

Order

43 F. T. C.

IN THE MATTER OF
STANDARD OIL COMPANY

MODIFIED CEASE AND DESIST ORDER¹*Docket 4389. August 9, 1946*

Order modifying original order of October 9, 1945, 41 F. T. C. 263, requiring respondent, its officers, etc., in connection with the sale of gasoline in commerce, to cease and desist from discriminating among purchasers, directly or indirectly, in the price of such gasoline of like grade and quality, in violation of the provisions of subsection (a) of section 2 of an act of Congress approved October 15, 1914 (the Clayton Act), as amended by an act approved June 19, 1936 (the Robinson-Patman Act), as in said order below set out; Commissioner Mason dissenting in the following opinion.

Before *Mr. Webster Ballinger*, trial examiner.

Mr. Cyrus B. Austin for the Commission.

MacMahon, Abbott & Roberts, of Detroit, Mich., and *Mr. Albert L. Green* and *Mr. Buell F. Jones*, of Chicago, Ill., for respondent.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission as amended, answer of the respondent, testimony and other evidence in support of the allegations

¹ The original order was modified, as herein set forth, and certain motions disposed of, by Commission order also dated August 9, 1946, as follows:

This matter coming on to be heard upon motion of counsel for the Commission dated January 21, 1946, and supplemental motion dated February 15, 1946, to modify the order to cease and desist entered herein by the Commission on October 9, 1945, and answers and briefs of the respondent in opposition thereto; motion of the respondent filed January 28, 1946, for rehearing and reconsideration of the order to cease and desist; petition of the National Council of Independent Petroleum Associations for leave to intervene and to set aside the order to cease and desist and reopen the proceeding for further hearings and the taking of further testimony; and upon oral argument of counsel in support of and in opposition to said motions; and the Commission having duly considered the various motions, answers, briefs, and oral argument of counsel and the record herein and being now fully advised in the premises:

It is ordered, that the motion of respondent for rehearing and reconsideration of the order to cease and desist be, and the same hereby is, denied;

It is further ordered, that the petition of National Council of Independent Petroleum Associations for leave to intervene and to set aside the order to cease and desist and reopen the proceeding for further hearings and the taking of further testimony be, and the same hereby is, denied;

It is further ordered, that the motions of counsel for the Commission dated January 21, 1946, and February 15, 1946, to modify the order to cease and desist issued October 9, 1945, be, and the same hereby are, granted, and that said order to cease and desist be modified substantially in the manner and to the extent as set out in the supplemental motion of counsel for the Commission dated February 15, 1946;

It is further ordered, that a modified order to cease and desist incorporating the modifications provided for in the supplemental motion of counsel for the Commission be issued and served upon the respondent.

of said complaint as amended and in opposition thereto taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and exceptions filed thereto, briefs in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission having made and entered its findings as to the facts and its conclusion that respondent has violated the provisions of subsection (a) of section 2 of an act of Congress entitled, "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by act approved June 19, 1936 (Robinson-Patman Act), issued its order to cease and desist on October 9, 1945. Thereafter, this matter came on for hearing before the Commission upon motion and supplemental motion by counsel for the Commission to modify said order to cease and desist issued on October 9, 1945, answers and briefs of respondent in opposition thereto, motion of respondent for rehearing and reconsideration of said order and motion of National Council of Independent Petroleum Associations for leave to intervene and to set aside said order to cease and desist and reopen the proceedings for further hearings and the taking of further testimony, and the Commission having considered said motions, answers, briefs, and oral argument of counsel and the record herein, and being of the opinion that a modified order to cease and desist should be issued in this cause, and having entered its order modifying said order to cease and desist to the extent set out in said supplemental motion or counsel for the Commission, issues this its modified order to cease and desist:

It is ordered, that the respondent, Standard Oil Co. (Indiana), a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the sale of gasoline in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such gasoline of like grade and quality as among purchasers:

1. By selling such gasoline to competing purchasers at different prices in the manner and under the circumstances stated in the findings as to the facts herein.

2. By continuing or resuming the discriminations in price of such gasoline referred to and described in the Commission's findings as to the facts herein.

3. By otherwise discriminating in price between purchasers of such gasoline in a manner and degree substantially similar to the

manner and degree of the discriminations referred to and described in the Commission's findings as to the facts herein.

4. By selling such gasoline to some retailers thereof at prices lower than the prices charged other retailers who in fact compete with them in the sale and distribution of such gasoline.

5. By allowing a price to any dealer, jobber, or wholesaler on such gasoline sold by such dealer, jobber or wholesaler at retail lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such dealers, jobbers, or wholesalers in their retailing capacity.

6. By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler resells such gasoline to any of its said retailer customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer.

For the purpose of comparison the term "price" as used in this order includes discounts, rebates, allowances and other terms and conditions of sale.

The above specified requirements of this order are subject, however, to the following provisos:

(a) That none of the prohibitions of the order shall be taken as inhibiting any price differentials by respondent that were not found under the facts herein to have a tendency to injure, destroy or prevent competition with respondent's customers receiving the benefit of such differentials or with their customers.

(b) That none of the prohibitions of the order shall be taken as preventing any price differentials by respondent which make only due allowance for differences in respondent's cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered.

(c) That none of the prohibitions of the order shall be taken as inhibiting a lower price to jobbers than to retailers where respondent thereby makes only due allowance for its differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such gasoline is to such purchasers sold or delivered.

(d) That none of the provisions of the order shall be taken as inhibiting any price differentials by respondent that reflect differences in the grades and qualities of such gasoline.

It is further ordered, that the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

DISSENTING OPINION OF COMMISSIONER LOWELL B. MASON TO MODIFIED
ORDER TO CEASE AND DESIST

There are four reasons for this dissent.

1. The modified order is too indefinite and obscure to be followed;
2. The failure of the Commission to consider the evidence offered under the proviso of section 2 (b) of the Robinson-Patman Act;
3. The failure to prove injury to competition; and
4. The failure to establish jurisdiction.

First, in my judgment, the order is too indefinite and obscure to be followed. The first half merely says, "Look at what Standard did and don't do that." I refer specifically to those portions of the order which state that the respondent is ordered to cease and desist from discriminating—

1. By selling such gasoline * * * in the manner * * * stated in the findings * * *.
2. By continuing or resuming the discriminations * * * described in the Commission's findings * * *.
3. By otherwise discriminating * * * in a manner * * * similar to * * * the discriminations * * * referred to * * * in the Commission's findings * * *.

An order is a command to do or refrain from doing certain things, and thus should interpret the Robinson-Patman Act ideals into completely understandable, explicit directions.

To rely on the finding of facts to determine the command of an order is bad. How can business men determine the standard at which they must aim if the Commission will not set down in words and figures in the order what is illegal?

The order of the Commission, being of a negative quality, that is to say, an order to cease and desist, should ban specific acts and thus by a series of quasi-judicial exclusions, direct all men of enterprise toward the best practices of their trade.

The last half of the order is a paraphrasing of the general terms of the statute and thus in effect commands nothing specifically but counsels perfection generally.

I believe the primary burden rests on the Commission to present an understandable order so it can be obeyed. Otherwise, first the businessman must guess what the law requires him to do, and then

he must guess what the Commission requires he must do, to obey its order entered because he guessed wrong the first time.

In my opinion, the Federal Trade Commission should not swell that area of the law which cannot be known until litigated. A law that cannot be applied with certainty to the current affairs of everyday business is *ex post facto* in effect.

It simply means, instead of living in a country where a king declares today that what a citizen did yesterday should be a crime, the Federal Trade Commission declares what the businessman did 5 years ago is interpreted as a violation of law today.

We have made a fetish out of "litigation to determine the law." And by obscure and unintelligible orders which rely on extraneous references to indicate their meaning, we will make a fetish out of "litigation to determine the litigation."

This may not be such a fault that our superior courts feel empowered to interdict. If so, there lies all the more reason for our diligence in protecting against it.

There is a parallel in Gulliver's Travels between the directions the tailors of Laputa used to measure Gulliver for a suit of clothes and the directions given by the Commission for the defendant to clothe itself with legality in this case.

Gulliver's tailors, immersed in the abstractions of life, used quadrants, angles, and complicated formulae to determine a simple sleeve length. The result was a most ill-fitting suit.

Gulliver took some comfort out of the fact that at least everyone else was as poorly dressed. But even this satisfaction is denied the defendant in this case, for here, only the defendant is subject to the obscurities of higher dialectics whilst his competitors roam the fields of competition secure in the knowledge that they don't have to guess how to carry out the order because it does not apply to them.

I shall exemplify what I consider the law and facts on the second and third points by illustrations, using fictitious characters and episodes.

This method is at odds with common legalistic austerity, but it suits the purpose of those who would care to know why there is a dissent in this case.

The case is about one distributor getting gas for less than another distributor.

There are many kinds of distributors—brokers, wholesalers, jobbers, retailers, etc., but in the gas business, two are most common:

The retailer who operates the corner filling station—the essential

tools of his trade consist of a gas pump, rest rooms, air for tires, and water for radiators.

The jobber—ordinarily has a railroad siding or delivery trucks that carry as much as a tank car, big storage tanks, a fat credit and enough retail distributors as customers to make the use of these facilities profitable.

These two types of distributors pay different prices for the gas they sell. The jobber—a cent and a half less. It is easier to sell jobbers—they buy millions of gallons. The corner station buys thousands. The credit risks, the delivery costs, the storage costs, the sales costs are either less or entirely absent when selling to a jobber. Besides the saving of money, there are many other valid reasons which invite a producer to dispose of his stock at a lesser price to a jobber than to a retailer. In fine, it seems there is no quarrel over this generally accepted economic fact.

It is true the statute makes no references to classes of purchasers.¹ It bans any discrimination between purchasers without regard to class or function, provided competition is or tends to be injured. The point is, that competition is nonexistent between different functions. The respondent claims that there is nothing in the Robinson-Patman Act to prevent different price scales based on the different functions of distributors. This claim is sound only because the function of a jobber is not in competition with the function of a retailer. To hold otherwise would be to ordain that the profit motive could no longer be legal in the distribution field except at two points, distribution by the manufacturer and distribution by the retailer. All other intermediaries would be out of business unless they were willing to operate sans profit. If they should be out of business, that's up to Congress, not the Federal Trade Commission.

The trouble comes when the retailer function and the jobber function become joined—then we have a controversy such as in this instant case.

For the purpose of illustrating this point, let us assume:

You are a producer of gasoline. You sell gas to Jerry. Jerry pumps it out to the folks who drive up and say, "Fill 'er up." Jerry does a nice retail business. You sell him gas at the same price you sell all the other retailers in town. You are obeying the Robinson-Patman Act which says you mustn't give a cheaper price to one than another.

You also sell gas to Harold. Folks can't drive up to Harold's place and get 5 gallons. Harold won't mess around with the public—wiping

¹ The Senate and House bills originally contained references to classes of distribution. These were struck out before passage. See Senate Report 1502, p. 5, 74th Cong., 2d sess.; see also House Rept. 2287, 74th Cong., 2d sess.

windshields, putting water in radiators, etc. He buys from you in big batches and then resells it in smaller lots to retailers who have corner filling stations just like Jerry. Harold is a jobber. You sell him your gas at the same price you sell all the other jobbers in town, and that's O. K., too. Naturally, Harold's price is less than what you charge Jerry. In fact, it is $11\frac{1}{2}$ cents less, because Harold takes the job of distributing your gasoline off your hands. This is worth something besides just the money you save.

Now nobody is in hot water yet because each person is being treated "Even Stephen" according to the line of work he is in. But take a look at Bill across the street. Bill has a retail gas station. Folks drive up and use Bill's washroom while he put 5 gallons in their tank. That makes Bill a retailer. So you tell Bill you'll let him have your gas at your retailer's price.

Bill says, "Come with me."

He takes you around back and, lo and behold, Bill owns a side track for tank cars, delivery trucks for gas, and gigantic storage tanks. Then Bill takes you into his office. He shows you his books. Bill has plenty of money. He buys a million—2 million gallons a year, not in little truck wagon loads, but in big batches. Bill can do this because he sells to a lot of other retail stations besides using some himself.

Then there is Martin. Martin has just as big a lay-out as Bill but he doesn't even bother to sell to other retailers. Martin has so many retail outlets of his own that he operates a wholesale establishment just for his own filling stations.

Are Bill and Martin retailers or wholesalers?

To tell the truth, they are like Pooh-Bah in Gilbert and Sullivan's opera, the Mikado. It all depends on whether you look at them front or back.

But, being a big gasoline company, you can't afford to take any chances on Uncle Sam suing you for price discrimination.

So you say, "Bill and Martin, I'm sorry, old fellows, but you look like retailers to me. I'm going to have to charge you a cent and a half higher price than what I charge Harold, the jobber, who doesn't do any retail business of his own."

Bill and Martin, being vigorous American businessmen, resent this very much. Bill and Martin buy just as much as Harold buys. Their equipment is just as good. They take as much work off your hands as Harold does, and their money looks just as good as Harold's any day. They want the same treatment.

Now some folks think that because you are a big gasoline company, you can tell Bill and Martin to "take it or leave it." That's the way it

used to be in the old days. You used to be the big frog in the puddle. Nowadays the puddle is bigger, the frogs are bigger, and there are lots more of them.

Tell Bill he is a retailer and entitled only to a retailer's discount, and 5 seconds later all the other frogs put on their glasses and say, "Why, Bill, you look exactly like a jobber to me. We'll give you the jobber price!"

So you lose Bill to a competitor whose price you wouldn't meet, and maybe you lose a couple of more customers for the same reasons, about the same time.

This all makes life very complicated.

Million-gallon customers don't grow on trees, and tomorrow Martin is going to be around to see you about his cent and a half discount. Treat Martin like a retailer, you're out of business (at least, as far as Martin is concerned). Treat Martin as a jobber, Uncle Sam will sue you as a price discriminator (just as the Federal Trade Commission has done in this case).

When passing the Robinson-Patman Act, Congress has just such a dilemma in mind. So it added a proviso to the law (in sec. 2 (b), Robinson-Patman Act) which said in effect: "If somebody else is offering Martin or Bill gas for a cent and a half less, then you can, too, and show as a defense in a suit by the Federal Trade Commission that you were only meeting your competitor's price."

That's what Congress says, and on the 26th day of February of this year, the Federal Trade Commission agreed with Congress.²

But that's not what the Commission says in the instant case.

Now the Commission says you can't offer such a defense, regardless of the statute, and if by chance such a defense is admitted into the testimony, and if by chance it is proven by a greater weight of the evidence, and if in fact no testimony is offered in opposition, still the Commission will disregard such a defense.

If you apply the order in this instant case to the example I have just given, you will have to give Martin and Bill the lower jobber's price on all gas that they sell to other retail stations, but charge them the higher retailer's price on all gas they use in their own stations. In other words, they pay two different prices for the same gas in the same barrel, depending on what they use the stuff for.

That is what is known as "determining price by use."

² In the *Ferro* case, Docket 5155, the Commission provided that the order to cease and desist "shall not prevent the respondent manufacturers from showing that any lower price to any purchaser was made in good faith to meet an equally low price of a competitor." (42 F. T. C. 36 at 55).

This is foreign to the free enterprise system observed in our country. For the Commission to administer prices by determining which users shall be required to pay higher prices for a commodity than other users, tends to divide the distributive functions of our economy into hostile groups, each striving for government favoritism rather than for consumer acceptance.

It is time we moved the area of competition back into the open marts of trade where service and price to the consumer are the arbiters of success.

It is of interest to note that the social economic ideology of "determining price by use" embodied in the Commission's order was once considered and flatly rejected by Congress. "Pricing by use" was included in the House Committee (Judiciary) Report 2287 of March 31, 1936, Seventy-fourth Congress, second session. This is what it said:

For the purpose of such classification of customers as wholesalers or jobbers or retailers, the character of the selling of the purchaser and not the buying shall determine the classification, and any purchaser who * * * does both a wholesale and retail business shall, irrespective of quantity purchased, be classified as a wholesaler on purchases for sale to retailers only * * * and as a retailer on purchases for sale to consumers.

This ideology Congress refused to adopt and, before final passage of the Robinson-Patman Act, all such language was stricken from the bill.

There are those who feel this country requires such a channeling of a businessman's field of activity. This is strong medicine for a free economy to swallow. If needed, it is up to Congress and not this Commission to write the prescription. As yet, Congress has not seen fit to pass such bills that have been introduced to accomplish this end. Nor has Congress enacted any law preventing one from meeting his competitor's price. The competitive system still contemplates that the seller will get as much as he can and that the buyer will pay no more than he has to.

I cannot subscribe to an order that embraces what Congress specifically rejected.

Not only did Congress reject the ideology of "pricing by use," but obviously contemplating just such a situation as the instant case presents, embodied in the act a proviso in section 2 (b) as follows:³

Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * *

³ 49 Stat. 1526 (1936) ; 15 U. S. C. A. 13.

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to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *.

These words cannot be denied, and it is difficult to see how they can be ignored, but the decision in this case waives them aside, and the findings of facts and order have completely evaded any discussion of what the respondent proved by greater weight of the evidence (in fact, I find the testimony uncontroverted). The respondent proved that it had granted a lower price in good faith to meet a competitor's price. The trial examiner who heard the case so held, and I as a Commissioner would so find.

The Commission concludes as a matter of law that it is unnecessary for it to determine this fact. In my opinion, this is not sound. So far as the Federal Trade Commission is concerned, I believe deliberate and intentional matching of a competitor's lower price is legitimate as long as the proviso on section 2 (b) of the Clayton Act stays on the statute books.

It is lawful for a seller to meet a competitor's price, unless there is a showing that the meeting and matching is a planned, common course of action, resulting in a conspiracy in restraint of trade.

In the instant case, the respondent, having lost two customers because it would not meet the prices of its competitors, made up its corporate mind to hang on to what business it had left, and in good faith, and what appears to me only ordinary common sense, lowered its price to that of its competitors.

In my opinion, the rejection of this defense by the Commission is fatal to the validity of the order.

So much for the second point.

Let us next consider the findings of the Commission that "the effect of the discrimination * * * has been * * * substantially to lessen competition and to injure, destroy and prevent competition * * * in the resale of gasoline."

I take it, an injury to a competitor must be illegal before it can be banned. We mouth the phrase "injury to competition" so often that we confuse it with "injury to a competitor."

When you meet your competitor's lower price so as to keep a customer he sought to take away from you, he feels he has been injured. Of course he has, but that does not mean that competition has been injured. On the contrary, it may have been improved.

In theory, it would be nice if one could do business without having people come along and meet his price. But in a free economy people are always trying to do that very thing; inveigling customers away by better services or cheaper prices. That's the consumers' protec-

tion. The well established companies refer to these people as "chiselers." Those who are not well established, and who are trying to secure a foothold in the market place, refer to the well established companies who meet their lower prices as "monopolists" or "price discriminators." It all depends on which foot the shoe is on.

The man who sells a customer something for less is entitled to his patronage, but he must not expect a monopoly on that patronage. As long as the proviso in section 2 (b) stands, others are free to come in and take a shot at the goose, too.

In my opinion, the testimony showing injury to competitors in this case is in reality a demonstration of the existence of competition.

There is another phase of this order bearing on the question of competition which warrants scrutiny.

As long as a buyer can get goods of like grade and quality at the same price or even less, he cannot claim competition has been injured because you refuse to sell him your goods at the price he wants to pay. This prohibition against discrimination is specifically limited by the statute to the grade and quality of the products sold, and has nothing to do with the popularity of the merchant or his brand, or the public acceptance of trade names.

The act makes no mention of "major brands" or "off-brand" commodities. Its sole criterion, so far as the words of the statute are concerned, has to do with the physical properties of the commodity. The reason for this is obvious. Congress realized the impracticality of weighing the mercurial popularities of name acceptance in determining discrimination. Hence, it set the standard of discrimination on a factual rather than on a beauty contest basis.

Grade and quality are stable things, determinable with mathematical certainty. There is no danger in empowering a commission to ascertain grade or quality—but "public acceptance!" How are we to determine what is a major or a minor brand, and how much differential shall be justified from one to the other? When Congress gives us that power, there will be time enough to worry about the many possibilities of abuses which can grow out of such authority.

As the law now stands, a discriminatory price is lower than what others have to pay to obtain goods of "like grade and quality." It has nothing to do with the relative popularity of brand names.

To illustrate: Let's suppose you are producing a gasoline that is sold on name acceptance but which is of the same grade and quality as many other gasolines which have no trade names. The unbranded gas sells for from 2 to 6 cents under what you sell your branded gas for.

You call your product Kelley's Kreem Gas (fictitious name, of course). It is accepted everywhere; everybody knows the name. You sell it for 12 cents to Bill. That is 1½ cents under the retailer price Jerry pays.

Jerry runs to the Federal Trade Commission and complains he is being discriminated against.

"Does it hurt?" asks the Commission.

"Of course it hurts," says Jerry. "I want Kelley's Kreem Gas at the same price Bill, the jobber, pays."

The Federal Trade Commission looks at the law. "It doesn't say anything here in the statute about Kelley's Kreem Gas. In fact, the statute doesn't even mention brand names; it just says that discrimination in price of goods of 'like grade and quality,' *if it tends to prevent competition*, shall be unlawful.

"Now, can you get gas just as good in grade and quality as Kelley's Kreem from other folks for a lot less?"

"Sure," says Jerry. "There is plenty of competition willing to sell me gas of like grade and quality for even less than Kelley sells to Bill. But I want Kelley's Kreem Gas."

"All right, all right," says the Federal Trade Commission. "Congress used the words, 'of like grade and quality.' I'll interpret it to read, 'of like grade, quality or brands.'"

"Then I'll enter an order against Kelley's Kreem saying he mustn't sell such gas at different prices. This will let everybody else sell unbranded, but just as good, gas for any price they want."

Let us take a careful look at the order in the instant case to see if I have paralleled my example with the facts at hand.

The report of the Federal Trade Commission trial examiner in the instant case lists 9 "major" companies in the Detroit area. He lists 3 companies as "doubtful," using as his yardstick the fact that some witness did not list them as "major," and then he describes 10 other companies as secondary. This cataloging has nothing to do with the quality of the gas sold but relates to the relative importance of the companies.

These secondary companies who merchandise relatively unknown brands, plus the unbranded gas sold by the "doubtful" major companies, amount to about 12 percent of the total Detroit business. This gas is sold for as much as 6 cents off the branded price and always at least 2 cents off.

The sole difference, so far as the record indicates, is that 88 percent of the gasoline sold in the Detroit area carries a brand name, while 12 percent is unbranded. There is no distinction as to quality or grade.

This would indicate that at no time were there any competitors shut out from buying gasoline of like grade and quality at prices ranging from 2 to 6 cents less than they were paying, and at a price always less than the respondent's so-called discriminatory price.

As long as the other gas of like grade and quality was offered for sale at a lower price, where could there be injury to competition except on a plane that was not contemplated by Congress, namely, on a plane between names and not qualities or grades?

In the *Corn Products* case,⁴ the discriminations were in "feed and meal," not in "Joe Blow's Feed" or "Blue Plate Meal." In the *Corn Products* case there was no effort to add words to the statute so that the Commission could hold a popularity contest on public acceptance. There the determination only had to be that the feed and meal were of the same grade and quality. In the instant case, the facts are that at all times there were plenty of competitors offering gas of as good grade and quality as the respondent at prices lower than respondent's so-called discriminatory prices.

I point this out because in the case under consideration, neither the respondent nor the trial attorney has seen fit to stress the point. Perhaps the respondent doesn't like to admit there is unbranded gas of the same grade and quality as its own product, and the trial attorney would find it difficult to prove injury to competition in like grades and qualities if it were shown that there was plenty of gas of like grade and quality available at much less than the alleged discriminatory price of the respondent.

The instant case has important public aspects and the Commission is entitled to consider all the facts involved before entering an order. There were two orders entered in this case, an original, entered prior to my membership on the Commission, and a modified order now being considered. Let us look at them.

The original order referred to gasoline "of like grade and quality." This was subsequently changed so as to refer to only the gas described in the findings, namely, three brands—"Solite with Ethyl," "Red Crown" and "Stanolind," and all reference to the statutory language "of like grade and quality" was stricken.

There might be a moral if not a legal justification for this tinkering with an act of Congress if one considers that without such an amendment the unknown producers would be at a great disadvantage, but perhaps the reason for the change lies deeper. If the order were left in the words of the statute, it would be impossible to deny that there was plenty of gas of like grade and quality available at much less than

⁴ 324 U. S. 726; 65 Sup. Ct. 961.

the alleged discriminatory price of Standard. This being true, the charge of injury, or even potential injury, flies out the window—for no one was injured by being shut out from buying gas of like grade and quality.

Now let us consider the fourth reason for this dissent.

The findings do not disclose facts sufficient to warrant the Commission assuming jurisdiction. If the Commission felt the evidence supported a conclusion that the purchases involving discriminatory prices were in interstate commerce, it should have so found. The Commission did not so find. It found that the respondent was engaged in interstate commerce. It avoided any reference to the actual purchases which under the statute I believe must be shown to have been in interstate commerce. This is not enough. The statute is explicit that the "purchases involved in such discriminations" must be in interstate commerce.

The inhibition does not include every action by a company engaged in interstate commerce, but is limited to those acts which themselves are in interstate commerce.

In my opinion, the Commission in this case has dealt with the facts and the law just as Procrustes dealt with the unfortunate guests who slept in his bed. The Commission has cut off the facts of the case that do not fit in with the order, and it has stretched out the statute until it is no longer the law Congress passed but becomes the law that the Commission would like to enforce. It requires private policing of one man's business by another. It freezes the avenues of trade to set patterns. It eliminates the profit for one type of distributor and guarantees the profit to another. It subjects branded goods to restrictions not applied to unbranded goods. It attempts to settle a private struggle between enterprisers by opening a Pandora's box of governmental directives on a minutia of accounting and distributing practices that bear scant relation to what Congress sought to inhibit.

I am against it.

Order

43 F. T. C.

IN THE MATTER OF
A. P. W. PAPER COMPANY, INC.

MODIFIED ORDER TO CEASE AND DESIST

Docket 4747. Order, August 12, 1946

Modified order, pursuant to the provisions of section 5 of the Federal Trade Commission Act, and in accordance with decree below referred to, in proceeding in question, in which (1) original order issued on January 7, 1944, 38 F. T. C. 1; (2) the Circuit Court of Appeals for the Second Circuit in *A. P. W. Paper Company, Inc. v. Federal Trade Commission*, 149 F. (2d) 424, 40 F. T. C. 921, rendered its decision and on May 17, 1945, entered its decree reversing the Commission's said order and remanding the cause to the Commission for further proceedings in conformity with its opinion; (3) the Supreme Court on May 6, 1946, in *Federal Trade Commission v. A. P. W. Paper Company, Inc.*, 328 U. S. 193, 66 S. C. 932, 42 F. T. C. 909, affirmed the decision of said circuit court of appeals, and on June 19 issued its mandate affirming the judgment of said court; and, (4) said court of appeals on June 21, 1946, entered an order to the effect that the judgment of said Supreme Court be made its judgment, and that the decision of the said circuit court be affirmed—

Requiring respondent herein, its officers, etc., in connection with the offer, etc., of respondent's toilet tissues and paper towels in commerce, to cease and desist from using, subject to the permissible limits prescribed by a certain act of Congress as amended, the words "Red Cross", etc., as in said order below set out.

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Marshall Morgan for the Commission.

Sullivan & Cromwell, of New York City, for respondent.

MODIFIED ORDER TO CEASE AND DESIST

This matter coming on for further proceedings before the Federal Trade Commission, and it appearing that on January 7, 1944, the Commission made its findings as to the facts herein and concluded therefrom that the respondent A. P. W. Paper Co., Inc., had violated the provisions of the Federal Trade Commission Act, the Commission on January 7, 1944, issued, and thereafter served its order to cease and desist upon said respondent A. P. W. Paper Co., Inc.

Thereafter on February 16, 1944, respondent company filed in the United States Circuit Court of Appeals for the Second Circuit its petition to review and set aside the Commission's said order to cease and desist. On May 17, 1945, said court entered its decree reversing the Commission's said order and remanding the cause to the Commis-