹² Here the seller, by discriminating against other general trade areas in favor of the area in which his competitor operated, was able to force a price so low in the competitor's area that the competitor could not meet its competition. Cases in this category, of course, represent clear cut violations of the Robinson-Patman Act and the Federal Trade Commission Act, and they have arisen infrequently in recent years.

PROTECTING COMPETING BUYERS FROM THE SELLERS' PRICE DISCRIMINATIONS

The focus in recent years has been more and more centered upon the elimination of price discriminations where the competitive injury is between a seller's customers, rather than between him and his competitors. This is consistent with the primary objective of Section 2 (a) of the Clayton Act.¹³ Cases of price discrimination which have arisen under Section 2 (a) fall into various categories including: (a) discrimination through freight equalization or reduced delivery charges,¹⁴ (b) straight price cutting,¹⁵ and (c) the granting of quantity discounts. For the purposes of this article we shall treat in detail only those price discriminations which fall into the category of "quantity discounts". The

¹¹ See note 2 *supra*.

¹² 142 F. 2d 511 (6th Cir. 1944).

¹³ Sen. Doc. No. 4, 74th Cong. 1st Sess. (1935).

¹⁴ *American Can Co. v. Bruce's Juices*, 187 F. 2d 919 (5th Cir. 1951), *cert. denied* 342 U. S. 875 (1951); *American Can Co. v. Russellville Canning Co.*, 191 F. 2d 38 (8th Cir. 1951); *Corn Products Refining Co. v. F. T. C.*, 324 U. S. 726 (1945).

¹⁵ *F. T. C. v. Standard Brands*, 189 F. 2d 510 (2d Cir. 1951).

quantity discount cases are the leading cases involving the interpretation of Section 2 (a) as applied to price discriminations between competing buyers. They emphasize the need for protecting the small buyer from his chain store competitor.

The leading case in this category is *Federal Trade Commission v. Morton Salt Company*.¹⁶ Morton's price schedule ranged from \$1.35 to \$1.60 per case of salt, depending on the volume of purchases, but only 5% of its customers, all chain stores, ever bought sufficient salt to obtain the \$1.35 price. As a result, the chain store buyers were able to sell the salt at retail cheaper than wholesale purchasers from Morton could reasonably sell the same brand of salt to independently operated retail stores which were in competition with the chain stores.

In holding this to be a discrimination in price within the meaning of the Act, the Supreme Court said:

The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyers' quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs¹⁷

The issue was raised that the Federal Trade Commission had failed to show that Morton's discriminatory discounts had in fact caused injury to competition. In disposing of this issue the Court held:

. . . the statute does not require the Commission to find that injury has actually resulted. The Statute requires no more than that the effect of the prohibited price discriminations *may be* substantially to lessen competition¹⁸ (italics supplied)

The Supreme Court further held:

Since there was evidence sufficient to show that the less-than-carload purchasers *might have been* handicapped in competing with the more favored carload purchasers by the differential in price established by respondent the Commission was justified in finding that competition *might have* thereby been substantially lessened or have been injured within the meaning of the Act.¹⁹ (italics supplied)

As to what constitutes a price discrimination which "may" or "might have" lessened competition, the Court cited with approval its own opinion in *Corn Products v. Federal Trade Commission*,²⁰ where it was held that the Statute does not require that discriminations must in fact have

¹⁶ See note 7 *supra*.

¹⁷ *Id.* at 43.

¹⁸ *Id.* at 46.

¹⁹ *Id.* at 49.

²⁰ 324 U. S. 726 (1945).

harmed competition but only that there be a reasonable "possibility" that they may have had such effect.²¹

In *American Can Company v. Bruce's Juices*²² it was likewise held that the seller's quantity price, discount schedule and classification of customers into three arbitrary groups for discount purposes, according to volume of purchases, discriminated against smaller purchasers. The court went on to say that the seller's quantity price was not based on actual differences in sales cost, but constituted price discrimination between large and small purchasers.

Qualification of the Morton Rule

The broad rule laid down in the *Morton* case as to sellers' liability for price discriminations is qualified by the later case of *Standard Oil Company v. Federal Trade Commission*.²³ In this action the Federal Trade Commission challenged the right of the Standard Oil Company, under the Robinson-Patman Act, to sell gasoline to four comparatively large jobbers in the Detroit area at a price less per gallon than it sold like gasoline to many small service stations in the same area.

The company's defense was that its lower price to jobbers was made in good faith to meet the equally low price of a competitor. The Commission found that each jobber was selling at retail, as well as wholesale, in competition with the smaller service stations with a resulting injury to competition. The Commission concluded as a matter of law that it was not material under the circumstances whether the discriminations in price granted to the four jobbers were made to meet equally low prices of competitors and made no findings in this regard. The Commission held that even though the lower prices may have been made by the respondent in good faith to meet the lower prices of competitors, this does not constitute a defense in the face of affirmative proof that the effect of the discrimination was to injure, destroy or prevent competition with the retail stations operated by the four jobbers and with stations operated by their retailer-customers.

The Court held, in a five to three opinion, that Congress did not intend "either to abolish competition or so radically curtail it that a seller would have no substantial right to self-defense against a price raid by a competitor."²⁴ The court thereupon reversed the Circuit Court of Ap-

²¹ *Ibid.* This holding of the Court was vehemently criticized in the minority opinion of Justice Jackson in which Justice Frankfurter concurred: "I think the law as written by the Congress and as always interpreted by this court requires that the records show a reasonable *probability* of that effect. The difference, as every lawyer knows, is not unimportant and in many cases would be decisive The law rarely authorizes judgments on proof of mere possibilities."

²² 187 F. 2d 919 (5th Cir. 1951).

²³ 340 U. S. 231 (1951).

²⁴ *Id.* at 249.

peals and remanded the case with instructions to the Federal Trade Commission to make findings of fact on the question of seller's "good faith" in meeting a lawful and equally low price of its competitor.²⁵

PROTECTION OF THE SELLER FROM THE BUYER

The original Clayton Act was directed solely against the seller granting a price discrimination.²⁶ It was not until the passage of the Robinson-Patman Act that proceedings could be instituted also against buyers who knowingly induced or received discriminatory prices. Section 2 (f) of the Robinson-Patman Act imposed this new liability upon the buyer in the following language:

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. (italics supplied)

Thereupon it became no more blessed to receive than to give. For several years, however, the Federal Trade Commission directed its energies in price discrimination cases primarily against the seller rather than the buyer under the apparent and perhaps well founded assumption that the seller is the prime offender and without his acquiescence there could be no price discrimination. Since the Robinson-Patman Act was passed, however, the Federal Trade Commission has proceeded in nineteen cases²⁷ against the buyers of assorted merchandise, charging in each case that the buyer violated Section 2 (f) of the Robinson-Patman Act by knowingly inducing or receiving a discrimination in price. In all of these cases the Commission proceeded on the theory that the buyer's liability under Section 2 (f) was identical with the seller's liability under Section 2 (a), and that consequently, in each case the Commission established its prima facie case merely by proving that the buyer received goods from the seller at a lower price than the seller charged for like goods sold to the buyer's competitors.

²⁵ *Id.* at 267, the minority said: "We believe that good faith meeting of a competitor's price only rebuts the prima facie case of violation established by showing the price discrimination. Whether the proven price discrimination is of a character that violates Section 2 (a) then becomes a matter for the determination of the Commission on a showing that there may be injury to competition."

²⁶ H. Rep. 627, 63d. Cong., 2d Sess. (1914).

²⁷ *In matter of Bird & Sons, Mont. Ward*, 25 F. T. C. 547 (1937); *In matter of Golf Ball Mfg. Assn.*, 26 F. T. C. 824 (1938); *In matter of Miami Wholesale Drug Corp.*, 28 F. T. C. 485 (1939); *In matter of American Oil Co. & Gen. Finance*, 29 F. T. C. 857 (1939); *In matter of A. S. Aloe Co.*, 34 F. T. C. 363 (1941); *In matter of Atlantic City Wholesale Drug Co.*, 38 F. T. C. 631 (1944); *In matter of E. J. Brach & Sons*, 39 F. T. C. 535 (1944); *In matter of Assoc. Merchandising Corp.*, 40 F. T. C. 578 (1945); *In matter of Curtis Candy Co.*, F. T. C. dkts 4556 & 4673; *In matter of Crown Zellerbach Corp.*, F. T. C. dkt 5421; *In matter of Sylvania Electric Products*, F. T. C. dkt 5728; *In matter of National Tea Co.*, F. T. C. dkt 5648; *In matter of Namco Inc.*, F. T. C. dkt 5771; *In matter of Atlas Supply Co.*, F. T. C. dkt 5794; *In matter of Metro. Auto Wholesalers Coop.*, F. T. C. dkts 5720-5724; *In matter of Safeway Stores*, F. T. C. dkt 5990; *In matter of Kroger Co.*, F. T. C. dkt 5991; *In matter of Automatic Canteen Co.*, F. T. C. dkt 4933; *In matter of Window Glass Mfgs. Assn.*, F. T. C. dkt 3154.

In none of these cases under Section 2 (f) did the Commission attempt to prove that the purchaser accepted a discriminatory price with knowledge that the lower price to him was not justified by the sellers' cost savings. It was assumed, in other words, that the prima facie rule laid down by the Supreme Court in the *Morton*²⁸ case, with respect to the seller's liability under Section 2 (a), was equally applicable to cases arising under Section 2 (f) where buyers were charged with inducing price discriminations.

The rude awakening came with the decision of the Supreme Court in the case of *Automatic Canteen Company v. Federal Trade Commission*.²⁹ This is the only case, which has reached the higher courts, involving a review of the Federal Trade Commission's action against buyers under Section 2 (f). In the *Automatic Canteen* case the Commission introduced evidence that the petitioner received, and in some instances solicited, prices which it knew were as much as 33% lower than prices quoted other purchasers. The Commission did not proceed further and attempt to show that the price differentials received by the petitioner exceeded any cost savings which the sellers may have enjoyed by reason of the large volume of sales made to the petitioner.

In reversing the Circuit Court of Appeals and remanding the case to the Federal Trade Commission the Supreme Court observed:

The Commission made no finding negating the existence of cost savings or stating that whatever cost savings there were did not at least equal price differentials petitioner may have received. It did not make any findings as to petitioner's knowledge of actual cost savings to particular sellers, and found only as to knowledge, that petitioner knew what the list prices of other buyers were.³⁰

The Court went on to point out that a buyer is not precluded from inducing a lower price based on cost differences that would provide the seller with a defense under Section 2 (a) to a charge of price discrimination. Consequently, a prima facie case was not made by the Federal Trade Commission by merely proving the price discrimination without also going on to prove that the buyer who induced or received the price discrimination knew that the seller could not justify it upon his cost savings resulting from quantity sales.

Thus, the Federal Trade Commission is placed in the anomalous position of assuming one burden of proof in proceedings against sellers of merchandise under Section 2 (a), and an entirely different and seemingly impossible burden of proof in proceedings against buyers of merchandise under Section 2 (f).

²⁸ See note 7 *supra*.

²⁹ 346 U. S. 61 (1953).

³⁰ *Id.* at 66, 67.

In cases against sellers, the rule recited in the *Morton* case applies and a prima facie case for the Federal Trade Commission is made upon the mere proof that prices charged by the respondent were lower to some of his customers than to others. In cases under Section 2 (f) against the buyer, however, it is necessary under the rule recited in the *Automatic Canteen* case to prove not only that the prices charged the respondent buyer were less than those charged to his competitor, but also that the respondent buyer *knew* that the prices charged him could not be justified by the seller's reduced costs on quantity sales. The Commission must prove, therefore, under Section 2 (f), not only a state of facts spelling out a solicited price discrimination, but also the operation of the buyer's mind.⁸¹

The effect of this decision was to throw a wrench into the efforts of the Federal Trade Commission to reach large quantity buyers, under Section 2 (f), who have been exerting pressures on the sellers for price discriminations. From a practical standpoint the decision seems to nullify Section 2 (f). Large buyers were the target at which the Robinson-Patman Act was aimed, but in view of the new burden of proof rule the target has been missed. In seeking to counteract the pressures exerted by the large buyers to obtain price discriminations through quantity discounts, the Commission now finds itself in approximately the same position that it occupied back in 1936 before the passage of the Robinson-Patman Act. It is only in an extreme case that the Commission will be able to come forward with the necessary proof that buyers are inducing and receiving price discriminations and are also aware that these price discriminations are not justified by the seller's reduced costs. Since the decision in the *Automatic Canteen* case, the Commission has found it necessary to dismiss several pending cases under Section 2 (f) for lack of proof of knowledge.⁸²

NEW PROBLEMS IN PROCEEDING AGAINST BUYERS UNDER SECTION 2 (f)

The question arises as to what course of action remains open to the Federal Trade Commission in its efforts to stop chain store buyers

⁸¹ *Id.* at 85. The minority opinion of Justices Douglas, Black and Reed takes issue with the majority on what constitutes a prima facie case under Section 2 (f): "The Court's construction not only requires the Commission to show that the price discriminations were not justified; it also makes the Commission prove what lay in the buyer's mind. I would let the acts of the buyer speak for themselves. Where, as here, the buyer undertakes to bludgeon sellers into prices that give him a competitive advantage, there is no unfairness in making him show that the privileges he demanded had cost justifications. This buyer over and again held itself out as a cost expert. I would hold it to its professions."

⁸² *In matter of Crown Zellerbach*, F. T. C. dkt 5421, dismissed July 27, 1953; *In matter of Safeway Stores*, F. T. C. dkt 5990, dismissed August 3, 1953; *In matter of Kroger Co.*, F. T. C. dkt 5991, dismissed Sept. 25, 1953.

from soliciting or receiving price discriminations which are not justified by the seller's cost differentials. There would seem to be three possible avenues of approach:

(1) Section 2 (f) of the Clayton Act might be amended by striking out the word "knowingly" with the result that a prima facie case of price discrimination will be made by the Federal Trade Commission under Section 2 (f) against buyers upon the mere introduction of proof that the price charged to one buyer is less than the price charged to his competitor for the same goods. This change would have the effect of shifting the burden to the buyer of showing that the reduced price which he solicited or accepted was justified by the seller's cost savings.

(2) The Commission might attempt to assume the burden of proof imposed upon it in the *Automatic Canteen* case by attempting to show not only the price discrimination under Section 2 (f), but also that the recipient of the price discrimination *knew* that it was not justified by the seller's cost savings. The Supreme Court in the *Automatic Canteen*³³ case makes it look somewhat easy for the Federal Trade Commission to assume this burden of proof:

The Commission, need only to show, in order to establish its prima facie case, that the buyer *knew* that the methods by which he was served, and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery, to justify the price differential, and that the buyer, knowing these were the only differences, *should have known* that they could not give rise to sufficient cost savings. (italics supplied)

The recent action of the Federal Trade Commission in dismissing pending 2 (f) cases against Safeway, Kroger, and other buyers, indicates that only in the most obvious cases will the Commission attempt to carry this burden of proof as to the operation of the buyer's mind.

(3) The Supreme Court suggests another possible approach to the problem, namely, that the seller and the buyer be joined in the same proceeding. In its decision in the *Automatic Canteen*³⁴ case the Court said:

Indeed, though it is of course not for us to enter the domain of the Commission's discretion in such matters, the Commission may in many instances find it not inconvenient to join the offending seller in the proceedings.

It has been the general policy of the Commission not to join the seller and the buyer in one proceeding and there are on record only four cases where this has been done.³⁵ It seems even less likely that buyers and

³³ See note 29 *supra*, at 80.

³⁴ See note 29 *supra*, at 79.

³⁵ *In matter of Golf Ball Mfgs. Assn.*, 26 F. T. C. 824 (1938); *In matter of American Oil Co. & Gen. Finance*, 29 F. T. C. 857 (1939); *In matter of Bird & Sons, Mont. Ward*, 25 F. T. C. 547 (1937); *In matter of Atlas Supply Co.*, F. T. C. dkt 5794.

sellers will be joined in the same proceeding in the future because of the different burden of proof which the Commission must now assume in cases under Section 2 (f). Reasons for not joining the buyer and seller are stated rather effectively in the brief of the Federal Trade Commission in the *Automatic Canteen* case before the Supreme Court at page 26:

The anomaly is most clearly shown in a proceeding in which the seller and buyer were joined, the former being charged with granting certain discriminations in price in violation of Section 2 (a) and the latter with having knowingly induced and received the same discriminations in violation of Section 2 (f). Assume that in such a proceeding the Commission successfully established the existence of all the elements required under the Morton Salt case; that the buyer induced these discriminations in price knowing the presence of those elements; and that neither the seller nor the buyer made any defense. If petitioner were correct in its argument, then in the circumstances stated an order might issue against the seller, but not against the buyer, because the Commission did not prove that the discriminatory price was not justified by costs.

CONCLUSION

Under all the circumstances it would seem that the problem presented to the Federal Trade Commission by the *Automatic Canteen* case cannot be solved by simply joining the buyer and the seller in the same proceeding, nor is it likely that the Federal Trade Commission can solve it by proceeding against the buyer individually and attempting to prove his knowledge that the price discrimination is not justified by the seller's costs. The burden of proving the operation of the buyer's mind is too heavy to assume. Consequently, if anything is to be done to carry out the original intent and purpose of Section 2 (f) of the Clayton Act, the law must be amended once more.

Quantity discounts such as those granted by the Goodyear Tire and Rubber Company to Sears-Roebuck led to the passage of the Robinson-Patman Act in 1936, and to the adoption at that time of the rule that no price discrimination could be granted by the seller, or received by the buyer which was not justified by cost savings on the part of the seller.

As the problems involved in the *Goodyear* case led to the passage of the Robinson-Patman Act, so may the *Automatic Canteen* case lead to the adoption of an amendment to existing law which will shift the burden of proof to the buyer in a 2 (f) proceeding, to justify the price discrimination, upon the mere proof by the Federal Trade Commission that the buyer has been favored with a lower price than his competitor for goods of like quality.