

Complaint

59 F.T.C.

It is further ordered, That the hearing examiner's initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

By the Commission, Commissioner Anderson concurring in the result and Commissioner Kern dissenting.

IN THE MATTER OF

SUNSHINE BISCUITS, INC.

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

Docket 7708. Complaint, Dec. 22, 1959—Decision, Sept. 25, 1961

Order requiring a substantial manufacturer of potato chips, peanut butter, biscuits, cookies, and pretzels, among other food products, with net sales in 1958 of approximately \$180,000,000, to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by granting, through its Velvet-Krun-Chee Division, 5 per cent volume plus 2 per cent cash discounts on "Krun-Chee" potato chips to certain large retail grocery and drug chains in Cleveland, Ohio—including Marshall-Miller Drugstores, Pick-N-Pay Supermarkets, Foodtown Supermarkets, and Fazio Markets—while not offering the discounts to competitors of the chains.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Sunshine Biscuits, Inc., has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues this complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Sunshine Biscuits, Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 29-10 Thomson Avenue, Long Island City 1, New York.

PAR. 2. Respondent is now, and for a number of years has been, engaged in the business of manufacturing, selling and distributing various products, including grocery products such as potato chips, peanut butter, biscuits, crackers, cookies and pretzels, to wholesale distributors, retail grocery and drug chains and individually operated retail outlets. Deliveries by respondent to purchasers and customers have been, and are now, made largely either directly from respondent's manufacturing plants or through its distributing branches. Respondent's net sales amounted to approximately \$180,000,000 in 1958.

PAR. 3. In the course and conduct of its business, respondent has

been engaged and is presently engaged in commerce, as "commerce" is defined in the amended Clayton Act.

PAR. 4. In the course and conduct of its business in commerce, respondent has been and is now in competition with other corporations, partnerships, firms and individuals engaged in the manufacturing, selling and distributing of various products, including potato chips, peanut butter, biscuits, cookies and pretzels.

PAR. 5. In the course and conduct of its business in commerce, respondent, through its Velvet Peanut Products—Krun-Chee Potato Chips Division (hereinafter referred to as Velvet—Krun-Chee Division), has manufactured and sold, and is presently manufacturing and selling, potato chips under the brand name "Krun-Chee," as well as several varieties of peanut butter. The manufacturing plant of this division is located at 14471 Livernois Avenue, Detroit, Michigan.

PAR. 6. In the course and conduct of its business in commerce, respondent, through its Velvet—Krun-Chee Division, has sold and is now selling certain products to some purchasers at prices substantially higher than those charged other purchasers of these products of like grade and quality who have been and are now competing with said unfavored purchasers.

For example, respondent, through its Velvet—Krun-Chee Division, has granted and is now granting certain large retail grocery and drug chains located in Cleveland, Ohio, 5 percent volume plus 2 percent cash discounts on "Krun-Chee" potato chips. These 5 percent volume plus 2 percent cash discounts were not offered to all other purchasers in competition with said favored purchasers. Among the favored retail chains receiving such favored prices in the Cleveland area are: Marshall-Miller Drugstores, Pick-N-Pay Supermarkets, Foodtown Supermarkets and Fazio Markets.

PAR. 7. The effect of respondent's discriminations in price, as above alleged, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are respectively engaged; or to injure, destroy or prevent competition with purchasers of respondent who receive the benefit of such discriminations.

PAR. 8. The acts and practices of the respondent, as alleged above, violate subsection (a) of Section 2 of the amended Clayton Act.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions 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 (the Clayton Act), as amended by the Robinson-Patman Act, approved

June 19, 1936 (15 U.S.C., Sec. 13), the Federal Trade Commission on December 22, 1959, issued and subsequently served upon the respondent named in the caption hereof its complaint in this proceeding, charging said respondent with having violated subsection (a) of Section 2 of said Clayton Act, as amended. The respondent's answer to the complaint was filed on April 4, 1960. Thereafter, by stipulation between counsel, executed June 2, 1960, respondent admitted the material allegations of the complaint but reserved the right to offer evidence to prove any affirmative defense authorized by subsection (b) of Section 2 of the amended Clayton Act. Hearings were thereafter held before a duly designated hearing examiner of the Commission and testimony and other evidence were introduced by the respondent for the purpose of establishing a defense under the aforesaid subsection. In an initial decision, filed February 20, 1961, the hearing examiner held that a valid defense under Section 2(b) of the amended Clayton Act had been established by respondent and ordered that the complaint be dismissed.

The Commission having considered the appeals of counsel supporting the complaint and respondent from the initial decision and the entire record in this proceeding, and having determined that the appeal of counsel supporting the complaint should be granted and that the initial decision should be vacated and set aside, now makes this its findings as to the facts, conclusions drawn therefrom and order to cease and desist which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Sunshine Biscuits, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 29-10 Thomson Avenue, Long Island City, New York. Respondent is engaged in the business of manufacturing, selling and distributing various grocery products, including potato chips which are sold under the brand name "Krun-Chee".

2. In the course and conduct of its business, respondent has been and now is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

3. In connection with the sale of "Krun-Chee" brand of potato chips from its plant located in Detroit, Michigan, respondent has during the period June 28,¹ 1957, to May 1960, granted discounts of 5% plus 2% to four customers in Cleveland, Ohio, and discounts of 5% to fifteen customers in that same area. The aforesaid purchasers re-

¹ As corrected by order of Nov. 9, 1961.

674

Order

ceiving said discounts competed with other purchasers of respondent's "Krun-Chee" brand of potato chips who did not receive any discounts from respondent. The effect of such price discriminations may be to injure, destroy, or prevent competition with the recipients of the aforesaid discounts.

4. Respondent claims that it granted the aforesaid discounts for the purpose of meeting in good faith equally low prices granted or offered by its competitors. In some instances, it was necessary for respondent to grant discounts in order to prevent the loss of its customers to competitors. In a number of other instances, however, respondent granted discounts to buyers who had been purchasing from its competitors and was thus able to obtain new customers.

5. The defense of meeting competition contained in the proviso to Section 2(b) of the amended Clayton Act is limited in its scope to those situations in which a seller is acting in self-defense against competitive price attacks and is not applicable where the seller makes discriminatory price reductions in order to obtain new customers. In those instances in which respondent lowered its price to obtain new customers, it was not acting defensively and cannot avail itself of the meeting competition defense provided by Section 2(b).

6. On the basis of the record herein, the Commission finds that respondent has discriminated in price between different purchasers in the sale of its "Krun-Chee" brand of potato chips in commerce and that the effect of such discriminations may be to injure, destroy, or prevent competition with purchasers receiving the benefit of such discriminations; and that respondent has failed to establish a valid defense under Section 2(b) of the Clayton Act, as amended.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The aforesaid acts and practices of respondent, as herein found, constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended.

ORDER

It is ordered, That respondent, Sunshine Biscuits, Inc., a corporation, its officers, directors, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of grocery products, including potato chips, in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Discriminating in price by selling such products of like grade and quality to any purchaser at prices higher than those charged any other

purchaser, where such other purchaser competes with the unfavored purchaser in the resale and distribution of the aforesaid products.

It is further ordered. That respondent, Sunshine Biscuits, 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.

By the Commission, Commissioner Elman dissenting.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner :

This matter is before the Commission on cross-appeals of respondent and counsel supporting the complaint from the hearing examiner's initial decision.

The complaint herein charges respondent with violating subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, by discriminating in price between different purchasers of its products. Respondent has admitted in a stipulation executed by counsel that in connection with the sale of its "Krun-Chee" brand of potato chips it has granted discounts of 5% and 2% to four customers in the Cleveland, Ohio, area and discounts of 5% to fifteen customers in that area. Respondent has further admitted that it did not give any discount to other customers competing in the resale of said potato chips in the Cleveland area and that the effect of such discriminations in price may be to injure, destroy or prevent competition between the customers who received the discounts and those who did not receive them.

Although admitting the essential elements of a Section 2(a) violation in the aforementioned stipulation, respondent reserved the right to offer evidence to prove any affirmative defense authorized by Section 2(b) of the amended Clayton Act. Accordingly, at the close of the case in chief, it presented evidence for the purpose of showing that its lower prices to certain purchasers were made in good faith to meet the equally low prices of its competitors. The following facts relative to this defense are disclosed in the record :

In June, 1957, respondent acquired Velvet Peanut Products, Inc., a corporation engaged in the manufacture and sale of various food products, including the "Krun-Chee" brand of potato chips. Prior to the acquisition, Krun-Chee potato chips had been marketed in the Cleveland area by another corporation, Krun-Chee Distributing, Inc., which was later acquired by respondent. At the time of the acquisition of Velvet Peanut Products, Inc., competition and sale of potato chips in the Cleveland market was extremely sharp. Other distributors in that area were selling potato chips at discounts of 5% and

2% to certain favored purchasers, and 5% to others, and in order not to lose some of its customers respondent reduced its prices to certain customers to meet the lower prices of its competitors. In a number of instances, however, respondent offered discounts matching those granted by competitors to their customers and was thus able to obtain new customers.

The hearing examiner concluded from a review of this evidence that a valid defense under Section 2(b) had been established. He ruled in this connection that in granting the lower prices challenged by the complaint, respondent was meeting in good faith equally low prices of competitors and that it was entitled to take such action not only with respect to customers whom it was already serving but also with respect to new customers.

Counsel supporting the complaint has taken exception to this holding and the sole issue raised in his appeal is whether the Section 2(b) proviso can be used as an excuse for price discriminations granted, not for the purpose of retaining customers but for the purpose of obtaining new business. He contends in this connection that the hearing examiner did not interpret the proviso in its proper context and that he failed to give due consideration to various decisions which have endeavored to reconcile the defense set forth in the proviso with the basic objectives of the Robinson-Patman Act. We agree with counsel supporting the complaint that the hearing examiner erred in his interpretation of the proviso.

The Robinson-Patman amendment to the Clayton Act was designed to suppress discriminations adversely affecting competition, and Congress in enacting this legislation was concerned primarily with injury to competition at the buying level. The meeting competition defense contained in the Section 2(b) proviso of the Clayton Act, as amended, however, excuses certain discriminatory practices having the anti-competitive effects which Congress sought to prevent. Congress was aware of this basic conflict between a seller's right to meet competition and the remedial objectives of the statute, and the legislative history discloses a Congressional intent to restrict the application of the meeting competition defense.

In *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231, the Court held that the proviso in Section 2 of the amended Clayton Act continues in effect a defense which is equally absolute but more limited in scope than that which existed under Section 2 of the original Clayton Act. The Court also stated in that opinion that the actual core of the defense in subsection (b) "consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good

faith meet that lower price." The Court further stated in the same decision that there is "plain language and established practice which permits a seller, through § 2(b) to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." We have previously interpreted this decision as limiting the application of the Section 2(b) defense to those situations in which the seller is acting in self-defense against competitive price attacks (In the matter of *Anheuser-Busch, Inc.*, 54 F.T.C. 277). We have also held that the defense is not applicable in those situations where the seller is obtaining new customers (In the matter of *Standard Motors*, 54 F.T.C. 814). The ruling in the latter case was upheld on appeal to the Second Circuit, the Court stating as follows:

Petitioner also seeks to avail itself of the affirmative defense provided in § 2(b) of the Act, 15 U.S.C. § 13(b), which exempts differences in price made in good faith to meet an equally low price offered the favored purchaser by a competitor. As this defense is made only as to its sales to joint purchasing groups, the Commission's order must stand in any event, since the standard distributor contracts have themselves been shown to result in discriminations in price which may lessen competition. Moreover, it is well settled that a lowered price is within § 2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system. *F.T.C. v. Cement Institute*, *supra*, 333 U.S. 683, 721-726 [4 S&D. 676] *F.T.C. v. A. E. Staley Mfg. Co.*, *supra*, 324 U.S. 746 [4 S&D. 346], and only if it is used defensively to hold customers rather than to gain new ones. *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 249-250 [5 S&D. 221]. The testimony of petitioner's own vice president belies its assertion here that net prices paid by a buying group were always individually negotiated, and not merely an outgrowth of its standard distributor contracts; and the record is also clear that petitioner gained many new customers through the buying groups with which it dealt. Hence the Commission's rejection of Standard's claim under § 2(b) is supported by substantial evidence.* [Italic supplied.]

Although the hearing examiner did not consider *Standard Oil v. Federal Trade Commission*, *supra*, and *Standard Motors v. Federal Trade Commission*, *supra*, to be controlling in this matter in view of the different factual situations involved, he nevertheless was apparently of the opinion that in order to avail itself of the Section 2(b) defense a seller's actions must be defensive rather than aggressive. He has held in this connection that respondent's actions were "essentially defensive", basing this conclusion on the finding of cut-throat competitive conditions in the sale of potato chips in the Cleveland market. We do not agree, however, that the showing with respect to the general competitive situation in the market has any bearing on the issue of whether respondent's actions in obtaining new business in individual instances were defensive or aggressive. Since

*265 F. 2d 674.

in those instances respondent was not faced with the loss of a customer and did not lower its price to retain a customer, we are of the opinion that its actions were not defensive regardless of the competitive conditions which existed in the market. The defense set forth in the Section 2(b) proviso presupposes the existence of competition and would be equally applicable in a market in which over-all competition was not keen, if the seller would in fact lower its price in good faith to meet an equally low price of a competitor. The effect of the hearing examiner's ruling, therefore, would be to extend the scope of the proviso to excuse discriminatory price reductions made for the purpose of obtaining new customers in any competitive situation. Consequently, the finding of cut-throat competitive conditions in the present record is meaningless insofar as the hearing examiner's ultimate conclusion with respect to the application of the proviso is concerned.

Respondent has appealed from the hearing examiner's failure to make certain findings, including the finding that the prices met by respondent were lawful prices. Since we have held that respondent cannot avail itself of the Section 2(b) defense in those instances where it has granted discriminatory price reductions for the purpose of obtaining new customers, it is unnecessary to determine whether its competitors' prices were lawful or unlawful. It is equally unnecessary, in view of our disposition of this matter, to determine whether the other findings requested by respondent are supported by evidence of record.

The appeal of counsel supporting the complaint is granted and respondent's appeal is denied. The initial decision of the hearing examiner is vacated and set aside and we are issuing our own findings, conclusions and order to cease and desist in lieu thereof.

Commissioner ELMAN, dissenting:

In my opinion, the Commission's conclusion that the Section 2(b) defense is available only if the allegedly discriminatory price is charged "defensively" to retain old customers rather than "aggressively" to obtain new ones is neither compelled by the precedents nor justified by the provisions and policy of the Robinson-Patman Act.

The principal authority on which the Commission relies is *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231. But that case hardly dictates the result here. The issue under discussion in the passage upon which the Commission draws was only whether "it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor." 340 U.S., at 246. The Supreme Court was not then considering whether "offensive" or only "defensive" price cutting was permissible, and we are not war-

ranted in drawing inferences in that connection from its language. In nonetheless drawing such an inference, the Commission has paid insufficient heed to the familiar canon of construction that "Always the language used in an opinion must be read in the light of the issues presented." *Sinclair v. United States*, 279 U.S. 749, 767.¹

My view in this matter is reinforced by that expressed in the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955):

Standard Oil does not confine the "good faith" proviso solely to *defensive* reductions to retain an *existing* customer. The Supreme Court in that opinion merely employed language describing the case at bar; it did not promulgate a general doctrine surrounding each seller with a protected circle of customers which may be exploited without fear of a rival's price attacks. (Emphasis in the original.) *Report*, at p. 184.

Further, after careful study of the *Standard Oil* decision, the Committee on the Judiciary of the House of Representatives also concluded that "This question of applying the good faith defense in obtaining customers, has not been as yet decided by the courts . . .". H. Rep. No. 2438, 82d Cong., 2d Sess., p. 4 (1952).

Without the protective cover of *Standard Oil*, the remaining case support for the Commission's position evaporates. For both *Standard Motor Products Inc. v. Federal Trade Commission*, 265 F. 2d 674 (C.A. 2), and *Anheuser-Busch, Inc.*, 54 F.T.C. 277, rely completely, in restricting the coverage of Section 2(b) to defensive discriminations, upon the language of the *Standard Oil* opinion. Neither of these opinions, nor the Commission opinion in the *Standard Motor Products* case, 54 F.T.C. 814, cites any other authority, and none of them advances any legal or economic rationale for the rule. I therefore feel obligated to treat this question as one uncontrolled by prior decisions.

It has never been contended that the "aggressive to obtain new customers"—"defensive to retain old customers" distinction was required by the terms of the statute. Section 2(b) erects a defense for good-faith competitive price reductions "to *any* purchaser or purchasers." [Emphasis added.] Any requirement that the purchaser must already be a customer of the seller is entirely absent.

The distinction between "aggressive" and "defensive" price reductions is thus not compelled. Should we nonetheless make it? The answer must, I think, be no. This for two reasons.

First, it is practically unworkable. The line between "old" and "new" customers is far easier to state than to apply to the myriad

¹ See also *Armour & Co. v. Wantock*, 323 U.S. 126, 132-133 (1944) (Jackson, J.):

"It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

situations that develop in actual business relations between sellers and buyers. It has been aptly said that a "concept of 'retainable' customers leads into statutory bogs. A customer may be one who negotiates with a view to buying, one who has bought at some time in the past, or one who currently buys." Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 Yale L.J. 929, 970 (1951).

Indeed, this is a conservative description of the probable difficulties. Does an "old" customer retain that status forever, regardless of the infrequency or irregularity of his purchases? Suppose an "old" customer transfers his business to another seller offering a lower price; how long a period of grace does the first seller have in which to meet the lower competitive price? If he waits too long, will the "old" customer be regarded as a "new" one, and hence unapproachable because Section 2(b) no longer applies? If so, how long is too long? And if not, does it suffice that the buyer has at *any* time in the past, no matter how remote, been a customer of the respondent?

Even if these problems are satisfactorily solved (and, it seems to me, the Commission will have to solve them in such a way as to give reasonable guidance to businessmen who are entitled to know what they may or may not lawfully do), the evidentiary burden placed upon the seller, especially one whose business consists of a multitude of small individual transactions, seems virtually insurmountable. The point need not be labored.² Whatever its verbal simplicity, the "defensive" versus "aggressive" test will inevitably produce uncertainty and confusion in application.

Even more important, the test adopted by the Commission appears to be economically unsound. Let us suppose the presence in an area of two or three big buyers of a particular product and a number of small ones. Suppose further that producers of this product tend to make discriminatory price reductions to the big buyers alone. If one of those producers can manage legitimately to underbid its rivals (let us assume as a result of lower costs) for the business of the big buyers, under the Commission's ruling competing producers may also lower their price to the big buyers if they have previously dealt with them; otherwise they may not. Does this make economic sense, and does it accord with the basic policy of the statute? I venture to suggest that it does not.

Suppose Producer *P* lawfully lowers his price to Big Buyer *B*. Producer *Q* wishes to meet *P*'s price. Small Buyer *S*, who competes with *B* in the sale of *Q*'s product, complains. We tell him that we must let *Q* proceed with his desired price reduction because *Q* has pre-

² For additional perplexing questions of a similar nature, see Austern, *Inconsistencies in the Law*, CCH Symposium: Business Practices under Federal Antitrust Laws, 158, 167 (1951).

viously sold to *B* and therefore falls within the statutory protection of Section 2(b). But surely this is not a sufficient reason, or, at least, it should not be. The real answer is that by enacting Section 2(b) Congress has seen fit to qualify and limit the broad protection against price discrimination provided by Section 2(a). In its general structure and scope, the Robinson-Patman Act reflects the concern of Congress to prevent the injury to competition that arises from the unjustifiable grant of price reductions to a class of favored purchasers, to the detriment of other purchasers not so favored. But Congress was also concerned that, in seeking to protect unfavored purchasers against the harm done by such price discriminations, the statute should not go too far in restricting free competition in the market. Thus, it is because other interests (embraced in the concept of "meeting competition in good faith") are also involved that the statute denies redress for the very real injury to complaining Small Buyer *S* in the example above. The injury to *S* is not less because *Q* happens to have sold to *B* before. *S* is hurt just as much by *Q*'s meeting *P*'s lower price to *B*, whether the latter is an old or a new customer of *Q*. By enacting Section 2(b), Congress has said to *S*, in effect, "It is true that you are hurt by the price reduction to your competitor, *B*, but we are also trying to protect *Q*'s right to compete with *his* competitor *P*, and we will therefore allow him to meet the lower prices being offered by *P*, provided he does so in 'good faith'."

If, therefore, the basic function of the "good faith" defense of Section 2(b) is to prevent the broad prohibitions in Section 2(a) from so rigidifying the market that a seller could not effectively compete with his rivals, what difference should it make whether the competition between sellers is for old accounts, new accounts, or a combination of both? So far as the seller's "good faith" in trying to meet competition is concerned, it would seem to make no difference. Yet, under the Commission's construction of Section 2(b), whether or not it will enter an effective order protecting Small Buyer *S* against price discriminations favoring his large competitor *B* depends on the answer to that essentially irrelevant question. To make application of the statute turn upon how that question is answered is, I submit, to render its protections uneven and fortuitous.

Suppose further, in the hypothetical example, that another competitor of *B* and *S* is Big Buyer *C*, who has only recently started in business and therefore not bought from *Q* in the past. Assume also that *P* has the same cost justification for charging the same lower price to *C* that he did to *B*. Under the Commission's view, *Q* could not meet *P*'s lower price to *C* by offering him an equally low price. Thus, there would be a forced discrimination as between *B* and *C* in the price

charged them by *Q*. *C*, the new firm, would have to pay more for *Q*'s product than would *B*, and would therefore be seriously hindered in competing with *B*, the established firm, in the sale of that product. And this result, it is said, is required by a statute aimed at promoting competition by eliminating price discrimination.

Moreover, there is the seller's side to be considered. If we permit Producer *Q* to meet Producer *P*'s price, how can we justify denying this opportunity to Producer *R* who has never dealt with *B* before? In so doing we have restricted the number of sellers who can compete effectively for *B*'s purchases, thereby limiting *B*'s range of choice and, in turn, the range of choice of *B*'s customers. Such insulation of old-line sellers from the encroachments of new rivals upon sales to established customers would hobble rather than promote competition.³

If sellers may only lower prices to retain customers in economic self-defense, rivals are granted vested rights in trade. . . . Little incentive to competitive efficiency remains when competitors are shielded from their rivals' price attacks. Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 Yale L.J. 929, 970 (1951).

The impact on Producer *R* may be particularly destructive. Suppose, for example, that he is a new concern, trying to get started in a field now dominated by *P* and *Q*. A new firm's chances of success against old, established competitors are always uncertain. How much more precarious must they be if a major segment of the market is closed to him because he cannot adjust his price there to meet the competition of his settled rivals. In the name of protecting competition we prevent *R* from competing effectively, and we shield *P* and *Q* against *R*'s competition. This is indeed a curious result.⁴

In adopting the position that it does, the Commission is imposing on the Section 2(b) defense a limitation that the Attorney General's National Committee to Study the Antitrust Laws concluded "would not be in keeping with elementary principles of competition, and would in fact foster tight and rigid commercial relationships by insulating them from market forces." *Report*, at p. 184 (1955). Such a result is basically antithetical to the expressed opinion of the Supreme Court that "The heart of our national economic policy has long been faith in the value of competition," and that "In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'" *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 248-249, quoting in part from *A. E. Staley*

³ See S. Rep. No. 293, 82d Cong. 1st Sess., p. 6 (1951); Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, p. 100, n. 195a, 2d Rev. Ed. (1959); Wallace and Douglas, *Antitrust Policies and the New Attack on the Federal Trade Commission*, 19 U. of Chi. L. Rev. 684, 720, n. 101 (1952).

⁴ See Austern, *Inconsistencies in the Law*, CCH Symposium: Business Practices under Federal Antitrust Laws, 158, 166-167 (1951); Simon, *Price Discrimination to Meet Competition*, 1950 U. of Ill. Law Forum. 575, 588.

Mfg. Co. v. Federal Trade Commission, 135 F. 2d 453, 455 (C.A. 7). I am bound to say that the construction of the Act made by the Commission in this case seems more likely to protect monopoly and prevent competition.

I conclude, therefore, that the Hearing Examiner was correct in rejecting the contention that respondent could not avail itself of Section 2(b) for sales to purchasers with which it had not previously dealt. But this is not the end of the matter, for, unfortunately, the examiner's initial decision is deficient in another serious respect: It contains no finding as to whether the equally low prices met by respondent were "lawful" prices.

The requirement that the lower prices met be "lawful" appears now to be established. In *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 754, the Supreme Court pointed to the "clear Congressional purpose not to sanction by Section 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another." And in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 244, the Court explained that in the *Staley* case "The discussion proceeds upon the assumption, applicable here, that if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers, then the seller is protected, under Section 2(b), in making a counter-offer. . . ." References to "lawful price" appear throughout the opinion, and at one point it is stated that the interpretation "put on the proviso in the *Staley* case" is "to the effect that the lower price which lawfully may be met by a seller must be a lawful price." 340 U.S., at 249, n. 14.

I recognize that there is dispute over the correct reading of *Standard Oil* on this point. A strong contrary authority is *Standard Oil Co. v. Brown*, 238 F. 2d 54 (C.A. 5), which concludes that the Court's use of "lawful" may simply have stemmed from the absence in the record of anything to indicate that the prices met were unlawful. However, even this case concedes that there is room to infer from the Supreme Court's language "that if the seller discriminates in price to meet prices that he knows to be illegal or that are of such a nature as are inherently illegal . . . there is a failure to prove the 'good faith' requirement in Section 2(b)." At the least, no seller should be accorded the protection of the good-faith defense if he knew or had reason to know that the competitive prices he was meeting were unlawful. See *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 181-182 (1955). Without such a limitation, Section 2(b) would become a refuge for sellers who knowingly violated Section 2(a) confident in the knowledge that they could rely on each other's violations as adequate justification

for discriminatory price reductions to meet competition in "good faith."

The hearing examiner's failure to make a finding on this crucial point may have resulted from the willingness of Commission counsel to proceed from the premise that the prices met were lawful. In fact, on appeal, counsel supporting the complaint has gone so far as to "concede" that because respondent's principal competitor was engaged solely in intrastate commerce and therefore was beyond the reach of the Robinson-Patman Act, its discriminatory prices, which respondent met, were necessarily "lawful."⁵ This "concession" reflects a misunderstanding of the sense in which the word "lawful" is used in this context. The aim of a lawfulness limitation on the Section 2(b) proviso is to prevent its becoming a device for the protection of destructive competition employing "*oppressive discriminations* in violation of the *obvious intent* of the bill." [Emphasis added.] *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 754, n. 2, quoting from the remarks of the Chairman of the House Conferees, 80 Cong. Rec. 9418. That is to say, one "oppressive discrimination" should not be permitted to provide the justification for another. That the cases do not spell out this shorthand equation of "lawful" with "nondiscriminatory" is not surprising, since there has not hitherto been occasion to do so.

In short, "lawful", as I read the cases, means "lawful" when judged by the standards of legality provided in the Act. A price cannot be "lawful" under the Act if it is discriminatory, and a discriminatory price charged by an intrastate seller is not "lawful" under the Act merely because he is not subject to its prohibitions. A discriminatory price charged by an intrastate seller, which is not itself prohibited by federal law, is "lawful" only in the sense that a statement is "truthful" which one lacks the power to brand a lie.

To revert to our earlier illustration, suppose again that Producer *P* discriminatorily lowers his price to Big Buyer *B*. Producer *Q* follows suit and Small Buyer *S*, who handles *Q*'s product, complains. *S* is damaged just as much when *P* is only an intrastate seller as when *P* happens to have an interstate business. The fact that *P* conducts a business that is not subject to Federal jurisdiction in no way diminishes the harm to *S* from the pricing policy of *Q*. If *P*'s lower price is discriminatory and that fact bars *Q* from being in "good faith" in meeting it, what difference should it make, for purposes of determining if *Q* can claim the "good faith" defense of Section 2(b), whether *P* is an inter- or intra-state seller? The inability of federal law to reach a solely intrastate firm should not be permitted to derogate from its proper application to interstate business.

⁵ Reply brief of counsel supporting the complaint, p. 3.

It is of course obvious that thus conforming the definition of the words "lawful" and "good faith" to the basic policy of nondiscrimination of the Robinson-Patman Act may engender potential anti-competitive consequences apparently similar to those described earlier in this opinion. That is, the result may well be to prevent interstate sellers from meeting competitively the lower prices of intrastate sellers, with a consequent likelihood of some insulation of the intrastate seller from effective interstate competition. But there is a vital distinction between such competitive insulation (which is, in any event, perhaps inevitable in any scheme of federal regulation inapplicable to intrastate commerce) and that which would derive from adoption of the "aggressive" versus "defensive" test. Under the latter, the producers most likely to be hampered are the new small firms which have never sold to the big favored buyers before. But partial insulation of the intrastate seller should tend to protect and foster small local businesses that must fight for their share of the market against established and dominant national concerns. Such a result is entirely consonant with the statutory policy of preventing the suppression of small business by the overwhelmingly powerful mass distributor.⁶

For the reasons stated, I believe that the appropriate disposition of the case would be to remand it to the hearing examiner for a finding of whether the respondent knew or had reason to know that the prices of its competitors, which it met, were discriminatory within the meaning of the statute. This is in accord with the statutory "good faith" test. It should satisfy the needs of the statute without imposing an undue burden on the parties.

ORDER DENYING RESPONDENT'S MOTION TO VACATE FINDINGS AS TO THE
FACTS, CONCLUSIONS AND ORDER

This matter having come on to be heard upon respondent's motion, filed October 20, 1961, requesting the Commission to vacate and set aside the Findings as to the Facts, Conclusions and Order entered in this proceeding on September 25, 1961, and to remand the case to the hearing examiner for the taking of further testimony, and upon the answer of counsel supporting the complaint in opposition thereto; and

It appearing that respondent has stated as the principal grounds for said request that the date, June 19, 1957, appearing in paragraph 3 of the Commission's Findings as to the Facts, Conclusions and Order, is incorrect, and that there is no evidence to support the statement in paragraph 4 of said Findings as to the Facts, Conclusions and Order

⁶For general discussions of this legislative purpose, see e.g., Austin *Price Discrimination and Related Problems under the Robinson-Patman Act*, 2d Rev. Ed. (1959); Edwards, *The Price Discrimination Law* (1959); Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 Colum. L. Rev. 1059.

Complaint

that "in a number of other instances, however, respondent granted discounts to buyers who had been purchasing from its competitors and was thus able to obtain new customers"; and

It further appearing that through inadvertence the numeral "19" was inserted after the word "June" in the third line of paragraph 3 of said Findings as to the Facts, Conclusions and Order and that said error should be corrected; and

It further appearing that the finding that respondent obtained new customers by granting discounts to buyers who had been purchasing from its competitors is supported by the record, including an admission by counsel for respondent that, with respect to discounts granted to four buyers, respondent was trying to obtain business rather than meet an equally low price to retain business; and

The Commission having determined that while said Findings as to the Facts, Conclusions and Order should be modified to correct the aforesaid date in paragraph 3 thereof, there is no valid basis for respondent's request that said Findings as to the Facts, Conclusions and Order be vacated and set aside:

It is ordered, That respondent's motion be, and it hereby is, denied.

It is further ordered, That said Findings as to the Facts, Conclusions and Order be, and they hereby are, modified by striking therefrom the numeral "19" appearing in the third line of paragraph 3 on page 2 thereof, and inserting in lieu thereof the numeral "28".

By the Commission, Commissioners Elman and MacIntyre not participating.