

of July 1961, become the decision of the Commission; and, accordingly:

*It is ordered*, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

---

IN THE MATTER OF  
SHULTON, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE  
CLAYTON ACT

*Docket 7721. Complaint, Jan. 5, 1960—Decision, July 25, 1961*

Order requiring a manufacturer of toiletry, chemical, and pharmaceutical products with main office in Clifton, N.J.—with total sales in 1958 in excess of \$37,000,000—to cease violating Sec. 2(d) of the Clayton Act by such practices as paying to J. Weingarten, Inc., of Houston, Tex., \$6,000 as compensation for newspaper advertising of one of its deodorant products in connection with the chain's anniversary sales.

*Mr. Fredric T. Suss* and *Mr. Timothy J. Cronin, Jr.*, for the Commission.

*Howrey, Simon, Baker & Murchison*, by *Mr. David C. Murchison* and *Mr. Richard L. Perry*, of Washington, D.C., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

The respondent is charged with having made discriminatory payments to some of its customers in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Subsequent to the issuance of the complaint, respondent filed a number of pleadings, but it will serve no purpose to make a recital

thereof, in that respondent, in its last answer filed pursuant to Rule 3.7 of the Rules of the Commission, elected not to contest the allegations of fact set forth in the complaint, admitted all material allegations to be true and waived a hearing as to the facts so alleged. In such answer the respondent reserved the right to submit proposed findings of fact and conclusions of law, and such other rights as it may have in the premises.

The findings of fact and conclusions of law, and other requests proposed by the parties, not hereinafter specifically found or concluded, are herewith rejected. The Hearing Examiner, having considered the record herein, makes the following findings of fact and conclusions:

1. Respondent, Shulton, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 697 Route 46, Clifton, New Jersey.

2. Respondent is now and has been engaged in the business of manufacturing, selling and distributing toiletry, chemical and pharmaceutical products. It sells its products to retail chain store organizations, independent drug and grocery stores, department stores, and wholesalers throughout the United States, and certain countries in Europe and Latin America. Respondent's total sales are substantial, having exceeded \$37,000,000 in the year 1958.

3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in New Jersey, to customers located in other states of the United States, and certain countries in Europe and Latin America.

4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

5. An example of the kind of activities which occurred in the course and conduct of respondent's business as found in paragraph 4 above is that during the year 1958, respondent contracted to pay and did pay to J. Weingarten, Inc., \$6,000 as compensation or as

## Opinion

59 F.T.C.

an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of products of like grade and quality purchased from respondent.

## CONCLUSION OF LAW

The foregoing facts as alleged and admitted support the following conclusion:

The acts and practices of respondent are in violation of subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

## ORDER

*It is ordered.* That respondent, Shulton, Incorporated, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the sale in commerce, as "commerce" is defined in the Clayton Act, as amended, of toiletry products, chemical products, pharmaceutical products or other merchandise, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of J. Weingarten, Inc., or any other customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of respondent's products, unless such payment is made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

## OPINION OF THE COMMISSION

By SECREST, *Commissioner*:

This matter has come on for hearing on respondent's appeal from the initial decision of the hearing examiner filed January 5, 1961. The complaint charged respondent with violating subsection (d) of Section 2 of the Clayton Act, as amended. The following allegations were made therein:

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such pay-

ments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, during the year 1958 respondent contracted to pay and did pay to J. Weingarten, Inc., \$6,000 as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of products of like grade and quality purchased from respondent.

The hearing examiner's initial decision was based on the complaint and an answer filed by respondent pursuant to § 3.7(a)(2) of the Commission's Rules of Practice admitting all material allegations of fact set forth in the complaint. Respondent has appealed from a ruling of the hearing examiner and from the order to cease and desist contained in the initial decision. Since two of the arguments in this appeal are based primarily on the alleged failure of the hearing examiner to consider the entire record in making his initial decision, we will summarize briefly what transpired prior to respondent's filing an admission answer.

The complaint herein was issued by the Commission on January 5, 1960. After having been granted an extension of time within which to file its answer, respondent by motion filed March 23, 1960, requested an order directing counsel supporting the complaint to furnish a bill of particulars and further requested a pre-hearing conference on said motion. This conference was held on May 19, 1960, but, prior to that date, respondent filed its answer admitting in part and denying in part the allegations of the complaint. A second pre-hearing conference was held on June 23, 1960, at which time respondent moved for leave to adduce evidence that payments for services and facilities to one of its customers had been made in good faith to meet payments and allowances granted that customer by a competitor. This motion was denied by order of the hearing examiner filed June 28, 1960. Thereafter, respondent moved for and was granted leave to file an answer pursuant to § 3.7(a)(2) of the Rules of Practice. An answer which included a motion to dismiss was filed by respondent on July 11, 1960. In reply thereto, counsel supporting the complaint contended that respondent's answer failed to admit all material allegations of the complaint and requested that hearings be scheduled for the purpose of proving that allegations not admitted by respondent were true and to controvert certain statements made in respondent's answer. Respondent then moved that the proceedings be closed. The hearing examiner denied this motion by order dated September 9, 1960, and

scheduled an initial hearing. Respondent then filed its answer admitting the material allegations of the complaint.

We will consider first respondent's contention that the hearing examiner erred in failing to limit the scope of the order to the practice disclosed by the record or to practices reasonably related thereto. It argues in this connection that counsel supporting the complaint had stated at the conference held on May 19, 1960, that the evidence in the case related solely to payments and allowances made by respondent to one customer, J. Weingarten, Inc. It further argues that as a result of this understanding, it filed an answer wherein it made the following admission:

Payments made to J. Weingarten, Inc., in 1958 and 1959 in connection with the chain's anniversary sales described in the Federal Trade Commission's press release (January 20, 1960) accompanying the complaint herein were compensation for newspaper advertising by J. Weingarten, Inc. of one of respondent's deodorant products, and none other. Said newspaper advertising for 1958 is attached hereto and made a part hereof as Exhibit 1 (answer, July 11, 1960, par. 5).

Stated briefly, respondent's version of the facts of record is that J. Weingarten, Inc., solicited and induced payments from respondent for newspaper advertising of one of respondent's deodorant products, which payments, respondent apparently concedes, were not made available on proportionally equal terms to other purchasers of such products competing with Weingarten. Respondent contends, therefore, that the only practice involved in this case was participation by respondent in a buyer sponsored promotion and that this participation extended only to the making of payments for newspaper advertising to be furnished by the customer in connection with the sale of only one of respondent's products. Consequently, respondent argues, the order to cease and desist should go no further than to prohibit this specific practice.

Respondent's argument must be rejected for two reasons. First of all, an examination of the transcript of the pre-hearing conference held on May 19, 1960, discloses that counsel supporting the complaint did not indicate to respondent that the case to be ultimately presented in support of the complaint would be restricted to evidence relating solely to respondent's transactions with a single customer. Moreover, the record fails to show that any order of the hearing examiner or other document was entered on the record pursuant to the requirement of § 3.10(b) of the Rules of Practice that the "record shall show the matters disposed of by agreement" in a pre-trial conference. The record does disclose, however, that subsequent to the conference in question, counsel supporting the complaint twice requested that hearings be held for the purpose of

proving allegations not admitted by respondent and for the purpose of controverting statements made by respondent, which statements respondent now contends are facts of record. Hence, we find no substance to respondent's argument that the record discloses any pertinent facts concerning the alleged unfair trade practice other than those set forth in the complaint and admitted in the answer filed by respondent pursuant to § 3.7(a)(2) of the aforementioned rules.

Secondly, we would not limit the order in the manner requested by respondent even if the evidence of a violation related solely to respondent's participation in the Weingarten promotion. The order proposed by respondent would prohibit it from granting discriminatory allowances only, among other things, when such allowances are induced by the customer and only when the service or facility furnished by the customer is newspaper advertising. Such an order would be virtually worthless since it would do little more than prohibit respondent from engaging in the illegal practice by the same means it had previously employed. Contrary to respondent's assertion, there is no mandate, or even a suggestion, in the legislative history of the Clayton Act Finality Act (P.L. 86-107, 86th Cong., July 23, 1959) that the Commission should issue orders of such narrow scope. While certain members of Congress have expressed the need for clear, understandable orders, we find no indication in the Committee reports or elsewhere in the legislative history of the aforementioned statute that Congress intended that Clayton Act orders should prohibit only the specific acts engaged in by a respondent rather than the practices condemned by the statute.

Respondent's argument confuses the discriminatory practice alleged in the complaint with the acts by which this practice may have been manifested. Respondent is charged in this connection with violating Section 2(d) of the Clayton Act. The specific practice declared illegal by this subsection is the making of discriminatory payments by a seller to a buyer for advertising or promotional services or facilities rendered by the latter. The record shows that respondent has engaged in this practice and the order merely prohibits it from doing so again.

In further excepting to the order, respondent has interpreted such order to require that if it elects to accord advertising or promotional allowances on any product within a product line, such as toiletries, such allowances must be granted on all other products within that line, including those which are not of like grade and quality. Section 2(d), of course, does not impose such a requirement, but neither, however, does the order to cease and desist. Although the order

covers all products which respondent sells, respondent will be required thereby to extend allowances granted in connection with a particular product only to those customers competing in the distribution or resale of that product or products of like grade and quality purchased from respondent.

Respondent has also taken exception to the hearing examiner's ruling denying its request for leave to adduce evidence that payments for services and facilities to one of its customers had been made in good faith to meet payments and allowances granted that customer by a competitor. This ruling is consistent with the views expressed by the Commission in the matters of *Henry Rosenfeld, Inc.*<sup>1</sup> and *Exquisite Form Brassiere, Inc.*<sup>2</sup>, wherein we held that the meeting competition defense set forth in the Section 2(b) proviso is not available as a matter of law to a respondent charged with violating Section 2(d). The question was carefully considered in both cases and there is nothing in respondent's briefs which convinces us that we should now adopt a position contrary to that which we have previously taken. The argument is therefore rejected.

The appeal of respondent is denied and the initial decision is being adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman dissented and Commissioner Kern dissented joining Commissioner Elman.

#### DISSENTING OPINION OF COMMISSIONER KERN

Heeding Cromwell's plea: "I beseech ye think that ye may be mistaken", and following the mandate of such enlightened skepticism, I have carefully reviewed my own prior views on the identical question raised by this proceeding<sup>1</sup>—views still held by the majority.

The problem of statutory construction before us here is a difficult one; to disguise the difficulties or the closeness of the question is to apply gloss. In such a situation it is necessary to wrestle with doubt—and in this case even to wrestle with my own prior views—and doubt can sometimes be more cruel than the worst of truths. The line between the words of a statute and the purpose behind it is a difficult one to determine. It is hard to be true to both. I have always been sensitive to the possible accusation of going beyond law interpreting and of entering the prohibited area of law making. Perhaps it was my reticence in this regard that brought me when this problem was presented earlier to the Commission to side with

<sup>1</sup> *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956).

<sup>2</sup> *Exquisite Form Brassiere, Inc.*, Docket No. 6966 (1960).

<sup>1</sup> *Exquisite Form Brassiere, Inc.*, Docket 6966, decided October 31, 1960.

the majority. While I still respect their views, I find persuasive the cogent analysis by Commissioner Elman of the legislative materials. Without repeating it except by reference, I find in that analysis ample justification to depart from the strict words of the statute. I am fortified in that conclusion by the belief that in doing so it removes what otherwise would be a serious dissonance in connection with the application of the Robinson-Patman Act, for the close interrelationship between Sections 2(d) and 2(e) is beyond argument and consistency in their application is clearly desirable. I am also fortified by the fact that in dealing with this difficult statute the courts previously have found it necessary to supply words which were considered to be intended<sup>2</sup> and I am further fortified by certain statements made in oral argument by counsel supporting the complaint in this proceeding.<sup>3</sup>

I am also influenced by the recent decision of *Delmar Construction Co. v. Westinghouse Electric Corp.*<sup>4</sup> This case was decided on February 24, 1961 and was therefore not available to us as a precedent when the *Exquisite Form Brassiere* case was before us for consideration. In the *Delmar* case plaintiff's complaint charged a violation of Section 2(d) of the Robinson-Patman Act. The defense of 2(b) being raised by the defendant, plaintiff moved to strike such defense from the answer. The court in denying the motion, squarely held that "the 'meeting competition' defense of § 2(b) of the Robinson-Patman Act is applicable to cases arising under § 2(e) of the Act . . . and, because of the close inter-relation of § 2(d) and § 2(e), it is both logical and reasonable to likewise recognize such defense in cases arising under § 2(d) . . ." [citations omitted]. It seems to me that this recent and sole direct precedent of a federal court on this question is entitled to more than the usual precedential weight of such decisions. Especially is this true where it brings harmony to the statute and is supported by a viable theory of legislative interpretation.

I realize the vice inherent in any deciding authority's struggling to bring artistic symmetry to a statute by blurring clear statutory language; to attempt to rebuild a statutory edifice along symmetric lines may have artistic but not legal justification. But this is not to say that one should ignore the meaning and overall objectives

<sup>2</sup> E.g., *Elizabeth Arden Sales Corp. v. Gus Blas Co.*, 150 F. 2d 988, 991-993 (8th Cir. 1945), cert denied 326 U.S. 773 (1945), in which the court did not hesitate to build into Section 2(e) the "commerce" prerequisite that Congress omitted, and *Atlanta Trading Corp. v. Federal Trade Commission*, 258 F. 2d 365, 369 (2d Cir. 1958), in which the words "of like grade and quality" were judicially supplied to Section 2(d).

<sup>3</sup> Tr. of oral argument, p. 37, 1. 17-25; p. 42, 1. 18-20.

<sup>4</sup> CCH Trade Reg. Rep. Par. 69,947 (S.D. Fla. 1961).

that those drafters of the statute, as evidenced by the progression of the legislation to final enactment, meant to achieve.

To be bound by prior precedent of the Commission, which when uttered expressed my own views, after I have come to believe otherwise, would be unworthy of my statutory trust. If my present judgment tells me that my prior views were wrong, it seems desirable to say so; for it would seem more commendable to lay aside all else and seek truth rather than try to make my prior views prevail. This is not to say that truth has now been found; it is only to say that there has been a conscientious and continuing struggle to achieve it. The great body of our law has been built up in just that way.

In conclusion, having striven with the words of the statute, with the legislative materials out of which the intended meaning and overall objectives must be distilled, and with the entire record in this proceeding, I have reached, obviously with considerable difficulty and with humility, my decision to join Commissioner Elman in dissent.

*Commissioner ELMAN, dissenting:*

The question of statutory construction presented by this case—whether a seller charged with having paid discriminatory allowances to some customers for advertising or other services or facilities, in violation of Section 2(d) of the Robinson-Patman Act, may defend under Section 2(b) by showing that the payments were made in good faith to meet competition—is an open one. Although the Commission has passed on it several times, most recently in *Exquisite Form Brassiere, Inc.*, Docket 6966, decided October 31, 1960, the issue has not been considered and decided by any appellate court. The *Exquisite Form* case is now pending on review in the Court of Appeals for the District of Columbia Circuit; and, with all deference to the position there taken by the Commission, it seems to me that the persuasive arguments to the contrary presented in Commissioner Tait's dissenting opinion have not yet been answered. It would serve no useful purpose to repeat those arguments here, and I shall add only a few marginal comments.

1. The Supreme Court's holding in *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231, that Section 2(b) provides an absolute defense, and does not merely shift the burden of going forward with evidence, would seem irrelevant to the instant problem. Nevertheless, the defeat suffered by the Commission in that case seems to have left its mark here. There the Commission had

relied heavily on the legislative history to support its view. The majority of the Supreme Court, however, found the language of the section to be controlling and rejected the arguments drawn from the legislative history. It does not follow, however, that the *Standard Oil* decision has established a different or special rule of statutory construction for Section 2(b), under which legislative history is to be downgraded or given less weight than in the case of other enactments.

I am sure the Commission would reject such a reading of the majority opinion in the *Exquisite Form* case, but it almost seems to say: "If the Supreme Court wishes to ignore the legislative history of Section 2(b), as it did in the *Standard Oil* case, and to base construction solely on a 'literal interpretation of the language of the statute', well so be it and we shall do the same in dealing with every other problem arising under that section." It is one thing not to read into a law that which has been deliberately omitted by the Congress; it is something else again to stick in the bark of words and to reject all aids to construction beyond the language itself. In construing a statute, one always begins with its words. But it is not very often that a court or agency can safely stop there. John Marshall was not announcing a novel principle in *United States v. Fisher*, 2 Cranch 358, 386 (1804), when he wrote: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived \* \* \*."

Confining inquiry to the "literal" or "precise" terms of a statute is more treacherous than it would seem to a layman; for, as Judge Learned Hand has observed, there "is no surer way to misread any document than to read it literally."<sup>1</sup> One may, and frequently must, look to the legislative history "to see whether that raises such doubts that the search for meaning shall not be limited to the statute itself."<sup>2</sup> This would seem particularly appropriate in dealing with a statute like the Robinson-Patman Act as to which, the Supreme Court has noted, "precision of expression is not an outstanding characteristic."<sup>3</sup> The Court may have erred, as some believe, in the

<sup>1</sup> *Guiseppi v. Walling*, 144 F. 2d 608, 624 (C.A. 2) (concurring opinion).

<sup>2</sup> *Employees v. Westinghouse Corp.*, 348 U.S. 437, 444 (opinion of Frankfurter, J.).

<sup>3</sup> *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 65. It has become almost conventional, when lawyers gather to discuss the Robinson-Patman Act, to deplore its verbal infelicities. E.g., Frederick M. Rowe, in 17 A.B.A. (August 1960) Antitrust Section Proceedings, p. 310: "a cryptic and sloppy statutory text, which literally invited extreme and controversial interpretation." The Commission has also been frequently reminded of its responsibility, as the agency charged with enforcement of the law, for achieving coherent interpretation and administration, within the permissible limits of its function. E.g., Mr. Justice Jackson in *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 480 *et seq.* (dissent).

construction which it gave to Section 2(b) in the *Standard Oil* case; but surely it did not hold or even suggest that legislative history, as a relevant aid to construction, is to be given less significance in construing Section 2(b) than in the case of other statutes.

2. Turning to the "precise language" of Section 2(b), I find it to be by no means as "specific" as my colleagues apparently do. So far as pertinent here, it provides:

Upon proof being made \* \* \* that there has been discrimination in \* \* \* services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section \* \* \*: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that \* \* \* the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet \* \* \* the services or facilities furnished by a competitor.

Broadly speaking, the type of unfair trade practice which Congress outlawed in Section 2 of the Robinson-Patman Act consists of a seller's discriminating in favor of one or some of his customers at the expense of others, thereby putting the latter at a substantial competitive disadvantage. Viewed in the light of this manifest statutory design, it does not stretch the language of Section 2(b), "the furnishing of services or facilities," to read it as including both direct and *indirect* furnishing of services or facilities, through payment of allowances, reimbursements, or the like. Certainly, so far as the realities of the market are concerned, an unfavored purchaser is no less disadvantaged by the indirect furnishing of services or facilities to his competitors through such payments. It is only when Section 2(b) is read in conjunction with Sections 2 (d) and (e) that one is given pause in reaching this conclusion. For Congress has dealt specifically and separately with indirect and direct furnishing of services or facilities, explicitly proscribing the former in subsection (d) and the latter in subsection (e). Since subsection (e) relates expressly to the "furnishing" of services or facilities, and subsection (d) to the "payment of anything of value \* \* \* for any services or facilities furnished," the Commission apparently feels constrained by this differentiation in the terms and structure of the Act to conclude that Section 2(b), in its reference to "the furnishing of services or facilities," must be construed to apply only to subsection (e) and not to subsection (d).

While the Commission's construction of the statute may produce a strange result from the standpoint of economic realities, that is, of course, no reason for rejecting it. We must take the statute as

we find it; and if the statute contains inconsistencies or incongruities, the remedy is for Congress, not the agency created by it to enforce the law. But we must also be mindful, in approaching the Robinson-Patman Act no less than other enactments, of the Supreme Court's admonition that "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."<sup>4</sup> And here, as Commissioner Tait pointed out in his dissenting opinion in the *Exquisite Form* case, the legislative history of the Robinson-Patman Act, unilluminating and obscure though it may be in other respects, supports "a reasonable application" of Section 2(b) "consistent with [its] words and with the legislative purpose."

3. Senator Robinson's bill, S. 3154, and Representative Patman's bill, H.R. 8442, as originally introduced in June 1935 at the 74th Congress, 1st Session, were identical. Neither bill contained two provisions which ultimately emerged in the final legislation: the 2(b) defense of meeting competition in good faith; and the express 2(e) prohibition against discriminatory furnishing of services or facilities. However, both bills contained a provision—numbered Section 2(c)(1)—prohibiting the payment of "anything of value \* \* \* for any services or facilities furnished \* \* \*." This prohibition was essentially similar to what is now Section 2(d).

Section 2(b) first came into the legislation by an amendment made on the floor of the Senate. "As reported out of Committee," the Supreme Court noted in *Federal Trade Commission v. Simplicity Pattern Company*, 360 U.S. 55, 70, note 17, the Senate bill "contained neither a provision comparable to § 2(b) nor one comparable to § 2(e). S. Rep. No. 1502, 74th Cong., 2d Sess. A provision identical to § 2(b) was adopted as a floor amendment at a time when the bill did not in terms even cover the furnishing of services and facilities. 80 Cong. Rec. 6435-6436. The short debate on the amendment is not enlightening." Accordingly, when the Senate added Section 2(b), with its reference to "furnishing of services or facilities," those words, unless absolutely devoid of any meaning or significance, had to mean "furnishing of services or facilities" of the *indirect* kind proscribed in Section 2(c)(1) of the original bill (renumbered 2(d)(1) in the bill as passed by the Senate), which was the *only* kind of "furnishing of services or facilities" expressly prohibited by the bill at that time. It would seem too clear for argument, therefore, that as passed by the Senate, Section 2(b)

<sup>4</sup> *Haggar Co. v. Helvering*, 308 U.S. 389, 394.

## Order

59 F.T.C.

was unquestionably available as a defense to what is now known as a Section 2(d) violation.

H.R. 8442 was later amended in the House to add Section 2(e) as well as 2(b). But there is nothing in the legislative materials to suggest that the House, by adding subsection (e), thereby altered or reduced the scope of Section 2(b), which remained in the form adopted by the Senate, so as to knock out its application to Section 2(d)—which *was* in the Senate bill. Surely, if the House—or any member responsible for the handling of the legislation had any design to bring about such an inexplicable result, there would be some indication to that effect in the legislative history. There is none.

The evolution of the Robinson-Patman Act through the legislative process, with all the various adding and subtracting amendments, is enveloped in clouds, and one must be wary not to distill too much from the legislative materials. But this much, at least, seems clear: no distinction appears to have been drawn in the debates, so far as their economic nature or effect was concerned, between the furnishing of services or facilities directly (subsection (e)) and indirectly through compensating allowances and payments for such services and facilities (subsection (d)). It is conceivable that Congress may have intended that the “good-faith meeting of competition” defense provided by Section 2 (b) should be available in the one instance, but not the other, despite their essential similarity. If the language compelled such a curious result, we would of course be bound by it. But, viewing the statute as part of a legislative process having a history and a purpose from which its words cannot be severed without being mutilated, and bearing in mind that the Robinson-Patman Act is directed to economic realities and not abstract or theoretical relationships, I must respectfully dissent.

## FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

*It is ordered*, That respondent, Shulton, Inc., shall, within sixty (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 the order to cease and desist.

Commissioner Kern dissenting and Commissioner Elman dissenting.

## Decision

## IN THE MATTER OF

## BENNER TEA COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT*Docket 7866. Complaint, Apr. 19, 1960—Decision, July 25, 1961*

Order dismissing complaint charging with knowing inducement of discriminatory payments from suppliers, a corporate operator of a chain of retail grocery stores which was sold more than a month prior to issuance of the complaint, resulting in complete change of ownership.

*Mr. John Perry* for the Commission.

*McDermott, Will & Emery*, by *Mr. James O. Smith*, of Chicago, Ill., for respondent.

## INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on April 19, 1960, issued its complaint herein, charging the above-named respondent with having violated the provisions of § 5 of the Federal Trade Commission Act (U.S.C. Title 15, § 45) in certain particulars, and respondent was duly served with process.

On May 8, 1961, there was submitted to the undersigned hearing examiner, by counsel supporting the complaint, a Motion to Dismiss, setting forth the following facts and circumstances:

The above-mentioned complaint was issued against Benner Tea Company, an Iowa corporation, with its office and principal place of business located at 3400 Mt. Pleasant Street, Burlington, Iowa. More particularly, Paragraph Five of the complaint states as follows:

PAR. 5. In the course and conduct of its business in commerce, and particularly since 1957, respondent has knowingly induced or received from some of its suppliers the payment, or contracts for the payment, to it or for its benefit, of money or other things of value as compensation or in consideration for services or facilities furnished by or through respondent in connection with the sale or offering for sale of products sold to it by said suppliers. But such payments were not made available by such suppliers on proportionally equal terms to all their other customers competing with respondent in the sale and distribution of such suppliers' products.

An answer was duly filed to the complaint herein; but it was filed by Benner Tea Company, a Delaware corporation, and not by