

Complaint

IN THE MATTER OF

BORMAN FOOD STORES, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECTION 2(C) OF
THE CLAYTON ACT*Docket 8789. Complaint, July 10, 1969—Decision, Aug. 3, 1972.*

Order dismissing the complaint, as to two respondents, which charged two Salinas, Calif., purchasers and sellers of fresh fruits and vegetables as "ground" or "field" brokers, with violation of Sec. 2(c) of the Clayton Act, as amended, by receiving and accepting brokerage, commissions, or other compensation from sellers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended, (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Borman Food Stores, Inc., hereinafter referred to as "Borman," is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan with its office and principal place of business located at 12300 Mark Twain, Detroit, Michigan.

PAR. 2. Respondent Borman has been and is now engaged primarily in the retailing of food products and other articles for personal and household use and operates a large number of retail stores, including supermarkets, drug stores and department stores. As of January 27, 1968, Borman operated approximately 89 supermarkets in the State of Michigan. Respondent Borman is also engaged in the manufacture and sale of dairy products. Borman's volume of business is substantial, totalling in excess of \$300 million annually, as of January 27, 1968.

PAR. 3. Respondent P & R Brokerage Co. hereinafter referred to as "P & R," is a partnership organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 12 East Gabilan Street, Salinas, California.

Respondent Frank V. Condello, an individual, is a partner in respondent P & R Brokerage Co., and is located at the same address.

In his capacity as a partner, he is actively engaged in the purchase and sale of fresh fruits and vegetables. He formulates, directs and

controls the acts, practices and policies of respondent P & R, including the acts and practices hereinafter described.

PAR. 4. Respondent P & R has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of California, and purchases by buyers located in various States of the United States other than the State of California. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of P & R, in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables, is substantial.

PAR. 5. Respondent P & R, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent P & R.

PAR. 6. In the course and conduct of its business for the past several years, respondent Borman has purchased, distributed and resold, and is now purchasing, distributing and reselling, food products and other articles for personal and household use, including fresh fruit and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the State of Michigan in which respondent Borman is located. Borman purchases these food products including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Borman's warehouse and retail stores in the State of Michigan. Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent Borman.

PAR. 7. In the course and conduct of its business, respondent Borman has been and is now utilizing the services of respondent P & R as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent P & R performs valuable services for respondent Borman and other buyers by furnishing information concerning market conditions, by maintaining contact with

various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, and by negotiating purchases of said products at the most favorable prices. Respondent P & R, in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Borman and other buyers. In such capacity, P & R is subject to and under the direct or indirect control of Borman and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent P & R has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 8. Respondent Borman and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent P & R without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent P & R has been and is now collecting and receiving directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Borman and other buyers, or has been and is now subject to the direct or indirect control of respondent Borman and other buyers.

PAR. 9. The aforesaid acts and practices of respondents and each of them in receiving and accepting, directly or indirectly, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof from sellers, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Commissioners Elman and Nicholson dissenting.

DISSENTING STATEMENT OF COMMISSIONER ELMAN

Issuance of these complaints is regrettable; the violations charged are trivial, the effectiveness of the Commission's action dubious. Instead of taking this opportunity to re-examine and reassess its administration of the Robinson-Patman Act, to reconsider the policy goals that it is attempting to implement, and to review the success of its enforcement activities, undertakings that have recently been urged upon it by both the Task Force on Antitrust Policy established by President Johnson¹ and the similar body convened by President

¹ White House Task Force Report on Antitrust Policy, submitted July 5, 1968, released May 21, 1969, reprinted in Antitrust & Trade Regulation Report, number 411, part II, May 27, 1969 [hereinafter cited as Neal Task Force Report].

Nixon,² the Commission has mechanically and automatically ground out the instant complaints.

I

Although "the Robinson-Patman amendments by no means represent an exemplar of legislative clarity,"³ their essential purpose is clear and important to the functioning of a competitive economy. The "guiding ideal" of the Robinson-Patman Act was "the preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production. * * *"⁴ "In short," as the Supreme Court stated in the *Sun Oil* case,⁵ "Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned."

None will quarrel with this basic purpose of the Act. The questions that have arisen concern the Act's breadth of language, its seeming inconsistencies,⁶ and its implementation and extension, particularly by the Federal Trade Commission, in a way that may have deleterious effects on the very competitive process that the Act was intended to preserve and promote. The Commission has distorted the Robinson-Patman Act and extended it far beyond its basic premise. A statutory instrument intended to be used skillfully and carefully like a scalpel has been wielded as a bludgeon.

For example, the Commission's literal-minded enforcement of the Act has tended to rigidify prices in oligopolistic markets by preventing the kind of sporadic, unsystematic price concessions that may be the first step toward more general price reductions in such industries.⁷ The Commission's actions in the gasoline industry seem to have had this effect, dampening emerging price competition and causing gasoline marketers to engage in game promotions and other gimmicks, instead of reducing prices, as a means of attracting customers.

New or potential entrants to a market may find that the inertia of established trade relationships can be overcome only by selectively re-

² Task Force Report on Productivity and Competition, submitted March 1969, reprinted in Antitrust & Trade Regulation Report, number 413, June 10, 1969 [hereinafter cited as Stigler Task Force Report].

³ *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968). See *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 65 (1953) ("precision of expression is not an outstanding characteristic of the Robinson-Patman Act").

⁴ H.R. Report No. 2287, 74th Cong., 2d Sess. 6 (1936).

⁵ 371 U.S. 505, 520 (1963).

⁶ See, e.g., *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 359-60 (1968) (Harlan, J., dissenting), asserting that "the statute imposes a hodgepodge of confusing, inconsistent, and frequently misdirected restrictions" (footnotes omitted).

⁷ See, e.g., Neal Task Force Report 9.

ducing prices to buyers in that market.⁸ Such temporary promotional activities constitute an important form of competition and may be the only means by which a new entrant can come into an existing market. Insistence on price uniformity in such situations may deter new entry, entrench existing competitors, and vitiate emerging competition. But this is precisely the result the Commission has reached in enforcing the Act.⁹

Competition and efficiency in distribution have been impaired by the Commission's enforcement of the Act. There is no question that a bona fide functional discount or allowance to customers, offered and paid on a proportionally equal basis as compensation for warehousing and similar services rendered to the manufacturer, may increase efficiency, decrease costs, expand service to the consumer, and reduce prices. Such nondiscriminatory distribution methods promote competition, encourage innovation, benefit the consuming public, and thus advance the basic goals of the antitrust laws. Yet, "the Commission has in recent years waged a vigorous war against 'functional discounts,' which are discounts offered to middlemen who perform certain distributive functions (such as warehousing) that other middlemen, who are not given the discounts, do not perform."¹⁰

In the automotive parts cases,¹¹ for example, the Commission has striven mightily to prevent small jobbers from adopting new marketing methods—in particular, affiliating with or forming warehouse distributors to enable them better to compete with their larger, more fully integrated competitors. These new organizations performed warehousing and related functions which helped promote efficiency in distribution but the Commission has repeatedly held that they are not entitled to be compensated for their services on the same basis as their integrated competitors. Neither competition nor the small businessmen whom the Robinson-Patman Act was intended to protect were served by the Commission's actions.

⁸ See, e.g., *National Dairy Prods. Corp.*, F.T.C. Docket No. 8548 (June 28, 1967) (dissenting opinion [71 F.T.C. 1443]); Edwards, *The Price Discrimination Law* 637 (1959) [hereinafter cited as Edwards]; Henderson, *The Federal Trade Commission* 251-52 (1924); Neal Task Force Report 9.

⁹ See, e.g., *National Dairy Products, Corp.*, F.T.C. Docket No. 8548 (June 28, 1967 [71 F.T.C. 1333]); cf. *Sunshine Biscuits, Inc.*, 59 F.T.C. 674 (1961), *reversed*, 306 F. 2d 48 (7th Cir. 1962).

¹⁰ Stigler Task Force Report X-3; see, e.g., Report of the Attorney General's National Committee to Study the Antitrust Laws 207-09 (1955); Annual Report of the Council of Economic Advisers 109 (1969).

¹¹ See, e.g., *Alhambra Motor Parts*, F.T.C. Docket No. 6889 (December 17, 1965 [63 F.T.C. 1039]); *Purolator Prods., Inc.*, F.T.C. Docket No. 7850 (April 3, 1964), order enforced, 352 F. 2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968); *National Parts Warehouse*, F.T.C. Docket No. 8039 (December 16, 1963 [63 F.T.C. 1692]), order enforced sub. nom. *General Auto Supplies, Inc. v. Federal Trade Commission*, 346 F. 2d 311 (7th Cir.), *cert. pet. dismissed*, 382 U.S. 923 (1965).

Undaunted, the Commission has more recently held that stocking dealers, those retailers who maintain an inventory of the manufacturer's product, may not be compensated by the manufacturers for performing this service. In effect, the Commission declared that since some of the manufacturer's customers—i.e., the non-stocking dealers—would not provide the services or facilities that the manufacturer requested in the interest of promoting more economical distribution, the manufacturer could not reimburse the stocking dealers, who were ready, willing, and able to furnish such services or facilities. Functional compensation could not be paid to customers who had earned it by performing services the manufacturer needed unless it was also paid to other customers who had not earned and had performed no services at all. Here too the Robinson-Patman Act was converted into an anti-competition, antiefficiency, anticonsumer statute.¹²

The Commission's insistence that the law requires payment for services or facilities that are of no value is pervasive. Sections 2(c)-(e) of the Act have been applied to discourage experimentation with marketing techniques and further rigidify existing distribution arrangements.¹³ Manufacturers have been forced to choose between paying for promotional activities of no value to them or abandoning cooperative advertising that they found necessary and profitable.¹⁴

Similarly, as the instant complaints show, the brokerage clause has been given an expansive reading by the Commission. As interpreted, it has become a "featherbedding guarantee" for brokers in many industries, preventing buyers or sellers from developing more efficient, less costly methods of distribution.¹⁵ Here again, in addition to being anticompetitive, the Commission's actions have penalized the very small businessmen the Act was intended to help.¹⁶

Finally, the statutory defenses of meeting competition¹⁷ and, perhaps to a lesser extent, cost justification¹⁸ have been given unduly

¹² See Advisory Opinion Digest No. 263 (July 9, 1968) and accompanying dissenting opinions.

¹³ See, e.g., Neal Task Force Report 9; Annual Report of Council of Economic Advisers 109 (1969).

¹⁴ See, e.g., *House of Lords, Inc.*, F.T.C. Docket No. 8631 (January 18, 1966) (dissenting opinion 10-23 [69 F.T.C. 84-97]); Edwards 629-30.

¹⁵ Cf. *Henry Broch & Co. v. Federal Trade Commission*, 363 U.S. 166, 180 (1960) (dissenting opinion).

¹⁶ See, e.g., *National Retailer-Owned Grocers, Inc.*, 60 F.T.C. 1208, 1241 (1962) (dissenting opinion), reversed, 319 F. 2d 410 (7th Cir. 1963).

¹⁷ See, e.g., *Sunshine Biscuits, Inc.*, 59 F.T.C. 674, 681 (1961) (dissenting opinion), reversed, 306 F. 2d 48 (7th Cir. 1962); *American Oil Co.*, 60 F.T.C. 1786, 1824-26 (1962) (dissenting opinion), reversed, 325 F. 2d 101 (7th Cir. 1963), cert. denied, 377 U.S. 954 (1964); *Callaway Mills Co.*, F.T.C. Docket No. 7634 (February 10, 1964) (dissenting opinion [64 F.T.C. 743-759]), reversed, 362 F. 2d 435 (5th Cir. 1966).

¹⁸ See, e.g., Report of the Attorney General's National Committee to Study the Antitrust Laws 170-76 (1955); Neal Task Force Report 10, 20, citing *Federal Trade Commission v. Standard Motor Prods., Inc.*, 371 F. 2d 613 (2d Cir. 1967); cf. Edwards 611-13; *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 68-69 (1953).

narrow constructions. A requirement of precision in cost accounting and an unrealistic obligation to check and verify competitive offers have been imposed where the statute requires no such degree of certainty. These decisions too have tended to stifle rather than promote price competition.

Even this brief survey¹⁹ indicates that there are substantial problems with the Robinson-Patman Act, both in its textual difficulties and in its administration by the Commission which has tended to magnify rather than eliminate the problems. The Commission has failed to see the Robinson-Patman Act in the context of overall antitrust and economic policy and has made no effort to harmonize it with the philosophy and purposes of the antitrust laws. The Commission today compounds these problems by adhering to its established pattern and automatically issuing the instant complaints instead of using this opportunity to respond to the increasing calls—by economists, lawyers and businessmen who share the Commission's desire for a strong antitrust policy but want to insure the rationality, consistency and wisdom of that policy—for fundamental review and reappraisal of where we are and where we are going under the Robinson-Patman Act.

II

When the Commission first issued these complaints for consent negotiations, two members of the Commission expressed considerable doubts about the validity of the Commission's economic theory. We pointed out the inflationary impact that these cases would have if the Commission's economics were right, and the results that could be anticipated from litigation. These cases involve what is essentially a private controversy as to whether buyers or sellers should pay brokerage in the fruit and vegetable industry; there is no economic or competitive injury from the practice—similar to that used in compensating real estate brokers and advertising agencies—of having the broker's commission paid out of the selling price. Moreover, since these brokers perform services for sellers as well as buyers, these cases do not involve the use of "phony" brokerage, or price concessions given to favored large buyers which are disguised as brokerage to avoid the proscriptions of Section 2(a). It was this practice that Section 2(c) was designed to outlaw.²⁰

¹⁹ For a more extensive discussion of many of these issues see *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 U. Wash. L. Rev. 1 (1966).

²⁰ Sections 2(d) and (c) were similarly intended to prevent circumvention of Section 2(a) but have been applied broadly and indiscriminately by the Commission.

Curiously, two other members of the Commission who voted for issuance of the complaints accepted this basic analysis. They agreed that if their economic analysis was sound, lettuce prices would be increased but they argued that "such factors should [not] determine whether the Commission enforces" Section 2(c) because, they said, the Commission should not be concerned about "the optimum allocation of resources among growers, distributors and consumers." That there was no competitive injury from these practices they also deemed irrelevant, since Section 2(c) "makes no reference to competitive injury." In their view, "the statutory scheme is plain" and it would "frustrate the legislative intent" for the Commission not to issue these complaints. Although it was recognized that "of course, an increase in cost of .4¢ on every head of lettuce sold in the country would be a significant amount," and that if these proceedings had any economic impact it would be an inflationary one, the majority members believed that the Commission had no discretion in the matter and was compelled to proceed with these complaints, even though their issuance might be antithetical to fundamental national policies declared by the President and Congress.

These cases thus continue a long, but scarcely venerable, tradition. The language of the Robinson-Patman Act is given application beyond any reasonable bounds and without regard to the effect of such action on the competitive process and public policy. The Supreme Court has admonished that particularly in Robinson-Patman cases, "invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis."²¹ The instant complaints, however, fly in the face of that admonition, exalting form over substance and substituting talismanic word formulas for intelligent legal and economic analysis. The sorry results of this literal-minded, mechanical approach to law enforcement have already been described. It is instructive to consider what will be the predictable outcome of these complaints. Recent history provides a good guide.

One distinct possibility is that the complaints will engender years of fruitless litigation, peripheral to the merits of the proceeding, and will ultimately be dismissed on the ground of staleness. The *Associated Merchandising Corp.*²² (AMC) litigation is illustrative. The investigation in that case traced back to the 1930's and 1940's—just as the instant matters trace back to the 1950's when the Commission was first asked to intervene to help the sellers in this industry—when the Commission first became concerned about group-buying practices

²¹ *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 527 (1963) (footnote omitted).

²² F.T.C. Docket No. 8651 [74 F.T.C. 1555].

in the department store industry and entered orders to deal with the problem. In 1959 the Commission began a new investigation which led to the issuance of a complaint in April 1964 against AMC, a buying group, Aimcee Wholesale Corp. (AWC), its wholly-owned subsidiary, and the numerous individual department store stockholders. I dissented from the issuance of the complaint, which charged that respondents acting collectively had induced and received preferential prices and discriminatory discounts from suppliers. It was my view that the allegedly illegal practices were symptomatic of a larger problem concerning buying practices in the department store industry—a problem that would not have been cured by issuing the complaint and that would be better handled in a broad, industrywide proceeding designed to elicit all the relevant facts. Moreover, the Commission's staff had indicated that it was not prepared to prove its case and had not even adverted to the serious problem of the burden of coming forward with evidence on the question of cost justification.²³

Respondents submitted a proposed consent order which would have terminated all the group-buying practices challenged in the complaint. It would not have included a provision binding the department store respondents acting in their individual capacity, as opposed to collectively, not to violate 2(f). However, there was no evidence that these stores had the power, acting individually, to engage in such practices, the complaint did not allege anything on this subject and complaint counsel proposed to offer evidence bearing only on the group-buying issue. The Commission rejected the settlement and issued the complaint for adjudication on October 6, 1964. I again dissented.

Years of litigation ensued, most of it directed to discovery questions. It is unnecessary to recount the unhappy details here save to note that over my repeated dissent the Commission twice more rejected consent settlement offers that gave promise of ending at once the practices charged in the complaint and included order provisions never previously obtained in a Robinson-Patman case.

Late in 1968, some four-and-a-half years after the AMC complaint issued and more than nine years after the investigation began, the case was still not ready for trial on the merits and promised to continue at least until the mid or late 1970's. The Commission, in its myopia, stubbornly refused to compromise in any way its rigid insistence on an order cast in the specific language of Section 2(f). It persisted in wanting to handle this economic problem—a problem of in-

²³ See *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953) (holding that this burden is on the Commission in a 2(f) case); *Suburban Propane Gas Co.*, F.T.C. Docket No. 8672 (June 3, 1968) (dissenting opinion [73 F.T.C. 1276]).

dustrial organization and structure—as a simple matter of illegal conduct by a few individuals. Unwilling to face reality or to accept anything less than what it considered total victory, the Commission finally—and unanimously—withdrew the complaint in December 1968.²⁴ No order was entered covering any of the practices charged in the complaint. Ten years of fruitless battle, much of it carried on over my dissent, at an expense of millions of dollars wound up in absolutely nothing but a mountain of paper.

Yet, the Commission has learned nothing from this quixotic crusade. There is now pending within the Commission, before a hearing examiner, another hoary 2(f) case, *Suburban Propane Gas Corp.*,²⁵ which also dates to 1959. Many of the Commission's mistakes in the *AMC* matter have been repeated in *Suburban Propane*.²⁶

It should be obvious that the instant complaints fit neatly into the *AMC-Suburban Propane* tradition, with one difference: the violations here alleged are far more trivial than the violations alleged in those cases, and the public interest in these matters is far less. Nevertheless, these complaints too give promise of spawning years of costly but unnecessary litigation.

Suppose, however, that instead of degenerating into inconclusive litigation the outcome of these cases is a Commission victory. What will be the result? As I pointed out in my earlier dissenting opinion on these matters, the probable impact of these cases will be to force a mere change in bookkeeping:

If, for example, the current market price is \$1.75, the seller deducts 10¢ brokerage and his net price is \$1.65. Assuming the same market conditions, the only effect of the orders in these cases would probably be that the buyer would pay the 10¢ brokerage, leaving the seller with the same net price of \$1.65. * * * However, while the economic impact might be zero, the cost to the Commission in time, money, and manpower would be considerable.

Again, history confirms the view that these complaints will not result in any public benefit. In addition to the examples cited in part I of this opinion, there is the Commission's action in the wearing apparel cases. Rather than undertake the kind of economic inquiry necessary to ascertain and evaluate the facts concerning competition in the department store industry, the Commission issued hundreds of orders, most of them pursuant to consent agreements, against small apparel manufacturers, suppliers of the large retail outlets, to eliminate alleged

²⁴ *Associated Merchandising Corp.*, F.T.C. Docket No. 8651, order withdrawing complaint (December 18, 1968 [74 F.T.C. 1555]).

²⁵ F.T.C. Docket No. 8672 [77 F.T.C. 189].

²⁶ See, e.g., dissenting opinions accompanying order denying interlocutory appeal (September 20, 1968 [74 F.T.C. 1606]), and order allocating burden of coming forward with the evidence (June 3, 1968 [73 F.T.C. 1269]).

violations of 2 (d) and (e).²⁷ If these orders have stimulated competition in the apparel manufacturing or department store industries, or if they have had any procompetitive effect, it is not discernible.

More directly in point is the outcome of the Commission's famous *Herzog* case.²⁸ There the Commission was "successful" in litigating a 2(c) case against a broker whose position was entirely analogous to that of the brokers in the instant matters. The Commission "won" the case in the Court of Appeals, largely because the respondent had filed an admission answer which the court regarded as constituting a stipulation that Herzog was the buyer's agent and not an independent broker. Subsequently, it became clear that resident buyers (brokers) in the fur industry, like real estate brokers and the present broker respondents, perform a useful economic function, beneficial to buyers and sellers and that who paid their commission is a matter of indifference to the public interest. As a result, the Commission, by minute of April 2, 1951, reaffirmed on November 22, 1966, determined that enforcement of the *Herzog* order would not be in the public interest. This decision it did not, of course, publicly announce.

Thus, the Commission apparently believes it has no discretion when it comes to squandering scarce resources on bringing such a proceeding and litigating it, but has ample discretion thereafter, once everyone's time and funds have been wasted, to consider the public interest and to drop the matter if necessary. Since the instant matters seem clearly parallel to *Herzog*, it is pertinent to ask whether, if the Commission eventually issues an order, after arduous and expensive litigation, on the ground that there has been a technical violation of Section 2(c), the public interest and economic realities will dictate that this order, too, not be enforced.

The answer to that question may be conjectural but one fact is clear: as far as the public we are supposed to represent is concerned, the outcome of these proceedings will be "heads you win, tails we lose." Whether the Commission "wins" or "loses" this case, the public interest will suffer. Public funds will have been squandered on proceedings which can have no conceivable value in promoting competition or the interests of consumers or even the interests of those private parties at whose behest the Commission has acted.

²⁷ See *Abby Kent Co.*, F.T.C. Docket No. C-328 (August 9, 1965) (dissenting opinion [68 F.T.C. 407-414]).

²⁸ *Jack Herzog & Co.*, 35 F.T.C. 71 (1942), *aff'd*, 150 F.2d 450 (2d Cir. 1945); see generally Edwards 147-52.

III

One other aspect of these matters is worthy of mention. As I have noted, the Commission apparently believes it has a mandatory statutory duty to act in these matters. The prevailing idea seems to be that the Commission may not exercise any discretion but is compelled to issue complaints despite the manifest disharmony of the complaints, again accepting the Commission's economic assumptions for purposes of analysis, with fundamental economic policies pursued by the President and Congress.

I do not agree, of course, with the Commission's premise. However, it seems to me that if the Commission really believes that it has no choice or discretion under a statute and believes that it must enforce it in a way designed and calculated to achieve absurd results, it has an obligation to inform Congress of the anomalies it has found in the statute. Not only has the Commission made no effort to do this but, when its policies and actions are challenged as wasteful and bizarre, it points to Congress and blames the legislature for enacting foolish statutes.

It is particularly unfortunate that the Commission has shirked its obligations to Congress at the present time. As is indicated in part I, both the Johnson and Nixon White House Task Force Reports have severely criticized the Commission's unintelligent administration of the Robinson-Patman Act. The conclusions of these bodies are obviously entitled to serious consideration, reflecting as they do the consensus of a diverse group of economists and lawyers who are of differing antitrust philosophies. These respected voices thus join the growing demand for a new look at the Robinson-Patman Act and its implementation to determine its proper place in antitrust policy.²⁹ Yet, the Commission, the body charged with primary responsibility for enforcing the Act, has shunned this opportunity to take the lead in the important process of re-examining the Act and harmonizing it with the overall objectives of antitrust.

Instead of offering this kind of thoughtful economic analysis, which everyone but the Commission seems to agree is timely, and essential, the Commission wastes its resources on these cases. To be sure, the Commission avows that it eschews the numbers game—simply counting the number of complaints issued—as a measuring rod for agency performance, but what has been substituted for it? The number of complaints has diminished but the Commission has not channeled its

²⁹ See, e.g., *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 U. Wash. L. Rev. 1 (1966); Final Report of the National Commission on Food Marketing 107 (1966); Edwards 627-57.

resources to the other areas—like reappraisal of the Robinson-Patman Act—that cry out for attention. The paucity of complaints merely reflects the fact that more investigations are closed (because of age, staleness, etc.) with no action taken. The Commission still indiscriminately opens numerous investigations of alleged Robinson-Patman violations and pursues them at considerable expense, but now it at least has the good sense to close most of them without issuing complaints. The time has come to call a halt to this pernicious cycle, to re-evaluate the Commission's enforcement program under the Robinson-Patman Act, to take inventory of the successes and failures of the Act, and to make an informed and reasoned report to Congress and the public.

The Commission performs a disservice to the public interest in ignoring these larger questions and squandering its resources on these trivial brokerage cases. I dissent.*

July 10, 1969

*It is sad, but not surprising, that the only response to this dissent should consist of a personal attack on me, charging me with merely "giving lip service to the intention of Congress" and having "an obvious antipathy toward the Robinson-Patman Act."

Before joining the Commission and as an assistant to the Solicitor General, I successfully argued the Commission's position before the Supreme Court in such major Robinson-Patman Act cases as *Federal Trade Commission v. Anheuser Busch, Inc.*, 363 U.S. 536 (1960), and *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). Where was my "antipathy" to the Act at that time?

Similarly, when I wrote opinions for the Commission reflecting an expansive interpretation of the Robinson-Patman Act, in such cases as *Foremost* (62 F.T.C. 1344 (1963), affirmed, 348 F. 2d 674 (5th Cir. 1965)); *Continental Baking* (FTC Docket No. 7630 (December 31, 1963 [63 F.T.C. 2071])); and *Sunbeam* (FTC Docket No. 7409 (January 11, 1965 [67 F.T.C. 20])), I do not recall being charged at that time with "antipathy" to the Act.

If dissents from erratic and irrational Commission interpretations of the Robinson-Patman Act are to be equated with "antipathy" to the statute, what does one say about the Justices of the Supreme Court and the judges of the various courts of appeals who over the past eight years have upheld my dissenting position—finding it, and not the majority's interpretation, to be in accord with the intention of the Congress—in such cases as *Fred Meyer, Inc.*, FTC Docket No. 7492 (March 29, 1963) (opinion concurring in part and dissenting in part [63 F.T.C. 74-7]), modified, 359 F. 2d 351 (9th Cir. 1966), reversed, 390 U.S. 341 (1968); *Callaway Mills, Co.*, FTC Docket No. 7634 (February 10, 1964) (dissenting opinion [64 F.T.C. 743-59]), reversed, 362 F. 2d 435 (5th Cir. 1966); *Fry Roofing Co.*, FTC Docket No. 7908 (July 23, 1965) (concurring opinion [68 F.T.C. 266-9]), affirmed, 371 F. 2d 277, 281-87 (7th Cir. 1966); *Forster Mfg. Co., Inc.*, 62 F.T.C. 852, 923 (1963) (dissenting opinion), reversed, 335 F. 2d 47 (1st Cir. 1964), cert. denied, 380 U.S. 906 (1965); *Borden Co.*, FTC Docket No. 7474 (February 7, 1964) (dissenting opinion [64 F.T.C. 573-81]), reversed, 339 F. 2d 953 (7th Cir. 1964); *American Oil Co.*, 60 F.T.C. 1786, 1814 (1962) (dissenting opinion), reversed, 325 F. 2d 101 (7th Cir. 1963), cert. denied, 377 U.S. 954 (1964); *Central Retailer-Owned Grocers, Inc.*, 60 F.T.C. 1208, 1241 (1962) (dissenting opinion), reversed, 319 F. 2d 410 (7th Cir. 1963); *The Nuaro Co.*, 61 F.T.C. 375, 394 (1962) (dissenting opinion), reversed, 316 F. 2d 576 (7th Cir. 1963); *Sunshine Biscuits, Inc.*, 59 F.T.C. 674, 681 (1961) (dissenting opinion), reversed, 306 F. 2d 48 (7th Cir. 1962); and *Shulton, Inc.*, 59 F.T.C. 106, 114 (1961) (dissenting opinion), reversed, 305 F. 2d 36 (7th Cir. 1962).

It would appear that the *ad hominem* attack now being made finds me in good company.

I join Commissioner Nicholson in expressing despair for the Commission's future enforcement of the Robinson-Patman Act, as well as the other important statutes which

DISSENTING STATEMENT OF COMMISSIONER NICHOLSON

It was not long after I joined the Commission that it became apparent to me that a thorough review of both the Commission's enforcement of the Robinson-Patman Act and the statute's provisions was long overdue.¹ However, I was of the opinion that the Commission, itself, would conduct such a re-evaluation. In this respect, I was encouraged by the persistency of Commission efforts in recent years to reevaluate its policies and procedures and make necessary changes.

For one brief moment, it appeared that this general re-evaluation would finally focus on Robinson-Patman enforcement.² Today's action, however, has shattered the illusion. Apparently, Robinson-Patman policy is the Commission's "sacred cow." While willing to approach enforcement of its other statutes with rationality and a concern with ultimate result, the Agency has reserved a different approach for the price discrimination statute—mechanical.

Since the Commission appears either incapable or unwilling to review internally its Robinson-Patman Act responsibilities in the light of modern day business realities, it is now apparent that this appraisal should come from without the Agency.

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SEPARATE STATEMENT OF COMMISSIONER DIXON

The issuance of these complaints has given Commissioner Elman an opportunity to castigate not only the present Commission but its predecessors over the past 33 years for their enforcement of the Robinson-Patman Act. And his sweeping indictment would necessarily include the numerous court decisions which also reflect what Commissioner Elman characterizes as a "literal-minded" interpretation of the Act. It seems, however, that the dissenting statement is not so much an attack upon the Commission's interpretation of the Robinson-Patman Act as it is an attack upon the Act itself. But the argument is not a novel one. It has been made before by Commissioner Elman and will undoubtedly be made again whenever a majority of the Commission proceeds contrary to his views.

the Congress has entrusted to its stewardship. The only encouraging sign is that knowledge of the Commission's failures and deficiencies under its present management is no longer confined to a relatively small segment of the bar and the business community, but is increasingly becoming a matter of widespread public concern. One's faith must be that where there is knowledge and understanding, there is hope for reform.

¹See, *Antitrust: Sound and Fury?*—Remarks before the Section of Antitrust Law, 91st Annual Meeting of American Bar Association, August 7, 1968.

²In April, the Commission voted to reevaluate, through a trade regulation rule proceeding, the problem of functional discounts to stocking dealers. See Advisory Opinion Digest No. 333 (April 18, 1969). See also Advisory Opinion Digest No. 263 (July 9, 1968), and accompanying dissenting opinions.

Insofar as I can determine from reading the dissenting statement, Commissioner Elman's approach to enforcing the Robinson-Patman Act is essentially a negative one. While giving lip service to the intention of Congress to assure "that businessmen at the same functional level would start on equal competitive footing so far as price is concerned,"¹ he would apparently ignore discriminations causing secondary line injury, as well as various practices expressly prohibited by Sections 2(c), 2(d) and 2(e), if enforcement of the Act would in any way impede competition at the primary level. In short, it would seem that he would resolve all "conflicts" between the Robinson-Patman Act and the antitrust laws against the purpose for which the Robinson-Patman Act was passed.

In the present case, there have been numerous complaints that the challenged practices have had serious anticompetitive effects. If these allegations are true, the practices would certainly violate Section 2(c). Commissioner Elman's characterization of the matter as "trivial" merely reflects an obvious antipathy toward the Robinson-Patman Act.
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SEPARATE STATEMENT OF COMMISSIONER MACINTYRE

My decision to vote for the issuance of these complaints is based upon my conviction that their issuance is justified. However, I have grave doubts that the Commission as it is now constituted will find itself able to resolve the issues presented by these complaints. I say that because it is obvious that some members of the Commission are not in sympathy with some provisions of the laws entrusted to this Commission. These complaints are based on one of those provisions. It is my view that opposition to a law should be directed to the Congress. Unless and until Congress should repeal a law, it should be obeyed. The legislative function should not be usurped by the expedient of administrative rescission.

The current policy split at the Commission level on matters of this kind, in my view, operate as perhaps the principal deterrent to the Commission's fulfillment of its mission. This makes it difficult indeed for the staff of the Federal Trade Commission to pursue a coherent policy in presenting matters to the Commission for its consideration. The voting patterns of individual Commissioners speak more eloquently than the words of any of us. Consequently, for those who would have an interest in such records, I would invite a *full examina-*

¹ *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505-520 (1963).

tion of the Commissioners' votes in this area for the past eight years on the issuance of complaints and orders. The question of whether our decisions are governed by the statutory text or by our individual value judgments would seem worthy of Presidential and Congressional inquiry.

July 10, 1969

CERTIFICATION OF MOTION TO DISMISS RESPONDENTS P & R BROKERAGE
CO. AND FRANK V. CONDELLO FROM FURTHER PROSECUTION
UNDER THE COMPLAINT

BY DAVID H. ALLARD, HEARING EXAMINER:

Respondents P & R Brokerage Co., a partnership, and Frank V. Condello, individually and as partner in P & R Brokerage Co., have filed a motion that it would be "in the interests of justice and in the public interest" to dismiss the complaint¹ with regard to them at this time or effective on October 31, 1972. Since the motion clearly is addressed to the Commission's administrative discretion, the examiner certifies the matter to the Commission.

Condello is the partner in charge of P & R Brokerage Co., a brokerage business operated in Salinas, California. He is the only partner actively engaged in the brokerage business under the name P & R Brokerage Co. The other partners are residents of Arizona and their business interests apparently are not involved in the proceeding. Under the partnership agreement, a 4-month notice of retirement is required. Condello has officially given that notice and the effective date of his retirement is October 31, 1972.² On that date, P & R Brokerage Co. will cease to exist as a brokerage business in Salinas, California, and Condello has no intention of engaging in the business again.

Counsel supporting the complaint argue that the relief sought is untimely because it is grounded on an event to take place in the future and they also point out that the motion fails "to address itself to protection of the public interest against substantive continuation, or resumption of the practices charged in the complaint."

¹ Respondent Borman Food Stores, Inc., did not timely file an answer to the complaint. By virtue of such default, an examiner's initial decision was filed on May 26, 1972, under the provisions of Section 3.12(c) of the Commission's Rules of Practice.

² According to Condello's affidavit, he is retiring because of his advancing age (70 plus years) and poor health; the emotional strain caused by the Commission bringing formal charges against him in spite of the fact that he had been attempting to obtain clarification from the Commission for upwards of 10 years about his operations in light of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act (answer to complaint, pages 5-33); and the recent deaths of his wife and two of his brothers-in-law who had been his partners.

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Order

It is the examiner's recommendation that the motion be granted, conditioned on the respondents filing a certification by November 10, 1972, which would attest to Condello's retirement, the cessation of P & R Brokerage Co. as a business entity, as well as Condello's intention not to re-enter the business or for P & R Brokerage to come alive in a new form. Based on the representations made in the affidavit, the examiner concludes there is no reasonable basis for believing that respondents' purposes are anything but bona fide and that respondents' intention is not to circumvent the law. If the respondents comply with the suggested proviso of the dismissal order, there would be no successor business entity to be liable for violation of a Commission order. In this regard, then, there is, in effect no concrete case before the Commission, only an abstract controversy—"sterile as abstract controversies usually are." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 (1945).

Counsel supporting the complaint cite *Crowell-Collier Publishing Company*, 70 F.T.C. 977, as an example to illustrate the proposition that the Commission is disinclined "to forego entry of an appropriate cease and desist order simply because respondents have terminated their business after the issuance of complaints." In contrast to *Crowell-Collier*, here there is no indication that respondent has abused or reasonably could be expected to abuse the public by creating a new business entity to resume the assailed practices. Since counsel supporting the complaint apparently feel that the affidavit is incomplete in some ways, as an alternative, the Commission might consider referring the matter back to the examiner to take a further deposition of Mr. Condello for the limited purpose of providing counsel with the opportunity to explore the uncertainties outlined in their answer to respondents' motion.

July 26, 1972.

ORDER DISMISSING COMPLAINT AS TO RESPONDENTS FRANK V.
CONDELLO AND P & R BROKERAGE Co.

This matter is before the Commission on the hearing examiner's certification of respondents Frank V. Condello's, as an individual, and P & R Brokerage Co.'s motion to dismiss the complaint as to them. In an affidavit accompanying said motion, Frank V. Condello avers that because he is in ill health, over 70 years of age, and under strain caused by the present litigation and several deaths in his family, he plans to retire on October 31, 1972, from the brokerage business, which is the subject of the complaint in this matter. P & R Brokerage Co.

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is a partnership solely operated by Frank V. Condello, and will be dissolved with the retirement of Frank V. Condello.

Counsel supporting the complaint resist respondents' motion for the reasons that it does not provide permanent relief, and is untimely as Mr. Condello has not yet retired.

The hearing examiner recommends granting respondents' motion.

For the reasons cited by respondent Frank V. Condello, the Commission has decided that it would not be in the public interest to continue these proceedings against the instant respondents. To meet the objections of counsel supporting the complaint, the Commission, however, reserves the right to issue a complaint against respondents, based upon the same or similar charges as the complaint being dismissed by this action, should future events warrant such action. Accordingly:

It is ordered, That the complaint in Docket No. 8789 be, and it hereby is, dismissed as to respondents P & R Brokerage Co. and Frank V. Condello, without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against these respondents at any time in the future as may be warranted by the then existing circumstances.