

BUYER RESPONSIBILITY BEFORE THE FEDERAL TRADE COMMISSION

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The policy of the Federal Trade Commission with regard to anti-trust enforcement in the area of the buyer-seller relationship has been, until recently, embodied in the theory of Caveat Vendor. In an expansion of this theory defined by the then Chairman of the Commission, Earl W. Kintner, as "Resurgens,"¹ this policy has been expanded to embrace the doctrine of Caveat Emptor.

On August 19, 1960, the Federal Trade Commission ordered *The Grand Union Company*,² in effect, to stop inducing disproportionate promotional allowances from its suppliers. On March 7, 1960, a similar order had been issued by the hearing examiner against *Giant Food, Inc.*,³ and on May 27, 1960, still another examiner rendered such an order against *The American News Company* and the *Union News Company*,⁴ which decision was affirmed as to this proscription by the Commission on January 10, 1961.⁵ The *Grand Union* decision was the first such action by the Commission in a litigated case. There have been no court decisions as yet.

The decisions by the Commission in the *Grand Union* and *American News* cases are bound to have a substantial effect upon chain stores and other large buyers subject to the jurisdiction of the Federal Trade Commission.

The statute relied upon by the Commission as the basis for its orders to cease and desist from inducing disproportionate promotional allowances, or, in effect, from inducing a violation of Section 2(d)⁶ of

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¹ Kintner, "Resurgens: The Federal Trade Commission in 1959," Antitrust Law Symposium (1960).

² 3 Trade Reg. Rep. ¶ 28980 (1960).

³ Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 28624.

⁴ 3 Trade Reg. Rep. ¶ 28811 (1960).

⁵ 3 Trade Reg. Rep. ¶ 29335 (1961).

⁶ 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1958) provides: "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

the Clayton Act as amended by the Robinson-Patman Act, was not a provision of the latter Act. It was Section 5 of the Federal Trade Commission Act.⁷ Although the Federal Trade Commission Act was enacted in 1914, the Commission's action in the *Grand Union* case was one of first impression.

To the discomfort of large buyers, the Commission has been showing renewed activity with respect to Section 2(f)⁸ of the Clayton Act as amended by the Robinson-Patman Act. In 1959, there were before the Commission ten proceedings, complaints in which had been charged violations of Section 2(f). Contrast this with the period 1936 through 1959, during which time there had been only thirty-four 2(f) proceedings altogether.

PREVIOUS BUYER LIABILITY

It will be of assistance to trace the history of buyer liability to Federal Trade regulation to appreciate the apparent extension of such liability under recent cases.

Between 1914, the year in which the Clayton⁹ and Federal Trade Commission Acts¹⁰ were enacted, and the passage of the Robinson-Patman Amendment to the Clayton Act in 1936, buyers were fairly impervious to legal responsibility arising from business dealings with their suppliers. The Clayton Act did not affect them, and the Sherman Act,¹¹ in practice at least, had little effect with respect to their dealings with their suppliers. The vague Federal Trade Commission Act was on the books, but no one had yet suggested, let alone acted upon the theory, that it prohibited a buyer from obtaining the best deal that he could from his supplier.

By 1934, there was considerable agitation to change this hands-off policy with respect to buyers, the principal reasons for this being the buying practices of, and the favored treatment demanded and received by, the new, large chain stores. In 1934, the Federal Trade Commission recommended to the Senate that the law be revised with respect to

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."

⁷ 38 Stat. 717 (1914), 15 U.S.C. § 45(a) (1958) provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

⁸ Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(f) (1958) provides: "That 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."

⁹ 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1958).

¹⁰ 38 Stat. 717 (1914), 15 U.S.C. §§ 41-58 (1958).

¹¹ 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958).

price discrimination.¹² In 1935, several amendments to the Clayton Act were introduced in Congress. One of these was introduced in the Senate by Senator Robinson and in the House by Representative Patman. Although it was the increasing power of large buyers such as the chain stores which constituted the problem which Congress was trying to solve, the bill as introduced, with one exception, applied only to sellers.¹³ During Senate debate the provision which ultimately became Section 2(f) was introduced by Senator Copeland.

As finally enacted into law in 1936, the Robinson-Patman Act contained provisions against granting price discrimination not justified by other provisions in the act,¹⁴ against granting or receiving brokerage payments to or from any party on the other side of the transaction,¹⁵ against granting promotional allowances except on proportionally equal terms,¹⁶ against making payments for services or facilities except on proportionally equal terms,¹⁷ and against the knowing inducement or receipt of "a discrimination in price which is prohibited by this section."¹⁸

Although the buyer was the problem with which the Act sought to deal, almost all of the restrictions had been placed upon the seller.

Section 2(f) was directed against the buyer, but it was expressly limited to discrimination in price. It was, therefore, complementary to Section 2(a) only. There was no provision comparable to 2(f) which prohibited the knowing inducement or receipt of disproportionate promotional allowances or the disproportionate granting of services or facilities. There was no provision complementary to Sections 2(d) or 2(e).

FTC PROCEEDING AGAINST BUYERS

Since enactment of the Robinson-Patman Act, the buyer may have been affected by Commission orders against his suppliers but he has been affected only slightly by Commission proceedings against him.¹⁹

¹² This recommendation was the result of the FTC's investigation into chain stores, as directed by the Senate in 1928. S. Res. 224, 70th Cong., 1st Sess. (1928).

¹³ It was a violation of the act for a buyer to receive a brokerage payment from the seller. 49 Stat. 1526 (1936), 15 U.S.C. § 13(f) (1958). Even this exception was not clear at the time, but later cases definitely fixed responsibility for brokerage payments on buyer as well as seller, when a broker for a buyer received payments from a seller. *Modern Marketing Service, Inc. v. FTC*, 149 F.2d 970 (7th Cir. 1945).

¹⁴ 49 Stat. 1526 (1936), 15 U.S.C. § 13(a), (b) (1958).

¹⁵ 49 Stat. 1526 (1936), 15 U.S.C. § 13(c) (1958).

¹⁶ 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1958).

¹⁷ 49 Stat. 1526 (1936), 15 U.S.C. § 13(e) (1958).

¹⁸ 49 Stat. 1526 (1936), 15 U.S.C. § 13(f) (1958).

¹⁹ This article does not go into 2(c), brokerage proceedings against buyers. There

From September 30, 1936, when the first 2(f) complaint was issued, through April 4, 1960, 34 complaints were issued by the Commission charging violations of Section 2(f), an average of just under $1\frac{1}{2}$ complaints per year.²⁰ Twenty-five cease and desist orders had been entered in these cases, most of them the result of consent settlements.²¹

The first 2(f) proceeding, September 30, 1936, was directed against *Montgomery Ward*.²² The complaint alleged that Montgomery Ward had induced a price discrimination from Bird and Son, Inc., a distributor of "hard surfaced felt base floors" or "rugs." Bird and Son was charged with a 2(a) violation in a different count of the same complaint. The Commission dismissed both complaints, stating:

"The price discrimination alleged is to be found only during a four-month period of transition from a policy of selling ordinary retailers direct, to one of supplying through sales made to jobbers. Any price discrimination during that period was incidental to that transition and involved a negligible proportion and amount of seller-respondents' business.

"Since the case against seller-respondents fails for the reasons above stated, the case against buyer-respondent, for receiving an unlawful price discrimination, also fails."²³

Success for Commission Counsel followed this initial setback, however, and the Commission issued 2(f) cease and desist orders in 1937 against *Pittsburgh Plate Glass*,²⁴ in 1938 against the *Golf Ball Mfrs. Ass'n*,²⁵ in 1939 against *Miami Wholesale Drug Co.*²⁶ and *American Oil Co.*,²⁷ in 1941 against *A. S. Alse Co.*,²⁸ in 1944 against

have been a few of them. See Edwards, *The Price Discrimination Law*, chapters 5 and 6 (1959) for an exhaustive study of Section 2(c).

²⁰ Section 2(f) complaints were issued in FTC Dockets 2937, 3154, 3161, 3377, 3820, 3843, 4548, 4556, 4933, 4957, 5027, 5421, 5648, 5728, 5766, 5767, 5794, 5990, 5991, 6698, 6765, 6837, 6888, 6889, 6890, 7070, 7142, 7365, 7492, 7590, 7592, 7686, 7687.

²¹ Cease and desist orders were issued and not reversed on appeal, in FTC Dockets 3154, 3161, 3377, 3820, 3843, 4548, 4556, 4957, 5027, 5698, 5724, 5766, 5767, 5794, 6698, 6765, 6837, 6888, 6890, and 7142. Of these only *A.S. Alse Co.*, Docket 3820, 34 F.T.C. 363 (1941), *E. J. Brach & Sons*, Docket 4548, 39 F.T.C. 535 (1944), *Curtiss Candy*, Docket 4556, 44 F.T.C. 237 (1947), order modified, 48 F.T.C. 161 (1951), and *Atlantic City Wholesale Drug Co.*, Docket 4957, 38 F.T.C. 631 (1944) contested the proceedings at the Commission level and none of these appealed to the courts.

²² 25 F.T.C. 548 (1937).

²³ *Id.* at 553.

²⁴ 26 F.T.C. 1228 (1937).

²⁵ 26 F.T.C. 824 (1939).

²⁶ 28 F.T.C. 485 (1939).

²⁷ 29 F.T.C. 857 (1939).

²⁸ 34 F.T.C. 363 (1941).

E. J. Brach & Sons,²⁹ and *Atlantic City Wholesale Drug Co.*,³⁰ and in 1945 against *Associated Merchandising Corp.*³¹

It was not much in the way of volume, but during that period no respondent successfully defended a 2(f) charge. All complaints led to orders. Curiously, none of these respondents appealed to the courts.

In June of 1950, the Commission issued a 2(f) order against *Automatic Canteen Co. of America*³² and Automatic Canteen did appeal.³³

The *Automatic Canteen* case proved to be a staggering blow to Federal Trade Commission regulation of buyer activity.

The Commission found that Automatic Canteen had knowingly induced and received discriminations in the prices of candy and other confections and in so doing had violated Section 2(f). It issued a cease and desist order based on this finding.

At the Commission level, Automatic Canteen had maintained that the Commission had the burden of proving that the suppliers' lower prices to Automatic Canteen were not cost justified. The Commission's position was that cost justification was an affirmative defense with respect to which the respondent had the burden of proceeding, be it a 2(a) proceeding or a 2(f) proceeding, and that all the Commission had to do to prove a *prima facie* 2(f) case against a buyer was to prove a *prima facie* 2(a) case against the supplier, and that Automatic Canteen had knowingly received or induced the lower price.

The Court of Appeals agreed with the Commission, quoting Section 2(b) of the Robinson-Patman Act that once the Commission has proved a discrimination in price, "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."³⁴

²⁹ 39 F.T.C. 535 (1944).

³⁰ 38 F.T.C. 631 (1944).

³¹ 40 F.T.C. 578 (1945).

³² 46 F.T.C. 861 (1950).

³³ Since that appeal the Commission has issued 2(f) cease and desist orders against *National Tea Co.*, 46 F.T.C. 829, 47 F.T.C. 1314 (1951); *Atlas Supply Co.*, 48 F.T.C. 53 (1951); *Shell Oil Co.*, Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 27143; *Hunt Marquardt, Inc.*, Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 27402; *Midwest Warehouse Distributors Inc.*, Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 27478; *Allbright's*, Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 27922; *Mid-South Distributors*, Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 27846; *Metropolitan Automotive Wholesalers Cooperative, Inc.*, Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 27876; *Automotive Supply Co.*, Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 28235; *March of Toys, Inc.*, 3 Trade Reg. Rep. ¶ 29020 (1960); *Southwestern Warehouse Distributors, Inc.*, 3 Trade Reg. Rep. ¶ 29071 (1960); *Southern California Jobbers, Inc.*, 3 Trade Reg. Rep. ¶ 29172 (1960).

³⁴ 194 F.2d 433, 437 (7th Cir. 1952).

The Supreme Court reversed in a decision to which there were three dissents.³⁵ After making his oft quoted comment that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act," Justice Frankfurter, writing for the majority, stated:

"It is therefore apparent that the discriminatory price that buyers are forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act, and, what is pertinent in this case, a buyer is not precluded from inducing a lower price based on cost differences that would provide the seller with a defense."³⁶

Justice Frankfurter concluded that Section 2(f) makes "it unlawful only to induce or receive prices known [by the buyer] to be prohibited discrimination,"³⁷ and "a buyer is not liable under Section 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost of justification or not known by him not to be within one of those defenses."³⁸

Since this was so, Justice Frankfurter went on, the Commission should have the burden of proceeding with evidence to show that the low price induced by Automatic Canteen, the buyer, was not cost justified, with respect to costs of the seller, and so was not in fact a lawful price falling within the proviso of Section 2(a) dealing with cost justification.

Upon remand, the Commission dismissed the case against Automatic Canteen because the record did not contain evidence showing the prices received by Automatic Canteen were not cost justified.³⁹

Automatic Canteen temporarily paralyzed the Commission with respect to Section 2(f).

Almost at once it dismissed existing 2(f) proceedings against *Safeway Stores, Inc.*,⁴⁰ and *The Kroger Co.*,⁴¹ giving as the reason the *Automatic Canteen* decision. In 1954 the 2(f) case against *Sylvania Electric Products* was dismissed for failure of proof,⁴² and in 1955 the 2(f) case against *Crown Zellerbach* was likewise dismissed,⁴³ the Commission again relying on *Automatic Canteen*.

³⁵ 346 U.S. 61 (1953).

³⁶ *Id.* at 70.

³⁷ *Id.* at 72.

³⁸ *Id.* at 74.

³⁹ 51 F.T.C. 574 (1955).

⁴⁰ 50 F.T.C. 125, Dismissed July 27, 1953.

⁴¹ 50 F.T.C. 213, Dismissed Sept. 8, 1953.

⁴² 51 F.T.C. 282, Dismissed Sept. 23, 1954.

⁴³ 51 F.T.C. 733, Dismissed Feb. 9, 1955.

Federal Trade Regulation of buyers had reached its low water mark. Since the enactment of the Robinson-Patman Act the Commission had issued, on the average, less than two 2(f) complaints a year, had issued less than one 2(f) order per year, and had been clobbered in its only 2(f) court test.

The recovery of Section 2(f) was not immediate, and it may not yet be complete. Events in 1958, however, showed it had not yet returned to dust. *Shell Oil Co.*,⁴⁴ *Hunt Marquardt, Inc.*,⁴⁵ *Warehouse Distributors, Inc.*,⁴⁶ and *Midwest Warehouse Distributors, Inc.*,⁴⁷ were all charged with knowingly inducing or receiving price discriminations, and in 1958 all four took consent orders.⁴⁸ *Allbright's*⁴⁹ and *Automotive Supply Co.*⁵⁰ followed suit in 1959, as did *March of Toys, Inc.*,⁵¹ *Southwestern Warehouse Distributors, Inc.*,⁵² and *Automotive Southwest, Inc.*,⁵³ in 1960.

Aside from these uncontested cases, the Commission issued 2(f) orders in a few contested cases, *Midsouth Distributors, Inc.*⁵⁴ on January 24, 1959, *Metropolitan Automotive Wholesalers Cooperative, Inc.*,⁵⁵ on March 12, 1959, and *Southern California Jobbers, Inc.*,⁵⁶ on November 10, 1960. All three cases involved essentially the same fact situation:

Major suppliers in the automotive parts business had basic list prices. Specified successively increasing percentage reductions off the basic list prices were offered to jobbers for specified increases in dollar volume purchases. These cumulative volume rebates and graduated price schedules were accorded all purchasers and were available generally throughout the industry. Certain companies engaged as jobbers in the sale and distribution of automotive parts formed a cooperative association. Purchases of automotive parts from the suppliers were made for the member-jobbers by the cooperative

⁴⁴ Trade Reg. Rep. (1956-1957 FTC Cas.) ¶ 26324.

⁴⁵ Trade Reg. Rep. (1956-1957 FTC Cas.) ¶ 26453.

⁴⁶ Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 26612.

⁴⁷ Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 26712.

⁴⁸ *Shell Oil Co.*, Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 27143; *Hunt Marquardt, Inc.*, Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 27698; *Warehouse Distributors Inc.*, Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 27402; *Midwest Warehouse Distributors Inc.*, Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 27478.

⁴⁹ Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 27922.

⁵⁰ Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 28235.

⁵¹ 3 Trade Reg. Rep. ¶ 29020 (1960).

⁵² 3 Trade Reg. Rep. ¶ 29071 (1960).

⁵³ *Ibid.*

⁵⁴ Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 27846.

⁵⁵ Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 27876.

⁵⁶ 3 Trade Reg. Rep. ¶ 29172 (1960), appeal pending, 9th Circuit, #17222, filed Jan. 4, 1961.

association and although the orders, made in the name of the co-operative, were processed by the suppliers in the same manner as if they had been received directly from the individual jobber instead of in the cooperative's name, volume discounts were computed on the basis of the total purchases for all member-jobbers through the co-operative. After deducting operating expenses of the cooperative, these volume rebates were distributed to member-jobbers in proportion to each member-jobber's purchases for the year. The effect of this was to give member-jobbers a substantially lower cost than would have been paid for the same kind and quantity of goods by such jobber individually or by a competing individual jobber.

In issuing its order in *Midsouth* the Commission stated:

"The *Automatic Canteen* case, *supra*, holds, however, that in order to establish a violation of Section 2(f), the Commission as a part of its case must show more than that the buyer knew of the price differentials and of this probable competitive effect. In other words, under the 'balance of convenience' rule applied by the court, the burden is on counsel in support of the complaint to come forward originally with evidence that the buyer is not a mere unsuspecting recipient of the prohibited discriminations. Such violations under the Court's opinion must include a showing that the buyer, knowing full well that there was little likelihood of a cost justification defense available to the seller nevertheless induced or received the discriminatory prices. Just what evidence is necessary to make this showing, as the court indicated, will, of necessity, vary with the circumstances of each case. That trade experience in a particular situation can afford a sufficient degree of knowledge, however, is clear."⁵⁷

In *Metropolitan* the Commission then added:

"It is obvious from the record in this matter that respondent jobbers were receiving rebates which ranged up to 19% higher than those received by competing jobbers and that respondents were aware of these price differences and the probable adverse effect thereof on competition."⁵⁸

The Commission then commented further on *Automatic Canteen*:

"We do not construe the Court's opinion in *Automatic Canteen* as imposing upon counsel supporting the com-

⁵⁷ *Supra* note 54, at 36919.

⁵⁸ *Supra* note 55, at 36942.

plaint the additional burden of showing as a part of his case that respondents knew or should have known that the 'defenses' of fluctuating market conditions and good faith meeting of lower competitive prices were not available to the sellers. As we stated *In the Matter of D & N Auto Parts Company, Inc., et al., supra*, we believe that the respondents would more readily have evidence concerning such 'defenses' and that under the 'balance of convenience' doctrine would have the burden of coming forward with it."⁵⁹

The Commission then protected itself by adding:

"However, if in this respect we are in error, it seems clear that the required knowledge on the part of respondents has been shown."⁶⁰

And so the Commission attempted to move forward. On May 5, 1960, the Second Circuit added impetus to the movement by affirming the 2(f) order issued by the Commission in *Metropolitan*.⁶¹ The Court emphasized "trade experience" as a means by which a buyer may be held to have had knowledge that what it induced was an unjustifiable price discount.

"Petitioners also strenuously contend that under *Automatic Canteen v. F.T.C.*, 346 U.S. 61 (1953), the Commission failed to establish that petitioners *knowingly* induced or received discriminatory prices, a finding required by Section 2(f). *Automatic Canteen* held that, despite the provisions of Section 2(b), the Commission did not establish, *prima facie*, a violation of Section 2(f) merely by introducing evidence that the buyer had received prices lower than its competitors, but that the Commission must also come forward with some evidence that the buyer *knew* that the prices it was receiving violated Section 2(a). However, the Court, *supra*, at pp. 79-80, spoke further in language that is here very pertinent:

'But trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. *By way of example a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ 278 F.2d 225 (2d Cir. 1960).

with notice that a substantial price differential cannot be justified. The Commission need only to show, 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.' (Emphasis supplied.)

"Petitioners of course knew that they, as individual firms, were receiving goods in the same quantities and were served by sellers in the same manner as their competitors, and hence organized themselves into a buying group in order to obtain lower prices than their unorganized competitors. Hence, by the very fact of having combined into a group and having obtained thereby a favorable price differential, they each, under *Automatic Canteen*, were charged with notice that this price differential they each enjoyed could not be justified. And this knowledge of each of the seventeen individual firms is imputable to the organization of which they were all members. Thus, irrespective of whether the buying groups' efforts to bargain with the various manufacturers constituted an improper *inducement* under Section 2(f), we hold that the Commission introduced sufficient evidence to fulfill the requirements of *Automatic Canteen* when it showed that petitioners knowingly received preferential price treatment of such a nature as to violate Section 2."⁸²

The Fifth Circuit kept the ball rolling by affirming the Commission's order in *Midsouth*. Commenting on *Automatic Canteen*, the Court stated:

"The decision hardly meant . . . to impose any rigid mechanical requirements. On the contrary, the Court's opinion reflects an awareness that this critical knowledge of the buyer as to both (a) the underlying facts constituting the asserted justification and (b) the conclusion that it would not legally constitute a justification may have to be established from indirect circumstantial inferences. Rarely

⁸² Id. at 228-29.

will buyers have committed the crudities to permit categorical and direct proof. Of course, this is not to let down the bars. The imponderable, elusive nature of 'costs' which led the Court to impose the laboring oar on the Commission rather than on the buyer makes it necessary that like protection—if not more so—be afforded the buyer where the attack is circumstantial. *But within those limits much is available from which safely to draw reliable inferences.*

With its 1306 printed pages and hundreds of detailed, tabulated exhibits, we could not begin to detail the evidence of this record. The sum of it, briefly compressed, is quite sufficient to show the basis for inferences of buyer knowledge of seller non-justification. The outstanding factor is that as to a specific purchase order the particular member-Jobber knew two things: First, the price he was obtaining through the Co-op was substantially lower than his group (b) (individual) competitors were required to pay. Second, for all practical purposes, the order and shipment were handled exactly the same.⁶³ (Emphasis supplied.)

Assuming that the Commission's expertise will be a principal means of determining the existence of necessary "trade experience," and the reasonable inferences resulting therefrom, it may well be that *Automatic Canteen* has become the Maginot Line of buyer-inducer protection.

As of March 1, 1961, there were pending before the Commission four 2(f) proceedings, against *American Metal Products Co.*,⁶⁴ *Fred Meyer, Inc.*,⁶⁵ *Automatic Jobbers, Inc.*,⁶⁶ and *Ark-La-Tex Warehouse Distributors, Inc.*⁶⁷

About the only conclusion which can be drawn at present with respect to Section 2(f) and the liability of a buyer with respect to the price he "knowingly induces or receives" are:

(1) To make out a *prima facie* case the Commission counsel must prove that the discriminatory price the buyer received was not cost justified and that the buyer knew, or should have known, it was not cost justified.

(2) The Commission, but perhaps not the courts, will hold that respondent buyer has the burden of proceeding with respect to the

⁶³ 1961 Trade Cases ¶ 69939, at 77709-10.

⁶⁴ Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 27761 (complaint).

⁶⁵ Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 28027 (complaint).

⁶⁶ Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 28258 (complaint).

⁶⁷ Ibid.

other statutory defense contained in Sections 2(a) and 2(b); and

(3) Quite probably 2(f) complaints will be forthcoming in the future with more frequency than they have in the past.

SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE BUYER,
AND THE GRAND UNION DECISION

In *Miami Wholesale Drug Co.*⁶⁸ and *Atlantic City Drug Co.*⁶⁹ the Commission had issued 2(f) complaints against buyers for inducing promotional allowances, such, it was alleged, being an inducement of an indirect price discrimination. The Commission orders to cease and desist were not appealed to the courts in either case.

Using Section 2(f) as a vehicle for proceeding against inducers of disproportionate advertising allowances had certain obvious drawbacks for commission counsel. For one thing, counsel supporting the complaint would have to prove that the allowance knowingly induced or received by respondent buyer was not only disproportionate to allowances his competitor received, but also constituted an indirect price discrimination. Conceivably a payment could be a disproportionate promotional allowance, and still not be an indirect price discrimination. Then too in proving a 2(f) violation, counsel supporting the complaint would have the *Automatic Canteen* burden of proving that the disproportionate promotional allowance received was not cost justified. Since cost justification apparently is no defense to a 2(d) violation,⁷⁰ this burden would not fall upon Commission counsel if there were some other theory on which there could be predicated a violation of law for inducing disproportionate promotional allowances; some way, in other words, other than alleging that the promotional allowance received was really a price discrimination as prohibited under Section 2(a).

The problem was that the only provision in the Robinson-Patman Act referring to one who "knowingly received or induced" was Section 2(f), and it was limited, by its terms, to a discrimination in price. It did not mention the knowing receipt or inducement of disproportionate promotional allowances.

Section 5(a)(1) of the Federal Trade Commission Act states:

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

⁶⁸ 28 F.T.C. 485 (1939).

⁶⁹ 38 F.T.C. 631 (1944).

⁷⁰ See *Simplicity Patterns v. FTC*, 360 U.S. 55 (1959).

Is it not an unfair method of competition for a buyer knowingly to receive or induce from its supplier a disproportionate promotional allowance? Is this not in effect inducing a supplier to violate Section 2(d)? Certainly the inducing of a violation of the Clayton Act is contrary to the policy of the Clayton Act. Something contrary to the policy of the Clayton Act ought to be an unfair method of competition. So ran the reasoning of the Commission's staff, and a substantial number of complaints were the result.⁷¹

In these complaints respondents were charged with violations of Section 5 of the Federal Trade Commission Act for inducing disproportionate promotional allowances which were allegedly in violation of Section 2(d) of the Robinson-Patman Act.

As in the case of Section 2(f), opinions by the Commission and courts were not quickly forthcoming. Proceedings against *United Cigar-Whelan Stores Corp.* resulted in a consent order in 1956,⁷² and those against *Associated Barr Stores, Inc.* ended in the same manner in 1958.⁷³ A similar Section 5 complaint against *Food Fair Stores, Inc.* was dismissed for lack of jurisdiction.⁷⁴ Another proceeding against *Giant Food Shopping Center* was delayed by motions, interlocutory appeals and the death of the hearing examiner.

The first initial decision in a contested proceeding involving this new use of Section 5 was in the proceeding against *The Grand Union Company*.⁷⁵ It was filed on September 30, 1959, and ordered *Grand Union* to cease and desist from:

"Knowingly inducing, receiving or contracting for the receipt of anything of value as compensation or in consideration for advertising, promotional display or other services or facilities furnished by or through respondent in connection with the sale or offering for sale of products sold to respondent by any of its suppliers, when such pay-

⁷¹ Between December 1957 and June 1960 the Commission issued nine complaints charging buyers with violation of Section 5 of the Federal Trade Commission Act through knowing inducement or receipt of special payments and benefits from suppliers which had not been made available on proportionally equal terms to all competing customers. As of May 1, 1960 the Commission was investigating 22 other similar alleged violations. Statements by Chairman Kintner at June 3, 1960 meeting of Carolinas-Virginia purchasing agents at Ashville, North Carolina.

⁷² Trade Reg. Rep. (1956-1957 FTC Cas.) ¶ 126137.

⁷³ Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 27616.

⁷⁴ Trade Reg. Rep. (1957-1958 FTC Cas.) ¶ 26729. Food Fair convinced the Commission that it was a meat packer and so subject to the jurisdiction of the Department of Agriculture and not the Federal Trade Commission.

⁷⁵ Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 28313 (hereinafter referred to as Initial Decision).

ment is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all other customers competing with respondent in the sale and distribution of the suppliers' products."

The *Grand Union* case was hotly contested. It grew out of the following situation:

Douglas Leigh, Inc. was a New York advertising firm. It owned and operated many large signs in the Times Square Area of New York City. One of these signs contained on it an electric "Epok Panel" which would display cartoons on a panel of light bulbs. This sign was leased to Grand Union for the nominal sum of \$50.00. The stationary part of the sign was fashioned into a replica of the Grand Union Tower, and the name "Grand Union" was placed on it in several prominent places. The slogan "Your money buys more at your Grand Union Store" also appeared on the sign. For this advertising Grand Union paid nothing. Grand Union agreed, however, to procure 15 to 20 of its suppliers as "Participating Advertisers" on the sign. For \$1,000 a month each, payable to Douglas Leigh, Inc., cartoon commercials of the products of these suppliers of Grand Union would appear three times an hour on the "Epok Panel" of the sign. Grand Union received a portion of this money paid to Douglas Leigh by the "Participating Advertisers," but the Commission was unable to prove that the "Participating Advertisers" knew this, and in fact one "Participating Advertiser," a respondent in another case, denied any such knowledge.⁷⁶ Grand Union gave special in-store displays to its suppliers who became "Participating Advertisers," and in one instance agreed to stop buying the goods of a supplier's competitor if the supplier became a "Participating Advertiser."⁷⁷ As a result of the deal, Grand Union got free advertising in Times Square from December 10, 1952 to December 31, 1956, radio and television advertising,⁷⁸ and cash returns of over \$14,000.

The suppliers, for their \$1,000 a month, got space on the "Epok Panel" and, the complaint alleged, in-store promotions as part of the deal. At least one supplier, Swanee, denied in its Section 2(d)

⁷⁶ Swanee Paper, Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 28212, at 37102.

⁷⁷ General Mills, Inc., Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 28201. General Mills was charged by the FTC with a violation of Section 3 of the Clayton Act growing out of this sign transaction. The case was dismissed by the hearing examiner for lack of substantial effect on competition. Commission counsel did not appeal to the Commission.

⁷⁸ Grand Union traded some time and space on the "Epok Panel" to newspapers and TV stations in return for advertising in those media.

proceeding that the in-store promotions it received, at no extra cost, were part of the sign deal.⁷⁹

Douglas Leigh got \$1,000 a month from the "Participating Advertisers" procured for it by Grand Union.

In its Section 5 proceeding, Grand Union defended on two principal grounds:⁸⁰

(1) Section 5 of the FTC Act did not prohibit the inducing of disproportionate promotional allowances.

(2) Commission counsel had the burden of proving that

(a) The suppliers had violated 2(d), and

(b) Grand Union knew they had done so,
and this burden had not been met.

The first defense was purely one of law. Grand Union contended that Section 5 of the Federal Trade Commission Act could be used only against violations of the Sherman or Clayton Acts, or to nip in the bud incipient violations of those acts. It could not be used to broaden the concept of the antitrust laws, and make illegal a practice not prohibited by one of the antitrust laws.

Grand Union went further and maintained that Congress had intentionally declined to make unlawful the inducing of disproportionate promotional allowances when it failed to do so in the Robinson-Patman Act.

"During the more than 20 years between the enactment of the Federal Trade Commission Act and the Robinson-Patman Act, the practices that are now regulated by the latter Act were wholly lawful. When, therefore, the Congress legislated with respect to the questions in issue in the instant case, it, for the first time, established the category of illegal acts roughly known as price discrimination and defined the limits of that category. Laws are presumed to be passed with deliberation and with a knowledge of all existing laws on the same subject. [Citations omitted.]

"Where, as here, Congress has affirmatively prohibited certain acts and at the same time has clearly declined to render unlawful directly related though different acts, there is no room to argue that the acts not prescribed by the

⁷⁹ The hearing examiner and Commission found otherwise, however, in the 2(d) proceeding against Swance. Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 28212 (hearing examiner); 3 Trade Reg. Rep. ¶ 28675 (1960) (Commission).

⁸⁰ A third defense was that Grand Union had discontinued participation in the sign deal prior to the issuance of the complaint. The examiner and Commission rejected this defense. Cf. 3 Trade Reg. Rep. ¶ 28980 at 37484 (1960).

Congress may nevertheless be considered illegal. Nor may an earlier and general statute [the Federal Trade Commission Act] be extended to illegalize the acts that the Congress has declined to condemn in a later and specific statute [the Robinson-Patman Act.]”⁸¹

In other words, since in the Robinson-Patman Act Congress made it unlawful both to grant and to induce or receive discriminations in price, but only to *grant* disproportionate promotional allowances and not to induce or receive them, the Federal Trade Commission could not use the older, more general Federal Trade Commission Act to fill the gap.

To this Commission Counsel replied:⁸²

“Considering the breadth and scope of the Federal Trade Commission Act . . . , it is indeed too broad an assumption to say that the practice encompassed by the Robinson-Patman Act were not previously actionable under the Federal Trade Commission Act.”

Commission counsel also relied upon the order of the hearing examiner denying Giant Food’s motion to dismiss⁸³ in a similar proceeding:

“There is nothing inconsistent in Congress passing a general catchall statute, and then because hearings had uncovered specific practices then in existence and operating, proceeding to outlaw these per se by specific interdictions when specific standards were met. Such a statute, of course, cannot, and does not, cover variations and evasions engendered in future, nor loopholes arising from faulty draftsmanship or lack of foresight, as witness the adoption of the Robinson-Patman Amendment. In contrast, the Federal Trade Commission Act was designedly left flexible, with non-specific standards, with emphasis on incipency, potentiality, and the future, to permit a full examination of all the circumstances surrounding any commercial practice not yet having ripened into a Sherman Act violation, nor coming within the rigid prohibitions of the specific Clayton Act, to determine whether under all the circumstances such practice was unfair or reasonable. The Commission was created for this very purpose of determination.”

⁸¹ Respondent’s Brief before the Hearing Examiner, Oct. 6, 1958, p. 17.

⁸² Brief of Counsel Supporting Complaint, Opposing Respondent’s Appeal, p. 16.

⁸³ Hearing Examiner’s Order of February 10, 1956, Docket 6459.

Commission Counsel also maintained that:

"... knowing inducement of another to violate the law—that is, Section 2(d) of the Clayton Act—is patently an unfair act or practice and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act."⁸⁴

Hearing Examiner John Lewis, in deciding for Commission Counsel, discussed the "broad, general and flexible" standard of Section 5. He stated:

"Practices of the type which run counter to the policy of the Clayton Act have been held to constitute unfair methods of competition under the Federal Trade Commission Act, even though they may not technically fall within the scope of the former Act. *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 397; *Fashion Originators Guild of America, Inc. v. FTC*, 312 U.S. 457; *Carter Carburetor Corp. v. FTC*, 112 F.2d 722 (CA 8, 1940)."⁸⁵ Mr. Lewis added:

"It is the opinion of the hearing examiner that one who knowingly induces another to commit an act which is illegal under the Clayton Act is himself engaging in an unfair method of competition, within the meaning of the Federal Trade Commission Act, unless Congress deliberately intended to exclude such conduct from the category of illegality."⁸⁶

On August 19, 1960, the Commission affirmed the initial decision,⁸⁷ with Commissioner Tait dissenting.⁸⁸ In its opinion, written by Commissioner Secrest, the Commission laid claim to greater power than it had ever done before. In effect it ruled that it can write anti-trust laws as it goes along, as long as the abuses attacked "violate the spirit" of the antitrust laws:

"It is clear from the legislative history of the Federal Trade Commission Act and the long line of court decisions

⁸⁴ Brief of Counsel Supporting the Complaint Opposing Respondent's Appeal, p. 18. While the excerpts quoted above are from Respondent's brief before the hearing examiner, and Commission counsel's brief before the Commission, the excerpts succinctly state the opposing contentions before both the hearing examiner and Commission, and for that reason were used.

⁸⁵ Initial Decision, page 34.

⁸⁶ *Ibid.*

⁸⁷ 3 Trade Reg. Rep. ¶ 28980 (1960).

⁸⁸ *Id.* at 37484.

interpreting Section 5 of the Act that the Commission has the authority, subject to review by the courts, to determine in any factual situation before it whether a particular practice or course of conduct is an unfair method of competition of an unfair trade practice."⁸⁹

Commissioner Secrest added:

"We cannot accept respondent's contention that the Commission's authority in this field is limited under Section 5 to established illegal practices previously condemned by the anti-trust laws."⁹⁰

Federal Trade Commission v. R. F. Kippel & Bro., Inc.,⁹¹ *Federal Trade Commission v. Beech-Nut Packing Co.*,⁹² *Federal Trade Commission v. Cement Institute*,⁹³ and *Federal Trade Commission v. Motion Picture Advertising Service, Inc.*⁹⁴ were cited by the Commission in support of its position. In his dissent, however, Commissioner Tait pointed out that none of these cases had gone so far as the Commission's present position:

"The cases alluded to by my colleagues concerned the well known 'incipiency doctrine', the soundness of which is unquestioned; however, this doctrine and the cases cited are completely irrelevant here, both from a legal and factual standpoint, since this case—as charged in the complaint and as tried before the hearing examiner—is not founded upon any theories of 'incipient' violation of the Sherman Act or the Clayton Act.

"Nor are the various cases cited any precedent for the failure to show probable competitive harm. Cases such as *Motion Picture Advertising Service, Inc.*, *Keppel & Bro., Inc.*, *Beech-Nut Packing Co.*, *Fashion Guild*, and *Cement Institute* [citations omitted] all contained findings by the Commission that the challenged practices had adverse competitive effects. In the *Motion Picture Advertising Service* case, for example, it was found that the respondent's exclusive contracts unreasonably restrained competition and tended to monopoly. The Commission determined in the respective cases on the basis of injury evidence that the

⁸⁹ Id. at 37480.

⁹⁰ Ibid.

⁹¹ 291 U.S. 304 (1934).

⁹² 257 U.S. 441 (1922).

⁹³ 333 U.S. 683 (1948).

⁹⁴ 344 U.S. 392 (1952).

practices constituted unfair methods of competition and the courts agreed. There is no such factual situation here, and no such findings have been made. Moreover, in these authorities cited, the courts did not go so far as to hold, as the majority action herein seems to imply, that the Commission is empowered to declare as unfair methods of competition all practices which it may consider to be contrary to 'the policy of the antitrust laws' or 'which violate the spirit of the amended [Clayton] Act.' I am concerned by what the majority does; I am fearful of the implications of what it says."⁹⁵

The majority accurately pointed out that the Robinson-Patman Act was aimed more at buyer power than seller power. It added, correctly I believe, that the Congress did not intentionally exclude the inducement of a violation of Section 2(d) from the Robinson-Patman Act, but probably did so through oversight.

"We think that the most that can be said on this point from the legislative history and from a reading of the Act itself is that the practice charged in the complaint is not specifically prohibited by the Act. Certainly, it cannot be inferred from this fact that Congress countenanced a practice which so clearly violates the spirit of the statute.

"In the absence of evidence of Congressional intent not to render unlawful practices related to those specifically prohibited by the Robinson-Patman Act, there is no substance to respondent's argument that the Federal Trade Commission Act cannot be extended to proscribe discriminatory practices which do not come within the purview of the Robinson-Patman Act. The rule of statutory construction is that general and specific statutes should be read together and harmonized, if possible, and that the specific statute will prevail over the general only to the extent that there is conflict between them. There is no dispute as to whether the specific provisions of the Robinson-Patman Act are controlling insofar as they specifically prohibit certain practices. There is nothing in the Act itself, however, which conflicts with the Commission's broad authority under Section 5 to define and proceed against practices which it deems to be unfair, including those which may come within the periphery of the later Act, although not within its letter."⁹⁶

⁹⁵ *Supra* note 87, at 37485.

⁹⁶ *Id.* at 37482-83.

In a broad-brush conclusion, the majority held:

"For the foregoing reasons, it is our opinion that it is the duty of the Commission to 'supplement and bolster' Section 2 of the amended Clayton Act by prohibiting under Section 5 practices which violate the spirit of the amended Act. Consequently, we believe that if a buyer knowingly engages in a course of conduct that accomplishes the result which one of the provisions of the Act is intended to prevent and which Congress has declared to be injurious to competition *per se*, such course of conduct runs counter to the policy of the Act and, as such, is an unfair trade practice within the purview of Section 5 of the Federal Trade Commission Act."⁹⁷

To this language Commissioner Tait directed a pointed question:

"In the same vein it is interesting to note that the failure to include the instant practice under Section 2(f) was considered as a legislative 'oversight'. Is the majority suggesting that it has the power to correct a Congressional 'oversight' where the 'oversight' concerns a substantive violation of law? Surely the majority is not advancing the novel theme that when Congress acts—even as fully as it has acted here—it had best explain away any inaction or else this Commission may step in to plug self-asserted gaps and loop-holes."⁹⁸

He then summed up what he thought the undesirable effects of the decision would be:

"If the Commission's authority is so broad that it can declare unlawful any practice which it believes contrary to the spirit of the antitrust laws, it is apparent that all of the provisions of the Robinson-Patman amendment were not needed. Certainly, Section 2(f) dealing with the knowing inducement or receipt of price discriminations was unnecessary. Any alleged gaps which may appear in the Clayton Act provisions, under this principle, will not require legislation; the Commission merely has to declare them contrary to the spirit of the Clayton Act. Furthermore, a businessman in seeking to comply with the often difficult requirements of the Robinson-Patman Act, will now have not only the

⁹⁷ Id. at 37483.

⁹⁸ Id. at 37485.

Act to contend with in this antitrust area, but also declarations of *per se* illegality by the Commission under Section 5. In other words, in attempting to comply with the law, thousands of businessmen must first determine if the business practice is legal under the Robinson-Patman Act. Then they must also determine whether the practice is legal under a vague standard, herein stated to be 'the spirit of the amended Act'. I am in vigorous disagreement with an approach to the law which has too much sail and too little anchor, or too much supplement and too little bolster."⁹⁹

Commissioner Tait pointed out, furthermore, that the majority had adopted a rule under which the inducement of a disproportionate promotional allowance was held to be illegal *per se*. Under the majority decision, no showing of adverse competitive effect was necessary to the determination of a violation.

The dissent of Commissioner Tait may be grouped by some with that of Justice Burton in *United States v. E. I. du Pont de Nemours and Co.*¹⁰⁰ Both appeared to be logical statements of existing law, but both were bucking a strong tide of judicial antitrust philosophy which is placing more and more discretionary powers in the hands of the Department of Justice and the Federal Trade Commission.

While there is considerable doubt as to whether the Congress ever intended the Federal Trade Commission to have the power it used in *Grand Union*, probably because Congress did not think of it when the Robinson-Patman Act was passed, there is no doubt but that the Commission was curbing buyer power in *Grand Union* and that that was the principal purpose of the Act. Of course, the Commission used the much older Federal Trade Commission Act to bolster the "spirit" of the Robinson-Patman Act. Commissioner Tait was expressing doubt that the passage of the Robinson-Patman Act, which omitted, either intentionally or through oversight, to prohibit the inducing of disproportionate promotional allowances, gave the Commission power to do the prohibiting under the general terms of Section 5 of the Federal Trade Commission Act.

To this the majority answered that in passing the Robinson-Patman Act, Congress had not intentionally excluded conduct of the sort attacked, and so it was fair game under the broad, flexible powers of the Federal Trade Commission Act.

If the Commission expertise is to be the determining factor of

⁹⁹ Id. at 37485-86.

¹⁰⁰ 353 U.S. 586, 608 (1957).

what constitutes "unfair methods of competition," and the existing antitrust laws need not be violated, nor need be about to be violated, for an order of the Commission to be entered, then one can sympathize with the businessman, or lawyer, trying to understand what his duties are under Federal antitrust prohibitions. He may find himself hauled before the Commission "although the practices may not be specifically prohibited by the language of [the antitrust laws] or have been previously adjudged to be illegal by the courts."¹⁰¹

To be consistent, of course, Congress should have made the inducing of disproportionate promotional allowances illegal when it passed the Robinson-Patman Act. If the Courts ultimately reverse the *Grand Union* decision, the Commission probably will ask Congress to amend the law. One gets the impression, however, that Congress is afraid that if it attempts to make the Robinson-Patman Act a logical, consistent statute, there will be so much conservative pressure to weaken it and liberal pressure either to strengthen it or to substitute for it some different type of government control, that it will remain untouched for some time to come.

Grand Union's second contention, that Commission Counsel had not successfully borne the burden of proving that (a) the suppliers had violated Section 2(d) and (b), that Grand Union knew they had done so, was likewise unavailing. The Hearing Examiner found that certain of the suppliers had violated Section 2(d) and that Grand Union had knowingly induced them to do so.

On appeal to the Commission Grand Union pressed the following argument:

No promotional allowance, no matter how large, violates § 2(d) at the moment it is granted to a customer. It is the failure of the supplier subsequently to offer proportionally equal allowances to competitors of that customer which constitutes the violation. Therefore, it is impossible, *per se*, for a customer to induce a violation of § 2(d). No matter how large an allowance the customer induces, it is lawful at the time he induces it. The logical conclusion is readily apparent. Even if, *arguendo*, § 5 of the Federal Trade Commission Act is violated by knowing inducement of a violation of the Robinson-Patman Act, Grand Union is unaffected because at the time it induced its suppliers to pay to go on the sign, the suppliers' payments did not violate the Robinson-Patman Act. If the suppliers did violate § 2(d)

¹⁰¹ *Supra* note 87, at 37481.

of the Robinson-Patman Act, it was their subsequent failure to offer proportionally equal allowances to competitors of Grand Union which constituted the violation.

Grand Union added that it had a right to assume that its suppliers would obey the law. Curiously, neither the majority opinion nor the dissent so much as commented on this argument, although it took up a good deal of the time on the oral argument before the Commission.

The Grand Union proceeding was in the van in this new attack against buyers, but it was not alone. On March 7, 1960, Hearing Examiner Loren H. Laughlin filed an initial decision against *Giant Food, Inc.*¹⁰² Although the wording of the order differed slightly from that in *Grand Union*,¹⁰³ the theories of the cases were the same. It may be assumed that a standard order will be developed in this type case as it has, generally, in cases of Robinson-Patman Act violations, so that in the future, such variation in form will be avoided.

An Initial Decision against *The American News Company* and the *Union News Company*,¹⁰⁴ issued on May 26, 1960, determined a violation of Section 5 and prohibited the inducement of disproportionate promotional allowances, but did not discuss whether Section 5 could be so used. It is interesting to note that the hearing examiner found specifically that the inducements had an adverse effect upon competition. The examiner in *Giant* had made a similar finding. The Commission's *Grand Union* decision, issued several months later, indicated no such finding was necessary.

The decision of the Commission in the *American News* case¹⁰⁵

¹⁰² Trade Reg. Rep. (1959-1960 FTC Cas.) ¶ 28624. The complaint in this case was issued prior to that in *Grand Union*, but the proceedings were delayed by interlocutory matters and the death of Frank Hier, who was the original Hearing Examiner in the case.

¹⁰³ The *Grand Union* order is set forth, pp. 269-70, *supra*. *Giant* was ordered to cease and desist from: "Offering to enter or entering into any contract, agreement, understanding or arrangement or in any other way formulating, creating or adopting any scheme or method which has for its purpose the inducing of, or actually does induce, any persons to grant payment of anything of value to or for the benefit of respondent as compensation or in consideration for any service or facilities furnished by or through respondent in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such persons, unless such payment or consideration is available on proportionally equal terms to all other customers competing with respondent in the distribution of such products or commodities."

Giant was charged also with diverting to its own use some money received by it as promotional allowances, and was ordered to cease and desist from this practice. There was no similar charge against *Grand Union*.

¹⁰⁴ 3 Trade Reg. Rep. ¶ 28811 (1960).

¹⁰⁵ 3 Trade Reg. Rep. ¶ 29335 (1961).

was in accord with its holding in *Grand Union*. It is interesting to note, however, that the order of the hearing examiner was modified by the Commission through the deletion of that part of the order which prohibited the mere "attempt" to induce discriminatory payments from suppliers as being violative of Section 5.¹⁰⁶ While recognizing that the request for a promotional allowance does not, of itself, constitute an inducement to violate Section 2(d), it avoided any consideration of the "attempt" theory by finding that a lack of sufficient evidence did not warrant consideration of this issue.

It is to be anticipated that a decision will be forthcoming from the Commission on the "attempt" issue. It will be of interest to see whether the Commission will expand Section 5 to cover an attempt to induce promotional allowances when confronted with sufficient evidence to show, for example, that a buyer has specified that the requested allowance be granted to him alone.

In a complaint based upon a slightly different theory from that in *Grand Union*, the Commission charged *R. H. Macy & Co., Inc.*,¹⁰⁷ with using the force of its purchasing power to induce suppliers to make contributions to a general sales promotion scheme. As then Chairman Kintner has noted,¹⁰⁸ this complaint would not necessarily confine the buyer liability to an inducement of the seller to violate Sections 2(d) or 2(e). The Commission chose not to view the payments as rebates, thereby constituting a 2(f) violation, but proceeded under Section 5 of the Federal Trade Commission Act. This case was still in the hearing stage as of March 1, 1961.

PROGNOSIS

It remains to be seen how the courts will react to this new use of Section 5. It could be expected that the Commission would not decide against the validity of this new weapon in its arsenal, but a determination by the courts may result in a different conclusion. The task for the courts will not be an easy one. The meaning and scope of Section 5 of the Federal Trade Commission Act have been a source of puzzlement since the bill was first argued in Congress.

The Senate Report explained that:

"The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to

¹⁰⁶ *Id.* at 37670.

¹⁰⁷ 3 Trade Reg. Rep. ¶ 28735 (1960).

¹⁰⁸ Statement at meeting of the Carolinas-Virginia Purchasing Agents Association, Asheville, North Carolina, June 3, 1960.

forbid their continuance or whether it would, by a general declaration, condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better. . . ."¹⁰⁹

Some members of Congress seemed disturbed by the latitude and flexibility of the power, and responsibility, about to be delegated to the new Federal Trade Commission. Senator Sutherland stated that:

"I do not know whether it is the view of the framers of this bill that unfair competitors and unfair methods of competition mean the same thing, but I do know that the words 'unfair competition' have a very well settled meaning in the law and that the words 'unfair methods of competition' do not. So if we accept that provision as to unfair methods of competition it seems to me very clearly that we have authorized the Commission to legislate without laying down any primary standard."¹¹⁰

A Court of Appeals made its views clear in 1919:

" . . . The Commissioners, representing the Government as *parens patriae*, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases."¹¹¹

Six years later, in *FTC v. Gratz*, the Supreme Court spoke:

"The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not in-

¹⁰⁹ Committee on Interstate Commerce, S. Rep. No. 59, 63d Cong., 2d Sess. 13 (June 13, 1914).

¹¹⁰ 51 Cong. Rec. 12814 (1914).

¹¹¹ *Sears Roebuck & Company v. FTC*, 258 Fed. 307, 311 (7th Cir. 1919).

tended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."¹¹²

This language apparently rules out the use of Section 5 in situations such as *Grand Union* and *Giant*, and the *Gratz* case has never been expressly repudiated.

However, the Supreme Court commented again two years after *Gratz*:

"What shall constitute unfair methods of competition denounced by the act, is left without specific definition. Congress deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such scheme. The Commission, in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the act. (See Report No. 597, Senate Committee on Interstate Commerce, June 13, 1914, 63rd Cong., 2nd Sess.)."¹¹³

Apparently the *Gratz* concept of Section 5 had been broadened. However, *FTC v. Raladam* affirmed that:

"The question [of the meaning to be given the words 'unfair methods of competition'] is one for the final determination of the courts and not of the Commission."¹¹⁴

In *FTC v. Keppel & Bros.*,¹¹⁵ relied upon heavily by the majority in *Grand Union*, the Supreme Court again tried to help:

"The Act undoubtedly was aimed at all the familiar methods of law violations which prosecution under the Sherman Act had disclosed. See *Federal Trade Commission v. Raladam Co.*, supra, 649, 650. But as this court has pointed out it also had a broader purpose, *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 493; *Federal Trade Commission v. Raladam Co.*, supra, 648. As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared 'unfair competition' to be unlawful. But it was because the meaning which the common law has given to those words was deemed too nar-

¹¹² *FTC v. Gratz*, 253 U.S. 421, 427 (1920).

¹¹³ *FTC v. Beech-Nut Packing Company*, 257 U.S. 441, 453 (1922).

¹¹⁴ 283 U.S. 421, 427 (1931).

¹¹⁵ 291 U.S. 304 (1934).

row that the broader and more flexible phrase 'unfair methods of competition' was substituted. Congress in defining the powers of the Commission, thus advisedly adopted a phrase which, as this court has said, does not 'admit of precise definition but the meaning and application of which must be arrived at by what this court elsewhere has called "the gradual process of judicial inclusion and exclusion'." *Federal Trade Commission v. Raladam Co.*, supra, 648. Compare *Davidson v. New Orleans*, 96 U.S. 97, 104."¹¹⁶

Dicta in the famous *Schechter Poultry* case¹¹⁷ was in broader language, and certainly went further than *Gratz*, but still was not too helpful:

" . . . What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest."¹¹⁸

In *FTC v. Bunte Bros.*,¹¹⁹ the Supreme Court described Section 5 as "a flexible concept with evolving content."

Also, in 1941, the Supreme Court used language expressly relied upon by Commission Counsel in *Grand Union*:

"If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition."¹²⁰ (Emphasis supplied.)

Certainly, the argument went, it is against the *policy* of the Clayton Act, if not against its provisions, to induce someone to violate Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act.

In 1946, one Circuit Court concluded the narrow limitation of Section 5 as set forth in *Gratz* was no longer law. It stated:

"Conscious as we are of the danger in lifting specific observations from their content, we are nevertheless impressed by the fact that acts not in themselves illegal or criminal, or even immoral, may, when repeated and continued and their impact upon commerce is fully revealed,

¹¹⁶ Id. at 311-12.

¹¹⁷ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1934).

¹¹⁸ Id. at 532.

¹¹⁹ 312 U.S. 349, 353 (1941).

¹²⁰ *Fashion Originators Guild v. FTC*, 132 U.S. 457, 463 (1941).

constitute an unfair method of competition within the scope of the Commission's authority to regulate and forbid. So with respondent's practices, it may not be illegal for a manufacturer to buy up the obsolescent or unsalable stock of his competitors so long as he does not throw it upon the market at cut-rate prices to destroy his competitor's business or the goodwill attaching to his product. It is not illegal for a manufacturer to finance his retail outlets or to guarantee the products, but undoubtedly the utilization of these expedients, singularly or in combination, as an inducement to jobbers to throw out competing lines and to handle, exclusively or preferentially, the products of a manufacturer 'from whom such blessings flow,' may well be within the statutory concept of unfair methods of competition."¹²¹

In 1953 the Supreme Court commented on the present state of Section 5:

"The 'unfair methods of competition', which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. *Federal Trade Commission v. Keppel Bro.*, 291 U.S. 304. 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 was designed to supplement and bolster the Sherman Act and the Clayton Act (see *Federal Trade Commission v. Beech-Nut Co.*, 257 U.S. 441, 453)—to stop in their incipiency acts and practices which, when full blown would violate those Acts (see *Fashion Guild v. Federal Trade Commission*, 312 U.S. 457, 463, 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. 683, 691."¹²²

and:

"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."¹²³

¹²¹ *Hastings Mfg. Co. v. FTC*, 153 F.2d 253, 257 (6th Cir. 1946), cert. denied, 328 U.S. 853 (1946).

¹²² *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392, 394-95 (1952).

¹²³ *Id.* at 396.

Justice Frankfurter in dissenting stated:

"The curb on the Commission's power, as expressed by the series of cases beginning with the *Gratz* case, supra, so as to leave to the Courts rather than the Commission the final authority in determining what is an unfair method of competition, would be relaxed, and unbridled intervention into business practices encouraged."¹²⁴

CONCLUSION

By what standards can the courts judge the Federal Trade Commission in its use of Section 5 when the Commission uses that statute in a new way, proscribing a practice not defined as unlawful at common law or in another statute? Are the courts to judge the reasonableness of new proscriptions based upon Section 5? Does the interpretation by the Commission of Section 5 necessarily mean that it can create new antitrust laws as it may see fit, using as justification therefor the "expertise" ascribed to it? Is the Commission limited by acts contravening the "policy" of the antitrust laws? Is such a real limitation? These are substantial questions which should prove of some concern to the courts and will almost certainly have to be resolved as *Grand Union*, *American News* and, presumably, *Giant*, as well as others, are appealed from the final decisions of the Commission.

We have traced the development of antitrust enforcement and application over the years in a relatively small area, yet the conclusion seems warranted that expansion in the interpretation of the scope of antitrust coverage in this area has been significant. It would appear, from this, that the courts may well conclude that the extension of Section 5 to encompass activities which the Commission may, from time to time, determine to be violative of the "spirit" of the Robinson-Patman Act will be found compatible with the purpose of Section 5 and the antitrust laws to which it may be related. If this quite real possibility matures into reality, then Caveat Emptor will be indeed a reality also. In an area of the law which supports its share of confusion in interpretation, with correspondingly difficult problems in compliance, these problems will be compounded by the extension of the rather uncertain test of "unfair methods of competition."

It is perhaps ironic that the liability of the seller is now com-

¹²⁴ Id. at 405.

paratively clear, while that of the buyer, the original target of the Robinson-Patman Act, remains far from settled almost twenty-five years after the passage of the Act. Perhaps this extension of Section 5 by the Federal Trade Commission will serve to narrow, if not entirely remove, the disparity in liability which has existed between the buyer and seller in the past. It remains to be seen.