84TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 2202

TO STRENGTHEN THE ROBINSON-PATMAN ACT AND AMEND THE ANTITRUST LAW PROHIBITING PRICE DISCRIMINATION

MAY 24, 1956.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 1840]

The Committee on the Judiciary, to whom was referred the bill (H. R. 1840) to strengthen the Robinson-Patman Act and amend the antitrust law prohibiting price discrimination, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

REPORTED BILL

[H. R. 1840, 84th Cong., 1st sess.]

A BILL To strengthen the Robinson-Patman Act and amend the antitrust law prohibiting price discrimination

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (b) of section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (15 U. S. C. 13 (b)), is hereby amended to read as follows:

"SEC. 2. (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That unless the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce it shall be a complete defense for a seller to show that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in

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good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

PURPOSE

H. R. 1840 amends section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, to provide that unless the effect of a discrimination prohibited by section 2 of the act may be substantially to lessen competition or tend to create a monopoly in any line of commerce it shall be a complete defense for a seller to show that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. The bill would modify the doctrine enunciated by the Supreme Court in *Standard Oil Co.* v. *Federal Trade Commission* (340 U. S. 231 (1951)), that, regardless of the injurious effect on competition, it is a complete defense to a charge of discrimination for a seller to show that his differential was made in good faith to meet a lawful and equally low price of a competitor. The good-faith provision of section 2 (b), however, would still be a complete defense to a charge of discrimination where the effect may be to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

REASONS FOR BILL

H. R. 1840 would amend and strengthen section 2 (b) of the Clayton Act as amended by the Robinson-Patman Act by closing a loophole in that section which has frustrated effective enforcement of the anti-price-discrimination law. The loophole resulted from the 5–3 decision of the Supreme Court in the Standard Oil case. Since that decision any supplier is able to discriminate in favor of a customer who has been offered a lower price by a competitor notwithstanding the extent of the injury that the discrimination may cause to the supplier's other customers or upon competition generally.

The significance of this decision upon enforcement of the statute is best understood by reference to the act's historical development. The original law banning discriminatory pricing was contained in section 2 of the Clayton Act enacted in 1914, which made it unlawful for sellers in the course of interstate commerce—

> either directly or indirectly to discriminate in price between different purchasers of commodities * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

A proviso to this section permitted price differentials between purchasers of commodities resulting from cost differences and differences in the grade, quality, or quantity of the commodities sold, as well as differentials—

> in price in the same or different commodities made in good faith to meet competition.

The legislative history of this section shows that it was directed at the practice of large corporations:

> * * * to lower prices of their commodities, oftentimes below the cost of prices of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in a particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of the same class of commodities above their fair market value in other sections or communities.[1]

Congress concluded that these practices were unfair and unjust, not only to competitors who are injured thereby but also to the general public, and therefore made this form of discrimination a specific offense under the antitrust laws.[2]

Experience in administering section 2 of the Clayton Act proved unsatisfactory, however. As reported by the Senate Committee on the Judiciary:

> The weakness of present section 2 lies principally in the fact that: (1) It places no limit upon differentials permissible on account of differences in quantity; and (2) it permits discriminations to meet competition, and thus tends to substitute the remedies of retaliation for those of law, with destructive consequences to the central object of the bill. Liberty to meet competition which can be met only by price cuts at the expense of customers elsewhere, is in its unmasked effect the liberty to destroy competition by selling locally below cost, a weapon progressively the more destructive in the hands of the more powerful, and most deadly to the competitor of limited resources, whatever his merit and efficiency.[3]

As a result of these defects in the Clayton Act, harmful discriminatory practices became increasingly widespread.[4] It was against this background that the Robinson-Patman amendment to section 2 of the Clayton Act was adopted in 1936. This amendment was an outgrowth of investigations disclosing that large buyers were exacting from their supplies substantial preferences in the form of rebates, discriminatory discounts, false brokerage payments, and similar unearned allowances.[5]

Congress recognized that these practices which caused sellers to discriminate in favor of large buyers as against their smaller competitors threatened the survival of smaller concerns regardless of their efficiency. The Robinson-Patman amendment was designed to give protection against these practices and to preserve equal competitive opportunity at all levels of competition.

Section 2 (a) of the Clayton Act as amended made unlawful not only discriminations which may substantially lessen competition or

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[1] H. Rept. No. 627 (63d Cong., 2d sess., 1914), pp. 8–9.
[2] Ibid.
[3] S. Rept. No. 1502 (74th Cong., 2d sess., 1936), p. 4.
[4] See Final Report on Chainstore Investigation, S. Doc. No. 4 (74th Cong., 1st sess., 1934).
[5] Ibid.

tend to create a monopoly in any line of commerce but also discriminations which may "injure, destroy, or prevent competition with any person * * *." A second major change made by the Robinson-Patman Act was to restrict the scope of the "good faith meeting of competition" proviso of the Clayton Act which allowed a seller charged with price discrimination to fall back on the defense that the lower price was offered in good faith to meet competition. To limit the applicability of this good-faith defense, section 2 was rewritten and the meeting-competition proviso placed in section 2 (b) as follows:

> That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Although the 2 (b) proviso is not free from ambiguity and the legislative history not clear, there is support for the view that Congress did not intend to set up the meeting of competition as an absolute bar to a charge of price discrimination. As the chairman of the House managers stated in reporting the conference version of the Robinson-Patman bill to the House:

> If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the act entirely at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product. One violation of law cannot be permitted to justify another. * * *[6]

In the Standard Oil case the majority of the Supreme Court rejected the Federal Trade Commission's contention that the 2 (b) defense was not operative where the effect may be to substantially lessen or tend to create a monopoly. The Commission argued that since it found the prohibited competitive effects of the discrimination, a cease-and-desist order was properly issued whether or not Standard made out the 2 (b) defense by showing that it did meet its competitor's prices in good faith. Under the Court's construction of section 2 (b), Federal enforcement agencies have no power to stop a discriminatory practice by a seller even though it substantially lessens competition or tends to create a monopoly, in the event that the supplier can demonstrate that he acted in good faith.

Section 2 (b) as now construed permits a seller to engage in the very practices which largely nullified the original section 2 of the Clayton Act and which led to the enactment of the Robinson-Patman amendment. Present law permits a seller to discriminate against the vast majority of his customers in favor of a preferred customer if he can show that he offered the special low price in good faith to meet an equally low offer by a competitor, regardless of the injury inflicted on his customers denied the special low price. For example, a large supplier can, with impunity, offer a mass merchandiser a much lower price than he offers his other customers by showing that the mass mer-

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[6] 80 Congressional Record, p. 9418 (1936).

chandiser had first obtained a lower price from a competing supplier.

When a price discrimination favors a particular buyer-distributor, there is no assurance that he will pass this advantage on to the consumer by reducing the resale price of the commodity. The fact is that a favored buyer is under less economic compulsion to reduce his resale price because his competitors have not received the same preferential treatment. Indeed, the favored buyer has an incentive to hold his price to that prevailing in the market and thereby enjoy a wider margin of profit.

Price discriminations favoring preferred buyers present a danger to the competitive enterprise system which is inconsistent with the policy of the price discrimination statute. Firms can abuse their superior market position and engage in discriminatory practices that eliminate small suppliers and small retailers from the competitive scene. In practical effect the law as presently construed allows the private interests of a discriminator to outweigh the public interest in preserving competitive opportunity at all levels of business activity. H. R. 1840 would reassert that the public interest in protecting the economy against discriminations which may substantially lessen competition or tend to create a monopoly must prevail over private interests served by discrimination.

Under the bill, a seller retains all his rights to meet a competitive price by nondiscriminatory means. A seller may still give price differentials which are justified by cost savings. In addition good faith meeting of competition would remain a complete defense when the effect of the discrimination falls short of the requisite substantial lessening of competition.

EXPLANATION

The bill preserves good faith as an absolute defense where the effect of the discrimination may not substantially lessen competition but merely affects competition with a person who either grants or knowingly receives the benefit of such discrimination, or with customers of either the buyer or the seller. To the extent that the meeting competition proviso affords an absolute defense, it is circumscribed by the same conditions enunciated by the Supreme Court in the Standard Oil case.

Under the bill the defense in section 2 (b) in cases of price discrimination is intended to be limited to a price reduction made in good faith to meet a lawful and equally low price of a competitor. The defense in these cases is restricted to price differentials which occur in actual competition. It does not include reductions which undercut the lower price of a competitor.

Legality of a competitor's price is an essential element in determining the good faith of the person charged with unlawful price discrimination and consequently must be established by the respondent or the defendant. Such legality may be established by showing the existence of facts which would lead a reasonable and prudent person to believe that his competitor's price was lawful.

The defense provided in section 2 (b) of the bill is intended to apply to defensive reductions made by a seller in individual competitive situations in order to retain an existing customers and not to situations where competition is injured, destroyed, or prevented by discrimina-

tions made by a seller in an offensive effort to penetrate new markets or to secure new customers.

The meeting competition defense provided in section 2 (b) of the bill is available to rebut a prima facie case involving a discrimination in price or services or facilities furnished. A prima facie price discrimination case is made by showing the elements of a prohibited discrimination set forth in section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act. These elements are: (1) Discrimination in price between different purchasers of commodities of like grade and quality; (2) jurisdictional facts as to commerce; (3) injury to competition where the effect of the distrimination may be (*a*) substantially to lessen competition, or to tend to create a monopoly, or (*b*) to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination, or with customers of either of them.

Upon proof that the effect of the discrimination may be substantially to lessen competition or to tend to create a monopoly the meeting competition defense of section 2 (b) is not available. Accordingly, where these effects are shown, evidence tending to establish the good faith of the seller in meeting a competitor's price is irrelevant.

On the other hand, where the evidence shows that the effect of the discrimination may not substantially lessen competition or tend to create a monopoly but merely may be to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination, or with customers of either of them, the seller charged with the discrimination may overcome the prima facie case and have a complete defense by evidence which establishes that his lower price was made in good faith to meet the lawful and equally low price of a competitor.

The concepts of "substantial lessening of competition" and "tendency to create a monopoly" ordinarily involved more than a mere injury, destruction, or prevention of competition with an individual market trader. It is intended that the good-faith defense is to be applicable where the injury is only to an individual competitor, but is not of sufficient effect that it may result in injury to the vigor of competition. In appropriate cases, however, proof of injury only to an individual competitor would not preclude a finding that the effect of such injury may also be substantially to lessen competition or tend to create a monopoly.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the House of Representatives, there is printed below in roman existing law in which no new change is proposed; the matter proposed to be stricken out is enclosed in black brackets, and new matter proposed to be added is shown in italics:

SECTION 2 (B) OF AN ACT APPROVED OCTOBER 15, 1914, AS AMENDED (15 U. S. C. 13 (B))

SEC. 2. (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie

case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* [That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing] *That unless the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce it shall be a complete defense for a seller to show* that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

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