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MEETING COMPETITION UNDER THE ROBINSON PATMAN ACT

CHARLES J. STEELE†

IN VIEW OF THE VAST amount of literature on the subject, it is now almost trite to reflect upon the inconsistencies of the Robinson Patman Act. Its double lack of clarity and precision, as well as its conflicts with the Sherman Act, have been attested to by the Supreme Court,1 and have often been denounced by the perennial speakers at conventions of the anti-trust bar. It is unlikely, however, that more confusion and contradiction have ever existed in any field of law than now surrounds the "good faith meeting of competition" defense of Section 2(b) of the Clayton Act, as amended by the Robinson Patman Act.

THE STATUTE

Section 2(a) of the Clayton Act as amended by the Robinson Patman Act,2 in general, prohibits discrimination in the selling price of articles of like grade and quality sold in commerce, unless cost

2. Sec. 2(a) [Clayton Act] That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either of any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or 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: Provided, That nothing [herein] contained . . . shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promo-
justified, where the effect is injurious to competition. Section 2(d) of the Act prohibits the payment by a supplier to his customers of promotional or advertising allowances, unless the payment is made available on proportionally equal terms to all other customers of the supplier competing with the favored customer in the distribution of the product. Section 2(e) is very similar to section 2(d). Section 2(e) prohibits a supplier from furnishing services or facilities to a purchaser of a commodity bought for resale upon terms not accorded to all purchasers on proportionally equal terms.

While section 2(d) uses the term "customer" and 2(e) the term "purchaser," they have been construed to have the same meaning.

Section 2(b) provides, inter alia, that nothing shall prevent a seller from rebutting a prima facie case resulting from a showing of "discrimination in price or services or facilities furnished" by showing that the seller's "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.” This provision in section 2(b) is known as the “good faith meeting of competition defense.” To date, it has provided many more questions than it has answered.

As section 2(b) has been judicially construed over the years, the courts have clarified some aspects of it. In Standard Oil Company v. FTC, the Supreme Court rejected the reasoning of the Federal Trade Commission and the United States Court of Appeals for the Seventh Circuit, and held that a showing that price competition was met in good faith was a complete defense, even though the act of meeting a competitor’s price had had an adverse effect upon competition in the particular instance involved.

The competition met must be specific, and not general. In other words, specific definite prices are what must be met, not just a general pricing system generally met by a generally similar system.

The United States Court of Appeals for the Second Circuit has held that “an ‘equally low price of a competitor’ means an equally low price for a given quantity.” A competitor of Standard Brands had been selling to a customer a given quantity at a stated price which was less than Standard Brands’ price for that same quantity. Standard Brands then sold that customer a smaller quantity at a price below its competitor’s price for the smaller quantity and also below its own price for that quantity, but not below its competitor’s or its own price for the larger quantity sold to that customer by the competitor. This, the Second Circuit held, was not a good faith meeting of competition within the meaning of section 2(b).

There remains some doubt as to whether or not the competitor’s price which is met must itself be lawful before it can legally be met. In FTC v. A. E. Staley Mfg. Co., the Supreme Court referred 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.” Standard Oil Company v. FTC, is also cited as authority for the proposition that the price met must be lawful, and certainly that decision does at times use the word “lawful” in connection with the price to be met. Federal Trade Commissioner Elman, dissenting in Sunshine Biscuits, Inc., states that “[t]he requirement that the lower prices met be ‘lawful’

10. 324 U.S. 746, 754 (1945).
12. FTC Docket No. 7708, Opinion released September 25, 1961, 3 Trade Reg.
appears now to be established." Mr. Elman concedes that *Standard Oil Company v. Brown,*\(^\text{13}\) held that the price met need not be lawful, but concludes, "At the least, no seller should be accorded the protection of the good faith clause if he knew or had reason to know that the competitive prices he was meeting were unlawful." What a seller is supposed to do when his competitor begins to take his customers by offering them a low, unlawful price, is not discussed by Commissioner Elman. The seller will lose his customer, of course, unless he does meet the low, unlawful offer of his competitor. Complaining to the Federal Trade Commission about his competitor's unlawfully low price may not prove satisfactory since many FTC cases have taken years to conclude.

If, in *Sunshine Biscuits, Inc.*, Commissioner Elman glossed over the question of the requirement that the price the competitor meets must be lawful, he more than balanced the scales in two later dissents, *Tri-Valley Packing Assn.*\(^\text{14}\) and *American Oil Co.*\(^\text{15}\) His dissents in these two cases thoroughly examine different aspects of this problem of the "legality" of the price met and related procedural problems.

The Tri-Valley Packing Association was in the business of processing and canning fruits and vegetables which it sold to customers located throughout the United States. The Commission found that in doing so, Tri-Valley discriminated in price in favor of certain large chain stores. Among the defenses raised by Tri-Valley was the good faith meeting of competition defense of section 2(b). As phrased in the Commission opinion, "In order to establish this defense, respondent has the affirmative duty of proving that it reduced its prices to certain customers in good faith to meet the equally low price of a competitor." Turning to the lawfulness of the price met, the Commission opinion then stated:

The Supreme Court in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951), clearly indicated that the lower price which may be met by a seller under the [section 2(b)] proviso must be a "lawful" price. Certain it is, therefore, that as part of the good faith requirement of this defense, respondent must at least show the existence of circumstances, which would lead a reasonable person to believe that the lower prices it was meeting were lawful prices.

The Commission majority held that Tri-Valley failed to carry its burden because it showed only that it had met some lower prices of

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\(^{13}\) 238 F.2d 54 (5th Cir. 1956).

\(^{14}\) FTC Dockets 7225 and 7496, decided May 10, 1962, 3 Trade Reg. Rep. ¶ 15,893.

\(^{15}\) FTC Docket 813, decided November 24, 1961, 3 Trade Reg. Rep. ¶ 15,582.
competitors. Tri-Valley's evidence did not go further and indicate whether the prices met "could be cost justified or otherwise excused under any of the exceptions to the prohibitions of section 2(a) or that [Tri-Valley] had reason to believe that they could be justified."

Commissioner Elman differed with his four brethren with respect to the burden a respondent (in this case, Tri-Valley) should have to bear on the issue of the lawfulness of the price met. His dissent pointed out that the lower prices of Tri-Valley's competitors which were met were not automatically in violation of section 2(a) merely because they were discriminatory. The discriminatory prices might not have the proscribed effect on competition; they might be cost justified, or they might be in response to changing conditions affecting the market for, or marketability of, the goods concerned, or, lastly, they in turn might be offered in good faith to meet the equally low prices of their competitors. In any of these events, there would be no violation of section 2(a). Since this is so, Commissioner Elman concluded, a seller should not be forced to compete at his peril.

Where a seller in an active market meets the lower prices of other sellers and invokes the meeting-competition-in-good-faith defense allowed by section 2(b), consideration of elementary fairness, effective administration of the statute, and the realities of a competitive market preclude imposition on him of a heavier burden than showing he had no reason to suppose that the competitive lower prices he was meeting were unlawful.

The majority would have the seller-respondent prove that the prices he met were lawful, or at least that "circumstances" existed which would lead a reasonable person to believe they were lawful. Commissioner Elman, on the other hand, would make him show he has no reason to believe the prices were unlawful. It may not appear to be too large a distinction, but in the real world of competitive business it is of vital importance because very often a seller will have no idea whether or not the price of his competitor which he must meet is lawful or not. In this state of ignorance, the Commission majority would forbid him to meet his competitor's price (i.e., forbid him to compete). Commissioner Elman would allow him to compete.

The American Oil Company case grew out of a local, short lived gasoline price war. The war began, so the Commission found, when a Shell Station in Smyrna, Georgia, cut the price of its gasoline to meet that of a nearby, competing "Paraland" station. Other gasoline stations naturally and necessarily followed suit. To help stations selling its gasoline compete, American Oil Co. cut its prices to them. The war spread a little, and American also cut its price to its stations in
Marietta, a town two miles from Smyrna and on the same highway as Smyrna. Its prices to its stations\(^\text{16}\) in Smyrna, however, were somewhat lower than its prices to its stations in Marietta. The whole "war" lasted only two weeks.

The Commission majority found that the Smyrna American stations competed with the Marietta American stations and that the competition affected was that between American's customers "in the resale of [its] products," i.e., between the American Stations in Smyrna and those in Marietta.

The Commission held that the section 2(b) defense of good faith meeting of competition was not available to American in this case as a matter of law,\(^\text{17}\) but that even if it were, American had failed to rebut prima facie evidence of its knowledge of the illegality of the prices it met. In so doing, the Commission held, without hearings or evidence, that Texaco, Sinclair, and Gulf, as well as Shell and American, had violated section 2(a), even though it had never issued complaints against Texaco, Sinclair, Gulf, or Shell.

The Commission stated:

And we need not decide at this time whether proof of the illegality of a competitor's price in itself is sufficient to rebut a claim of meeting competition. We are of the opinion, however, that a seller who meets a competitor's lower price which he knows or has reason to believe is illegal, has failed to meet the good faith requirement of the defense. Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956). Since the seller claiming this defense has the affirmative duty of establishing each element thereof, including good faith, we think it incumbent upon him to show, at least, the existence of facts which would lead a reasonable and prudent person to believe that the price he was meeting was lawful.

Commissioner Elman again disagreed with the majority. He accused the majority of overlooking the fact that the controlling inquiry should be the seller's subjective good faith. He went on:

A seller's burden of establishing good faith is satisfied by showing that he had no reason to believe the lower price met was unlawful.

Commissioner Elman disagreed with the majority holding that the seller must go further and show positive facts or circumstances,

\(^{16}\) The stations were not owned by American Oil Co. By "its stations" reference is made to stations selling its products.

\(^{17}\) Relying on the Commission decision in Sun Oil Co., Docket 6641, reversed in Sun Oil Co. v. Federal Trade Commission, 294 F.2d 465 (5th Cir. 1961), now awaiting argument before the Supreme Court on certiorari. This case is discussed at length below.
known to him when he met the competitive price, "which would lead a reasonable and prudent person to believe that the price he was meeting was lawful."

It is difficult to disagree with Commissioner Elman's conclusion that the majority opinions in Tri-Valley and American Oil place the businessman in an impossible, not to mention anti-competitive position. In American Oil, for example, American's choice, once Shell lowered its prices, was either (1) not to meet Shell's price, i.e., not to compete with Shell price-wise and therefore lose business, or (2) meet Shell's price, for as short a time as two weeks, and risk facing years of litigation before the Federal Trade Commission and the appellate courts.

As a practical matter, American had no way of knowing whether Shell's price was lawful, especially since Shell merely met Paraland's price, and Paraland was owned by Phillips, a major competitor of Shell. It is this author's belief that ultimately Commissioner Elman's position will prevail in the courts over that of his colleagues.

Aside from the question of knowledge of the lawfulness of the competitor's price, to prohibit a supplier from meeting a competitor's price, even if it is unlawful, is a move calculated to stifle competition, not foster it. This may, however, turn out to be the law. If it does, it will be judge-made or Commission-made law beyond all question, because nowhere in the statute does the word "lawful" appear in connection with the good faith meeting of competition defense.

It should also be kept in mind that if two suppliers connive to adopt each other's unlawful prices, this is price fixing, punishable as a crime under the Sherman Act, not a good faith meeting of competition. However, when one supplier independently cuts his price in good faith, to meet the unlawful price of his competitor, then neither the wording of the statute nor sound economics requires that his actions be penalized.

Within recent months, three very important questions dealing with the good faith meeting of competition defense have been tentatively answered by the courts and the Federal Trade Commission. It may take many years before these questions are definitely set to

18. Under § 2(b), a seller can meet, but not beat, a competitor's price. The Commission has taken the position that when a "premium" beer, such as Anheuser-Busch's Budweiser, is sold at a "local beer" price, this is beating competition, not meeting it. (Docket 6331). Presumably, the same would be true when a "major" such as Shell Oil dropped its price to that of an "independent" such as Scott Gas. In the American Oil case, however, the "non-name brand," Paraland, was not an "independent" but was owned by a "major," Phillips. When Shell matched Paraland's price, therefore, did it "meet" it or "beat" it? The Commission held American should have known that Shell "beat" it, and that Shell's price was, therefore, unlawful, but this is unrealistic in the extreme. The correctness of the Commission's contention vis-a-vis "premium-local" or "major-independent" meeting or beating
rest as "established law." The questions and their present-day answers, however, are both interesting and important to today's anti-trust counsel and their clients.

I.

Whose Competition Can Be Met?

An example will best clarify the question. Sun Oil Company refines, sells, and distributes gasoline throughout the United States. In Jacksonville, Florida, Sun sells to a number of service stations. These stations are not owned by Sun; they are owned by independent contractors who buy gasoline from Sun and resell it to their customers.

One of the independent contractors was named McLean. In 1955, Sun was selling Blue Sunoco to McLean for 24.1¢ a gallon, and McLean was reselling it at 28.9¢. Sun was selling to the other Sunoco stations in Jacksonville at the same price. Now, had a competitor of Sun, Texaco or Gulf for example, tried to get McLean to switch to its brands, and offered him Gulf or Texaco gasoline at 22.1¢, Sun could have cut its price to McLean to 22.1¢ and at the same time kept the price of its gasoline at 24.1¢ to the other Sunoco stations in Jacksonville, including those nearest to McLean's station. In so doing, it would be discriminating in price, but it would, in good faith, be meeting the competition of its competitors, Gulf or Texaco. This good faith meeting of competition would be a complete defense to a charge of price discrimination. That, however, is not what happened.

In June of 1955, Super Test Oil Company, a "non-major" competitor of Sun in Jacksonville, opened a service station across the street from McLean's Sunoco station. The Super Test station sold gasoline cheaper than McLean. On August 28, 1955, it dropped its price to 20.9¢ a gallon, so that it was selling gasoline for less than McLean was paying to buy it from Sun. It would seem elementary that McLean, a small independent businessman, could not stay in business long unless he made his prices competitive with those of the Super Test station across the street while still maintaining a profit. After much urging on the part of McLean, who was losing so much money that he was soon to be driven out of business, Sun lowered its price only to McLean while maintaining its former prices with the other Sunoco stations in Jacksonville. The discount Sun gave to McLean was hardly drastic, only 1.7¢ a gallon.

19. Assuming the lawfulness of the Texaco or Gulf price.

20. There seems to be wide agreement that a branded, or "name" gasoline can effectively compete with a non-branded gasoline selling for one or two cents less.
Sun's aim was to allow McLean to meet the competition of Super Test. It was not enough to save McLean. He received the 1.7¢ discount on December 27, 1955. By February 18, 1956, McLean was out of business. In attempting to meet the competition of Super Test, however, Sun did accomplish one thing. It was charged by the Federal Trade Commission with a violation of Section 2(a) of the Clayton Act, as amended by the Robinson Patman Act, on the ground that it was discriminating in price when it cut its price 1.7¢ a gallon to McLean, while maintaining its former price on sales to other Sunoco stations in Jacksonville. To Sun's explanation that in cutting its price it was meeting competition in good faith, i.e., the competition of Super Test, the Commission answered that Sun was not meeting its competition, but was instead helping McLean meet his competition and this was no defense. Meeting competition without the meaning of the Act, the Commission held, was restricted to meeting your own competition, not your customer's competition.

The Sun Oil decision of the Commission was a hard doctrine which, if followed, will lead to many inequities. It also was anti-competitive in nature.

Take, for example, a producer selling to independent distributors from its plant located in Town X. The producer's independent distributor-customers pick up his products at his plant in Town X. Our producer sells his product to a distributor located in Town N, thirty miles to the north. In Town N, his distributor-customer is unionized. The competitors of his distributor-customer in Town N, selling a similar product, are non-union. In Town E, thirty miles to the east of his plant, both his distributor-customer and the competitors of his distributor-customer are unionized. In Town S, thirty miles to the south of his plant, there is a price war. A competitor of his distributor-customer in Town S is selling below cost. In Town W, thirty miles to his west, the opposite condition exists. It is a boom town, and prices are very high on all items. Our producer does not deliver. His distributor-customers come to his plant and pick up his product at his platform. They each buy in the same amount, then return to their respective towns where they resell the product. Under the rationale of the Commission's Sun Oil decision, the producer would have to sell to each of these independent distributor-customers at the same price. He could not help one meet non-union competition and the other meet below cost selling unless he cut his price uniformly to all four, even though prices were high in two of the areas and he might be forced to sell at a loss if he cut the price to all four. This reasoning, it seems, disregards completely the nature of competition. The United States Court
of Appeals for the Fifth Circuit also disagreed with the Commission's ruling in *Sun Oil* and, on July 24, 1961, it reversed the *Sun* decision of the Federal Trade Commission.\(^{21}\) The court stated: "We consider the Commission's construction of the Act unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act."\(^{22}\)

The court pointed out\(^{23}\) that inherent in the Commission's position is the notion that "[a]lthough a supplier's product competes with the products of other suppliers for the motorists' trade a supplier is not in competition at the consumer level—even with a supplier retailer; or, if he is, the Act ignores it."

The court felt this notion to be unrealistic in the extreme. The action of Sun in cutting its price to McLean was not only legal, because it was to meet competition, but, the court added:

Taking a coldly objective view of this case, one would have to say that, regardless of some injury to certain Sun dealers, Super Test's price-cutting and Sun's response of making an allowance to McLean benefitted consumers and the competitive process in at least two ways: by promoting competition at the retail level and by providing an opportunity for a major to break away from a uniform pricing system characteristic of an oligopolistic industry such as the oil industry.\(^{24}\)

The court seemed to limit its reasoning to the gasoline industry, characterizing the gas station retailer as a "rare bird." The court's observation, however, that:

The natural effect of the Commission's holding will be to push already highly-integrated majors into combining direct retailing with their other operations—*to the detriment of non-majors, such as Super Test, as well as to the detriment of filling station operators.*\(^{25}\) [Emphasis in the opinion.]

is just as applicable to other industries—certainly, for example, to the dairy industry.

The Fifth Circuit asked the question in *Sun Oil*, "How may a supplier protect itself in such as this case?" Its answer was that, the Federal Trade Commission to the contrary notwithstanding, it could cut its price to one of its service stations, such as McLean. In so doing, it was protected by the "good faith meeting of competition"

\(^{21}\) 294 F.2d 465 (5th Cir. 1961) (*certiorari granted*, awaiting argument in the 1962 Fall term.)

\(^{22}\) *Ibid.*, at 471.


\(^{24}\) *Ibid.*, at 474, 475.

defense of section 2(b), even if the direct competition was from the Super Test station, and not from a producer-competitor of Sun, such as Gulf.

The dilemma in which Sun found itself had many horns. Suppose the Super Test-Sun-Jacksonville situation had taken place in metropolitan New York, rather than Florida. To help McLean meet his Super Test competition would Sun have to cut its price to all its stations in greater New York, or just Manhattan? Would it have to go further and cut its price in Westchester County, Long Island, and nearby Connecticut and New Jersey? Where could it safely drawn the line, for probably any one of its stations competed to some extent with another Sun station a little farther out in the suburbs. Certain city planners now visualize one large metropolitan area from north of Boston to south of Washington in the foreseeable future. Must Sun cut its price to perhaps a thousand gasoline stations in this area so as to be able to help those of its customers caught in a gas war in Hartford? The question is not frivolous. It is to be hoped that the Supreme Court will answer it once and for all in the negative by adopting the reasoning of the Fifth Circuit in the Sun Oil case.

In the true sense, in an economically meaningful sense, Sun was also meeting its competition when it cut prices to enable McLean to meet his competition. So would the producer in Town X (in the example above) be meeting his competition by helping his distributor-customers meet their competition.

Whatever ultimately happens in Sun Oil, it would seem to be a brittle and inflexible approach for the Commission to decide that the section 2(b) "good faith meeting of competition" defense can never under any circumstances apply except where the competitor involved competes directly with the seller (e.g., Gulf with Sun). The seller can be met with strenuous competition at the level of his customers, and should be allowed to meet it in good faith, under section 2(b).

II.

Does the Good Faith Meeting of Competition Defense Apply Only to Retaining "Old" Customers, or May a Seller Meet the Price of a Competitor to Gain "New" Customers?

The question may not really be put as simply as this; it is not that black and white. This is the way a majority of the Federal Trade Commission stated the problem in October 1961, however, and it does serve as a satisfactory introduction to the problem.
P is a producer. In a certain city he sells his product to stores A, B, and C. He does not sell to stores D, E, and F. P's price per item to A, B, and C has been one dollar. X, a competitor of P manufacturing an identical product, moves into the area for the first time. X sells the item to D, E, and F for 95¢. X then goes to C and offers to sell the item to him for 95¢. Under these circumstances, the Federal Trade Commission would consider it lawful for P to cut its price to C to 95¢, even though he kept his price at a dollar on sales to A and B.\(^{26}\) P's cost may be the same on its sales to A, B, and C, but he can lower his price to C because he is doing so in good faith to meet the competition of X.

What about stores D, E, and F? These are customers of X to whom P has not previously sold. As indicated above, X is selling to them at 95¢. Can P then lawfully offer to sell to stores D, E, and F at 95¢, while retaining his price of one dollar to stores A and B? After all, P and X are in the same market area, fighting for the same customers. In meeting X's price of 95¢ in an attempt to get stores D, E, and F to carry his product, you would almost have to agree that P is meeting competition, i.e., the competition of X.

This example represents a common situation, especially in industries where the price of the item is usually negotiated, as opposed to a situation where there is a fairly common or standard price for the item in the area. P's salesman will enter a store and try to sell his product. The price is one dollar. The owners of the stores say, "X sells me that same item for 95¢. If you match his price, I'll carry your product too." To meet the 95¢ price is competition. Not to meet it removes or lessens the competition of P to X. To meet the price today, however, assuming that sales are made at a dollar to others, and assuming further the absence of distinguishing factors such as differences in cost, is to invite a formal complaint from the Federal Trade Commission.

In a decision released on October 19, 1961, *Sunshine Biscuits, Inc.*,\(^{27}\) the Commission held four to one that the "good faith meeting of competition defense" applied only to "defensive" price cuts made to retain "old" customers. It did not apply to "aggressive" price cuts made to meet a competitor's price to get "new" customers. Commissioner Elman dissented.

The record before the Commission in *Sunshine Biscuits* showed that the competition in the sale of potato chips in the Cleveland area was extremely sharp. Competitors of Sunshine were selling potato

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26. Again, assuming the lawfulness of X's price.
chips at discounts of 5% and 2% to certain favored customers, and at 5% to others. In order to keep some of its old customers, Sunshine adopted the discounts of its competitors. This enabled it to meet the lower price of these competitors. However, in the ominous language of the Commission's majority opinion: "In a number of instances, however, respondent [Sunshine] offered discounts matching those granted by competitors to their customers and was thus able to obtain new customers." [Emphasis added.]

For some reason, the majority was repelled by the thought of Sunshine going after "new" customers, even though a clear violation of the Sherman Act would have resulted had Sunshine agreed with its competitors not to go after "new" customers.

The sole issue before it in Sunshine, the Commission said, was "whether the section 2(b) proviso [i.e., good faith meeting of competition defense] can be used as an excuse for price discrimination granted, not for the purpose of retaining customers, but for the purpose of obtaining new business." [Emphasis added.]

The hearing examiner had felt that it wasn't particularly immoral or anti-competitive to compete for new business, but his decision was reversed by the Commission. In so doing, it ruled, with Commissioner Anderson writing for the majority:

Since in [some] 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.

The majority felt that this meeting of a competitor's price to try to get new customers, or to share new customers, was not authorized by section 2(b), despite the fact that, as the hearing examiner had pointed out in his initial decision:

Under section 2(b) a seller has a complete defense to a charge of price discrimination if he can show "that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. . . ." [Emphasis added.] There is an entire absence of any requirement that the purchaser must already be a customer of the seller.
Commissioner Elman's dissent was most convincing. He pointed out that the Standard Oil decision, supra, on which the Commission relied so heavily, concerned different issues. 'The Supreme Court, was not then considering whether 'offensive' or only 'defensive' price cutting was permissible, and we are not warranted in drawing inferences in that connection from its language.'

Not only does the statute not refer to "defensive" price cutting or to "old" customers, it specifically uses the language, "to any purchaser or purchasers." The statute does not say that this "any purchaser" must be an "old" customer.

Having shown that the statute itself does not distinguish between cutting prices to meet a competitor's offer to an "old" or "former" customer and a "new" or "potential" customer, Mr. Elman explores some of the problems which will result from the Commission's decision. Assume that the Commission is correct, and a seller can cut his price to meet the lowest lawful price of his competitor to a particular "old" customer, but cannot cut his price to a "new" customer to try to take him from another seller.28 We are left with the following questions: What is an "old" customer? Conversely, what is a "new" customer? Other questions asked by Commissioner Elman in his dissent are: 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? How long is "too long"? Does it matter that the buyer has at any time in the past, no matter how remote, been a customer of the respondent?

To state these questions is to be forced to the conclusion that the majority's black and white, "old" and "new," "defensive" and "offensive," dichotomy is not valid. The lines cannot be so sharply drawn. Too much of the area is grey. The burden placed upon the seller is, to use Mr. Elman's phrase, "virtually insurmountable."

The Sunshine Biscuit decision of the Commission, furthermore, would lead to some very undesirable results. Suppose, in a certain city, that the "X Dairy Company" sells to A & P as well as to many smaller customers. Because of the huge volume involved in its sales to A & P, and the economies of its own operation in servicing large customers, "X Dairy Company" can sell its Grade A milk to A & P at one dollar a unit. The "Y Dairy Company" has a smaller operation

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28. Assume further, for purposes of the example, the absence of factors such as cost justification, necessarily products, etc.
than its competitor, "X Dairy Company." Furthermore, its trucks are not nearly as large, and its relative savings on large volume accounts are not as great. For this and other reasons, it cannot offer to sell to A & P at as low a price as A & P is currently buying from "X Dairy Company" on a cost justification basis, i.e., on the basis of its savings in selling a large account like A & P. "Y Dairy Company" could cut its price across the board, but it is already losing money in selling to its smaller store customers. The only remaining way "Y Dairy Company" can offer competition to "X Dairy Company" on the giant A & P account is to be able to rely upon the good faith meeting of competition proviso of section 2(b). But, "Y Dairy Company" has not sold to A & P for the last 10 years. A & P is not a current purchaser. The Sunshine Biscuit decision of the Federal Trade Commission effectively prevents "Y Dairy Company" from competing with the large "X Dairy Company."

Let us follow this example one step further. Suppose A & P has, for the first time, just moved into the market area served by the "X Dairy Company" and the "Y Dairy Company." It has just opened a huge supermarket there. "X Dairy Company" and A & P entered into an agreement on Monday, January 1, whereby A & P will buy Grade A milk from "X Dairy Company" at one dollar a unit. The salesman of "Y Dairy Company" arrives at the offices of A & P on Tuesday, January 2. Y Dairy's salesman offers Grade A milk at $1.03 a unit, his standard price for the area. The A & P manager says that's too high, but if "Y Dairy Company" will meet the $1.00 price of "X Dairy," he will split the account evenly between the two dairies. If "Y Dairy Company" does not meet the price, the whole account will go to "X Dairy," the largest dairy in the area. A & P is not an "old" customer of "Y Dairy Company." Can the lower price of "X Dairy Company" legally be met? The Sunshine Biscuit doctrine of the Commission would seem to indicate that it could not. This is senseless, as Commissioner Elman pointed out when he said:

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?

Commissioner Elman's answer to his own question was that so far as the seller's "good faith" in trying to meet competition is concerned, it would seem to make no difference. It is an answer with which it is difficult to disagree.
On July 11, 1962, the Seventh Circuit agreed with Commissioner Elman and reversed the Federal Trade Commission majority. Its opinion was quite short and included the following language:

The proviso to section 2(b) permits a seller to show that his lower price “to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.” This language is clear and unambiguous. The plain meaning of the term “purchaser” is one who buys, and no connotation of the term is justified that would limit its meaning to those purchasers who had been customers of the seller before his lowering of prices to meet those of a competitor. . . . There are other reasons, however, for us to conclude that the Commission is not justified in making the distinction that a seller’s good faith competitive price reduction to old customers is permissible under section 2(b) while the same reduction to a new customer is not. These reasons, which are discussed by Commissioner Elman in his dissenting opinion, are first, that the distinction made by the Commission is unworkable as a practicality, and second, that it is economically unsound.

Even if the Commission attempts to reach the Supreme Court with the Sunshine Biscuits case, it is difficult but to believe that it will be forced to deviate from its reasoning in Sunshine Biscuits as other cases with similar, but not identical, fact situations come before it.

III.

Is the Section 2(b) Defense of Good Faith Meeting of Competition Available in a Proceeding Involving an Alleged Violation of Section 2(d)?

Sections 2(d), 2(e), and 2(b) of the Clayton Act as amended by the Robinson Patman Act are set forth in full in Footnotes 4, 5, and 6. The similarity between sections 2(d) and 2(e) is readily apparent. If I am a producer and pay one of my customers to bring in a demonstrator in connection with the sale of my product, I may be violating section 2(d). If I supply the demonstrator myself, I may be violating section 2(e). There is not a single, solitary reason for the good faith meeting of competition defense to be applicable to section 2(e) and not to section 2(d), or vice versa. The Federal Trade Commission, however, which is more than willing to read the word “lawful” into section 2(b), where it does not appear, and which had no trouble reading “commerce” into section 2(e) where it does

29. 306 F.2d 48, (7th Cir. 1962).
30. Ibid., at 51-52.
31. Elizabeth Arden Sales Corp. v. Gus Blas Co., 150 F.2d 988 (8th Cir. 1945).
not appear, and the words "of like grade and quality" into section 2(d), where they do not appear,\(^{32}\) refuses to read the section 2(b) "good faith meeting of competition" defense so as to make it applicable to section 2(d) as well as section 2(e).

The Commission also had changed the words of section 2(d) "is available" into "affirmatively offer," a metamorphosis apparently requiring no effort at all,\(^{33}\) but which required a far greater deviation from the words of the statute than is required by treating section 2(d) and section 2(e) alike with respect to the good faith meeting of competition.

The Commission's reason is that, in its opinion, a literal reading of the words of these statutes compels the distinction between section 2(d) and section 2(e). Section 2(b) provides that nothing contained in the Robinson Patman Act shall prevent a seller from rebutting a prima facie case against him by showing that the seller's "lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally lower price of a competitor, or the services or facilities furnished by a competitor." [Emphasis added.]

Thus, it is seen that section 2(b) makes no reference to the payment of promotional allowances for services or facilities, it refers only to the furnishing of the services or facilities.

Crucial to an understanding of the problem is the fact that when Senator Robinson's bill, S. 3154, and Representative Patman's bill, H.R. 8442, were originally introduced in Congress, they were identical and neither contained provisions like the present sections 2(b) and 2(e). They did contain a provision comparable to the present section 2(d), however. This provision, at that time designated section 2(c)(1), prohibited the payment of "anything of value . . . for any services or facilities furnished. . . ."

So, as introduced, the present section 2(d) was in the bill. The next provision introduced was the present section 2(b). For a time, present sections 2(d) and 2(b) were in the bill, but not present section 2(e). When section 2(b) was introduced, therefore, its reference to the "furnishing of services or facilities" could refer only to present section 2(d), because that was the only provision then in the bill which dealt with services or facilities. It was only later that present section 2(e) was added. It would seem to be a logical necessity to conclude that section 2(b) refers to, and provides a defense in connection with,

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section 2(d). Federal Trade Commissioners Kern and Elman agree, but when the issue was raised in the *Shulton* case\(^34\) they found themselves in a three-two minority.

Shulton, Inc., the manufacturer of "Old Spice" toiletries, had been charged with a violation of section 2(d). The hearing examiner ruled that evidence showing a good faith meeting of competition was irrelevant since the section 2(b) defense did not apply to section 2(d).\(^35\) In fairness to the examiner, it should be pointed out that prior Commission rulings in *Henry Rosenfield, Inc.*\(^36\) and *Exquisite Form Brassiere, Inc.*\(^37\) constituted binding Commission precedents on him, and there were no court decisions one way or the other.

On appeal to the Commission, Shulton stressed the legislative history showing that section 2(b)’s good faith meeting of competition defense must have applied to section 2(d), because at one time there was nothing else in the bill to which it could apply. The majority opinion brushed aside this defense saying only that the question had been carefully considered in the *Henry Rosenfield* and *Exquisite Form Brassiere* cases and "there is nothing in respondent's briefs which convinces us that we should now adopt a position contrary to that which we have previously taken."

In *Exquisite Form Brassiere*, the Commission had explored the legislative history for several pages of its opinion. It concluded that "there was little in the legislative history to explicate the meaning of the 'services and facilities' amendment to section 2(b)." By this, the Commission meant that the debates and reports were not helpful. Surely the fact that section 2(b) and section 2(d) were in the bill at the same time, while section 2(e) was not, should have been a helpful bit of legislative history, but the Commission did not discuss that. It merely concluded that:

Since the specific language of section 2(b) refers only to practices covered by sections (a) and (e), we must therefore reject the argument that the subsection must also logically apply to section 2(d).

In his dissent in *Shulton*, Commissioner Kern favored a re-examination of *Henry Rosenfield* and *Exquisite Form Brassiere*, and a rejection of the doctrine contained in those two cases. He would heed Cromwell's plea; Commissioner Kern said: "I beseech ye think that

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\(^34\) In Re *Shulton*, Inc., Docket 7721, 3 Trade Reg. Rep. ¶ 15,323.
\(^35\) Shulton had filed an admission answer admitting the facts charged, but preserving the good faith meeting of competition defense for subsequent appeals.
\(^36\) *Henry Rosenfield, Inc.*, Docket 6212.
\(^37\) *Exquisite Form Brassiere, Inc.*, Docket 6966, 1961 Trade Cas. ¶ 70,157.
ye may be mistaken.” Having done so, he joined Commissioner Elman in dissent. The dissent was based on the legislative history and a common sense reading of the statute.

On October 13, 1961, the hearing examiner in the Max Factor case followed Shulton and held that the good faith meeting of competition defense did not apply to a section 2(d) proceeding.

On November 22, 1961, the United States Court of Appeals for the District of Columbia Circuit reversed the Commission in the Exquisite Form Brassiere case.

Judge E. Barrett Prettyman, writing for a unanimous panel, began by analyzing the Commission’s position. He noted that while “services or facilities” are the subject of both section 2(d) and section 2(e), in the case of section 2(e), to which the section 2(b) good faith meeting of competition is admittedly applicable, the vendor furnishes the services or facilities to the customer. In the case of section 2(d), the services or facilities are furnished by the customer, and the vendor then reimburses the customer. As we have seen, section 2(b) read literally, refers only to the furnishing of the service, not to the reimbursement therefor.

Judge Prettyman felt that such a literal reading of section 2(b) was “unrealistic.” He noted that the economic evil sought to be outlawed was the same “whether the services or facilities are furnished to the customer or by the customer, with reimbursement, so long as discrimination is practiced.” In passing the Robinson-Patman Act, Congress was not, Judge Prettyman thought, “shadowboxing” or indulging in “fine semantic shadings.”

It is impossible to believe it [Congress] meant to treat one process of discrimination one way and to treat in another way another process equally effective as discrimination. The substance of the problem dealt with by this statute precludes such a construction in the absence of unmistakable evidence to that effect.

Surprisingly, the court stated that it found the legislative history of little value. It did state, however, that:

... there can be no doubt whatsoever that, so far as the Senate was concerned, the proviso in Subsection (b) applied to discriminations in compensation or allowances made to customers for services or facilities furnished by them, as now provided in Subsection (d); there was nothing else in the bill for this language to apply to.

40. Ibid., at 502.
41. Ibid., at 504.
Even though the court was unable to find in the legislative history "any dispositive matter," it disposed of the Commission's theory with no difficulty at all. It could not, it stated:

... read this phrase "furnishing... to any purchaser"—indeed the one word "to"—as making Subsection (b) mean that upon proof being made that there has been discrimination in services or facilities furnished customers, no matter how furnished, i.e., directly or indirectly, the person charged may rebut the prima facie case thus made by showing justification, and such rebuttal may consist of a good faith effort to meet competition if the services or facilities were furnished directly in kind to customers but not if they were furnished indirectly by the process of reimbursement or allowance.\(^{42}\)

This was unrealistic the court held. The realistic view was that Congress intended the section 2(b) "good faith meeting of competition" defense to be available to rebut a prima facie case of discrimination of services or facilities, be they directly or indirectly provided.

The reversal of the Federal Trade Commission in *Exquisite Form Brassiere* was the first decision by a court of appeals on the issue of the availability of the section 2(b) "good faith meeting of competition" defense to a prima facie case made out under section 2(d). Prior to *Exquisite Form Brassiere*, the Commission had held to the contrary in *Henry Rosenfield, Inc.*\(^{43}\) in *J. H. Filbert, Inc.*\(^{44}\) in *Admiral Corporation*,\(^{45}\) and in *Shulton, Inc.*\(^{46}\) with Commissioners Kern and Elman dissenting; Commissioner Tait had dissented from the Commission holding in *Exquisite Form Brassiere*. The United States District Court for the Southern District of Florida had ruled that the "good faith meeting of competition defense" is available in a section 2(d) case in *Delmar Construction Co. v. Westinghouse Electric Corp.*\(^{47}\)

On May 10, 1962, the Commission was also reversed on this point in the *Shulton* case,\(^{48}\) discussed above at some length. In that case, the Seventh Circuit stated simply that it agreed with the reasoning of Judge Prettyman's opinion in *Exquisite Form Brassiere*.

The *Exquisite Form Brassiere* case did not go to the Supreme Court, and the question of the applicability of the section 2(b) proviso in a section 2(d) case may not be decided by the high court for many years. The Commission feels that it cannot be bound by decisions of

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43. 52 F.T.C. 1535 (1956).
44. 54 F.T.C. 359 (1957).
46. 3 Trade Reg. Rep., ¶ 15,323.
47. 5 Trade Reg. Rep. (1961 Trade Cas.) ¶ 69,947 (S.D. Fla.).
48. *Shulton, Inc. v. FTC*, 305 F.2d 36 (7th Cir. 1962).
courts of appeal, as it frankly stated in its American Oil decision of June 29, 1962 (supra). While the Exquisite Form Brassiere and Shulton opinions may not be binding on the Commission, they are, however, so obviously sound that eventually they will have universal application. For the Federal Trade Commission to keep resisting on this point until all ten circuits decide against it, or until the Supreme Court does, would be most foolish, and would only result in a limited period of confusion and uncertainty.

CONCLUSION

The Federal Trade Commission prides itself on its expertise. Yet the decisions discussed above reflect a search by the Commission majority for the black and white, for the easy, for the per se doctrine. There is no compelling reason why the Commission cannot delve into a Sun Oil type situation, and see if it is good faith meeting of competition or price fixing which is truly involved, rather than to hold as it did, that only primary line competition, i.e., direct competition at the level of the seller, is covered under the statute.

It is much easier to state that only competitive offers of lower prices to "old" or "present" customers may be met, than it is to study the record to determine whether a respondent is really meeting competition to a new prospective customer, or is, on the other hand, engaging in a price cutting scheme which does not involve good faith meeting of competition. It seems to me, however, that the Commission's function is to follow the latter course.

The simplest way of all to avoid difficult problems is by shutting the door to them completely. This is what the Commission did by refusing to acknowledge that section 2(b)'s "good faith meeting of competition" defense applies to section 2(d) at all. In the interests of an anti-discriminatory enforcement of all the provisions of the Robinson-Patman Act, both from an economic and legal point of view, this author believes that the Commission should acquiesce in the decisions of the Courts of Appeal in Exquisite Form Brassiere and Shulton at the first opportunity.

49. This position of the Commission is not unreasonable. Often different circuits differ on rulings of the F.T.C. Also the Commission has had a good deal of success in reversing courts of appeal in the Supreme Court.

50. See, for example, the opinion of Former Chairman Howrey on the 1953 interlocutory appeal in Pillsbury Mills, Docket 6000.