

Interlocutory Order

92 F.T.C.

IN THE MATTER OF
THE TIMES-MIRROR COMPANY

Docket 9103. Interlocutory Order, July 25, 1978

This order grants the appeal of complaint counsel for reinstatement of count II of the complaint, dismissed by order of the administrative law judge.

ORDER GRANTING COMPLAINT COUNSEL'S APPEAL FROM
ORDER DISMISSING COUNT II OF THE COMPLAINT

On July 27, 1977, the Commission issued its complaint in this matter alleging violations of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) in connection with respondent's sale of retail advertising in The Los Angeles Times.

This matter is now before the Commission on appeal by complaint counsel, pursuant to Section 3.23(b) of the Commission's Rules of Practice, from the order of the administrative law judge (ALJ) dismissing count II (the Robinson-Patman charge) of the complaint.¹ The ALJ ruled that newspaper advertising is not a "commodity" within the meaning of section 2(a) and, therefore, count II fails to state a claim upon which relief can be granted. For the reasons set forth below, we disagree with the ALJ's holding and reinstate count II of the complaint.

In reaching his decision, the law judge relied on court decisions holding that the term "commodities" is limited only to tangible products, not intangibles or services.² In addition, he looked to statements made after passage of the Robinson-Patman Act by one of its co-authors to the effect that such items as advertising, insurance and brokerage service are not commodities for purposes of the Act.³ The judge also cited two recent district court decisions specifically holding that newspaper advertising is not a commodity within the meaning of Section 2(a) of the Robinson-Patman Act.⁴ After reviewing these authorities, the ALJ concluded that, although newspapers are tangible goods, the respondent is selling "the service

¹ The allegations of count I of the complaint, relating to Section 5 of the FTC Act, are not at issue here.

² *E.g., Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527 (7th Cir. 1974) (title insurance not a commodity); *Baum v. Investors Diversified Services, Inc.*, 409 F.2d 872 (7th Cir. 1969) (mutual fund shares not commodities); *Tri-State Broadcasting Co. v. United Press International, Inc.*, 369 F.2d 268 (5th Cir. 1966) (sale of news reports treated as sale of a privilege); *CBS v. Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961) (sale of broadcast advertising time not a commodity).

³ W. Patman, *Complete Guide to the Robinson-Patman Act* (1963) at 33.

⁴ *National Tire Wholesale, Inc. v. Washington Post*, 441 F. Supp. 81 (D.D.C. 1977), *appeal docketed*, No. 781148 (D.C. Cir. Feb. 22, 1978); *National Auto Brokers Corp. v. General Motors Corp.*, 1974-2 Trade Cases ¶75,281 (S.D.N.Y. 1974).

of taking the advertiser's message into a million homes, with its own circulation list and its own means of distribution." Thus, while both a service and a product are involved, "the dominant nature of respondent's business can best be characterized as the sale of a service and not the sale of commodities"

The specific question before us has never been formally addressed by the Commission⁵ and the Supreme Court has expressly reserved ruling on the issue.⁶

Section 2(a) of the Robinson-Patman Act prohibits under certain circumstances discrimination in price between different purchasers of commodities of like grade and quality. It is clear that the Robinson-Patman Act applies only if a challenged price discrimination involves the sale of commodities. Price discrimination in noncommodity transactions, such as the furnishing of services, is not actionable under the statute.⁷

Although it is clear that the Act applies only to sales of commodities, the scope of that term is more ambiguous. Neither the original Clayton Act nor the Robinson-Patman amendments provide a definition of the term "commodities." The statutes do contain other references to "goods, wares, or merchandise"⁸ and Section 3 of the Clayton Act, relating to exclusive dealing contracts, includes the language "goods, wares, merchandise, machinery supplies or other commodities"⁹ While helpful, such language does not unambiguously clarify the reach of the term "commodities."

Moreover, the legislative histories of these statutes do not provide specific guidance as to what the term "commodities" encompasses.¹⁰

⁵ Shortly after passage of the Robinson-Patman Act, the Commission closed a section 2(a) matter concerning the sale of advertising space because it did not involve the sale of a commodity. 81 Cong. Rec. App. 2336-37 (1937). However, that same year the Commission issued an uncontested order under section 2(a) prohibiting price discrimination in the sale of a Christmas club savings plan which included the sale of passbooks, account books and advertising literature. *Christmas Club*, 25 F.T.C. 1116 (1937).

⁶ In oral argument in *Times Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), government counsel referred to the Commission action discussed in note 5 *supra*. In a footnote, the Court referred to this as an "early informal Federal Trade Commission opinion," and specifically stated that it expressed no views on the Commission's statutory interpretation. 345 U.S. at 609, n. 27.

⁷ Sections 2(d) and 2(e) of the Act prohibit the furnishing of services or facilities on a discriminatory basis, but these sections are addressed to merchandising or promotional aids which are furnished by a supplier to customers in connection with a sale of products or commodities.

⁸ The words, "goods, wares, or merchandise," which appear in Sections 2(a) and 2(c), were also contained in Section 2(a) of the Clayton Act.

⁹ The term "commodities" in Section 3 has since been interpreted by one court as having essentially the same meaning as the words "goods, wares, or merchandise." *Baum v. Investors Diversified Services, Inc.*, *supra* note 2, at 875.

¹⁰ Congress specifically excluded labor from the coverage of the Clayton Act, 15 U.S.C. 17, but other exclusions are not delineated in the statute. Further, at least some members of Congress apparently believed that insurance would be covered by the Act except for a Supreme Court ruling that insurance contracts and policies were not in interstate commerce. See 51 Cong. Rec. 9390 (1914).

However, similar language is contained in many state statutes which Congress looked to in passing the Clayton Act,¹¹ and court decisions construing these or related state antitrust laws have not adopted a restrictive definition of commodities.¹² Although the state precedent offers no unequivocal guide to Congress' intentions, it does suggest that Congress was more concerned about the overall thrust of the statute and that primary emphasis should be placed on defining the term "commodities" within that context, rather than attempting to draw unduly fine distinctions between tangible and intangible products.

Since the word "commodities" was carried over from the Clayton Act, it is not surprising that the legislative history of the Robinson-Patman amendments sheds little additional light on the meaning of commodities. What is clear is that Congress' concern with chain store buying practices focused attention on pricing activities involving products which are unquestionably tangible in nature. That is reflected, understandably, in statements made during consideration of the legislation leading to passage of the Robinson-Patman Act.¹³ In addition, the language of the statute reflects emphasis on those types of transactions concerning clearly tangible goods, such as the reference in section 2(a) to price changes allowed for perishable or obsolescent goods. Representative Patman has since stated that the word "commodity" in its broadest sense could include items of trade other than those in tangible form, but that in the Robinson-Patman Act the term is used in an ordinary commercial sense to designate any movable or tangible thing.¹⁴ Thus, in his opinion, advertising, insurance, brokerage service, and similar items would be excluded from the Act's coverage though they might be commodities in the broader sense.

In construing the Robinson-Patman Act, the courts have adopted the tangible/intangible dichotomy and consistently taken the position that the Act applies only to transactions which have tangible characteristics.¹⁵ Although virtually no transfer of an

¹¹ A list of the 19 states which had enacted anti-price discrimination laws prior to passage of the Clayton Act is set forth in H.R. Rep. No. 627, 63 Cong., 2d Sess. 9 (1914).

¹² For example, in two state cases, one decided before and the other after enactment of the Clayton Act, courts found that telephone service, *McKinley Telephone Co. v. Cumberland Telephone Co.*, 140 N.W. 38, 40 (Wis. 1913), and electricity, *State v. Interstate Power Co.*, 226 N.W. 427, 433 (Neb. 1929), were commodities for purposes of the applicable statutes. However, as respondent points out, in the only reported case addressing the commodity issue under section 2(a) of the original Clayton Act, *Fleetway, Inc. v. Public Service Interstate Transp. Co.*, 72 F.2d 761 (1934), the court there distinguished the *McKinley* decision on the grounds that the Wisconsin statute went beyond the federal law by proscribing restraints on the supply as well as the price of "any article or commodity." *Id.* at 764. The court, though, ultimately concluded that discriminatory bus transportation rates were not covered by Section 2(a), a decision which is not inconsistent with the result we reach here.

¹³ See Representative Patman's remarks in connection with introduction of his bill at 79 Cong. Rec. 9079 (1935).

¹⁴ W. Patman, *supra* note 3.

¹⁵ See cases *supra* note 2.

intangible such as a service, right or privilege can be accomplished without the involvement of tangibles,¹⁶ the courts have held that the incidental existence of a tangible item will not suffice to bring a transaction within the Act's coverage. Rather it is the dominant or essential nature of the transaction which the courts have looked to in determining if it falls within the scope of the Act.¹⁷

Certainly there is no doubt about the Robinson-Patman Act's application to tangible products that are clearly identifiable as such. Nor is there any doubt that the Act was not intended to reach transactions of a purely service nature, as reflected in the *Fleetway* decision, *supra* note 12. The difficult issue arises where, as here, the transaction cannot be neatly categorized as either a service or tangible product. In our view the proper course is to construe the term "commodities" in light of the fundamental purposes and structure of the statute, rather than becoming preoccupied with metaphysical considerations about what is or is not a tangible product.

From that perspective, we conclude that it is consistent with the language and spirit of the Robinson-Patman Act to treat newspaper advertising as a commodity for purposes of Section 2(a). Clearly unjustified discrimination in the pricing of newspaper advertising space can adversely impact on competition at the retail level just as surely as price discriminations associated with the purchase and resale of products by retailers in the ordinary course of their business. More specifically, the transactions at stake here are amenable to the detailed provisions of the Act. In other words, the product sold (*i.e.*, newspaper advertising space) is sufficiently fungible in nature to be susceptible to the kind of non-discriminatory pricing contemplated by the legislative scheme.

Respondent contends, however, that the wording of the Robinson-Patman Act precludes its application to the instant transactions, citing provisions permitting price differentials based upon "differences in the cost of manufacture, sale, or delivery" and changes affecting the "marketability of the goods concerned," such as "deterioration of perishable goods," and "obsolescence of seasonal goods." To be sure, it is not likely that the latter exceptions would apply to newspaper advertising, as they probably would not be

¹⁶ *E.g.*, *Freeman v. Chicago Title & Trust Co.*, *supra* note 2, 505 F.2d at 531; *Tri-State Broadcasting Co. v. United Press International*, *supra* note 2, 369 F.2d at 270.

¹⁷ *See, e.g.*, *Tri-State Broadcasting Co.*, *supra* note 2 (right to broadcast news information, although news reports in written form); *General Shale Products Corp. v. Struck Construction Co.*, 132 F.2d 425 (6th Cir. 1942)(construction contract at stake rather than sale of bricks used in construction). *See also* *CBS v. Amana Refrigeration, Inc.*, *supra* note 2, 295 F.2d at 378, where the court concluded in a case brought under Section 2(a) and 3 of the Clayton Act that the sale of television advertising time involved essentially the sale of a privilege to sponsor a program and advertise.

invoked for many other tangible products. Yet, it seems equally clear that newspaper advertising space can be sold for "use, consumption, or resale," measured in terms of "like grade and quality" and priced in a manner that reflects differences in the cost of "manufacture, sale, or delivery." 15 U.S.C. 13(a)(emphasis added).

To put the issue differently, there is nothing inherent in the sale of newspaper advertising space that requires particularized skills or treatment for different customers which would render the application of the Robinson-Patman Act to such transactions especially difficult. Unlike the negotiation of a construction contract, the sale of investment or other professional services, or the provision of transportation, the product being sold here functionally conforms to the statutory framework.

To treat newspaper advertising as a commodity does no violence to the structure of the Act, nor does it open the floodgates for litigation concerning a host of transactions which bear little relationship to the purposes underpinning the statute. To the contrary, we believe our interpretation effectuates the purposes of the Robinson-Patman Act while recognizing the limiting features built into that legislation.¹⁸ We conclude, therefore, that newspaper advertising, despite the attendant service aspects, is essentially a commodity within the meaning of Section 2(a).

It is ordered, That complaint counsel's appeal from the order dismissing count II of the complaint be, and it hereby is, granted.

¹⁸ To the extent that our decision is in any way inconsistent with previous court decisions construing the meaning of the term "commodities," we respectfully decline to follow those holdings. Similarly, although we respect the contrary views expressed earlier by the co-author of the Robinson-Patman Act, we believe greater weight in this instance should be given to the history and purposes of the Act than should be accorded to Representative Patman's statements made after its passage. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963).

Complaint

IN THE MATTER OF

DRIVER TRAINING INSTITUTE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9060. Complaint, Oct. 3, 1975 — Decision, July 27, 1978*

This consent order, among other things, requires a Brooklyn, N.Y. truck and tractor-trailer training school to cease misrepresenting job opportunities, potential earnings, and employment demands for their graduates; and the effectiveness of their job placement activities. Further, firm is required to make timely, prescribed disclosures regarding cooling-off periods, cancellation rights, and job success of former trainees. Additionally, the order requires that firm establish a \$50,000 restitution fund to provide refunds to eligible former students, and maintain a surveillance program designed to ensure proper compliance with the terms of the order.

Appearances

For the Commission: *Alice T. Petizon, Jan F. Constantine and Shirley F. Sarna.*

For the respondents: *Spengler, Carson, Gubar, Churchill & Brodsky, New York City and Mirabelli & Guld, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Driver Training Institute, Inc., a corporation, Drivers Unlimited, Inc., a corporation, Ran-Lynn Rental and Service Corporation, a corporation, and Herbert Gruen, a/k/a Herbert Gruenstein, individually and as an officer of said corporations, and Sidney Spector, individually and as an officer of Driver Training Institute, Inc., hereinafter referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Driver Training Institute, Inc., Drivers Unlimited, Inc., and Ran-Lynn Rental and Service Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal office and place of business located at 50 Greenpoint Ave., Brooklyn,