Volume 8 | Issue 3 Article 4

1963

Antitrust - Robinson-Patman Act - Section 2(b) Defense Unavailable Where Gasoline Supplier Cut Price to a Retailer to Allow Latter to Meet Its Competition

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CASE NOTES

ANTITRUST—ROBINSON-PATMAN ACT—SECTION 2(b) DEFENSE UNAVAILABLE WHERE GASOLINE SUPPLIER CUT PRICE TO A RETAILER TO ALLOW LATTER TO MEET ITS COMPETITION.

FTC v. Sun Oil Co. (U.S. 1962)

Sun Oil Company refines, sells and distributes gasoline throughout the United States. Sun sells to thirty-eight service stations in Jacksonville, Florida, which are owned by independent contractors who buy gasoline from Sun and resell it to their customers. Super Test Oil Company, a non-major competitor of Sun, operated a service station near one of Sun's retail dealers. Sun's dealer was selling gas at 28.9¢ per gallon, the prevailing price in the area for a major brand product. At this time, Sun was supplying gasoline to its retail dealers in the area at 24.1¢ per gallon. Super Test cut its retail prices from 26.9¢ per gallon to as low as 20.9¢ per gallon. Sun's retailer, on the verge of going out of business due to the subsequent loss of customers to Super Test, asked and received from Sun a reduction in its wholesale price to him so that he might meet the competition. Sun did not reduce the wholesale price to its other retailers in the area. The Federal Trade Commission complained that Sun had violated § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,[1] by lowering its price to only one of its

1. Clayton Act § 2(a), as amended, 49 Stat. 1526 (1936) (Robinson-Patman Act), 15 U.S.C. § 13(a) (1958):
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 or 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 . . . 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: . . . *And provided further,* That nothing [herein] contained . . . shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing [herein] contained . . . shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

dealers in the Jacksonville area. The Commission rejected Sun's contention that the reductions were good faith price reductions made to meet competition, within the meaning of the proviso of § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act.[2] The United States Court of Appeals for the Fifth Circuit reversed the Commission's decision, holding that the defense of meeting competition in good faith pursuant to the proviso of § 2(b) of the Robinson-Patman Act is available to a supplier who reduces prices to one but not to all of its dealers to compete effectively at the retail level.[3] The United States Supreme Court reversed, *holding,* with two justices concurring in the Court's conclusion, that the "good faith meeting of competition" defense of § 2(b) of the Robinson-Patman Act was not available to a supplier of gasoline under these circumstances.[4] *FTC v. Sun Oil Co.,* ____ U.S. ____, 83 S. Ct. 358 (1963).

Section 2(a) of the Clayton Act,[5] as amended by the Robinson-Patman Act, prohibits price discrimination between different purchasers of commodities of like grade and quality where the effect may be to substantially lessen competition, except when due to the cost of manufacture, sale or delivery. Section 2(b) of the same Act[6] contains a proviso permitting a seller to rebut a prima facie case of price discrimination 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." This proviso has been frequently labeled the "good faith meeting of competition" defense of § 2(b). However, it is so vague and indefinite that it has brought caustic criticism from the United States Supreme Court.[7] The Court has been called upon to help clarify the section's inherent vagueness on several occasions.[8] In *Standard Oil Company v. FTC,*[9] it was held that § 2(b) provides a complete defense

2. Clayton Act § 2(b), as amended, 49 Stat. 1526 (1936) (Robinson-Patman Act), 15 U.S.C. § 13(b) (1958):
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 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.

3. FTC v. Sun Oil Co., 294 F.2d 465 (5th Cir. 1961).

4. That is, where a supplier of gasoline granted a discriminatory price reduction to only one of a number of its independent retailers to enable that retailer to meet price reductions by a station owned and operated by a competing retail chain and where there was no showing of any price having been set or offered by a direct competitor of a supplier the defense is not available.

5. *Supra* note 1.

6. *Supra* note 2.

7. Automatic Canteen Co. v. FTC, 346 U.S. 61, 65, 73 S. Ct. 1017, 1020 (1953).

8. FTC v. A. E. Staley Co., 324 U.S. 746, 65 S. Ct. 971 (1945); Automatic Canteen Co. v. FTC, *supra* note 7; Standard Oil Co. v. FTC, 340 U.S. 231, 71 S. Ct. 240 (1951).

9. 340 U.S. 231, 246-250, 71 S. Ct. 240, 248-250 (1951). In this case, Standard Oil was selling gasoline to its "jobbers" at a lower price than to its small service station customers. The "jobbers" were selling to other Standard retailers at lower

to an alleged violation of § 2(a) where the lower price allowed any purchaser is granted in good faith to meet an equally low price of a competitor. Section 2(b) allows a seller to meet a competitor's price but does not allow undercutting a competitor.[10] The discrimination must meet a particular competitor's price rather than competition in general and the discrimination must be temporary and not part of a permanent pricing system.[11]

Congressman Patman stated that his bill (which ultimately became the Robinson-Patman Act) was "designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves and the manufacturer from whom he buys, from exploitation by his chain competitor."[12] In the present case an independent retail dealer was competing with a chain competitor and was, therefore, a person to be protected under the Robinson-Patman Act. In *Enterprise Industries, Inc. v. The Texas Co.*,[13] a case similar on its facts to the instant case, it was held that § 2(b) did not apply since meeting an equally low price permits a seller to offer a discriminatory price only if his favored buyer has access to an equally low price of a competing seller. It was not meant to apply when the competing offers converged on the dealer's level. This decision has been criticized[14] and other courts have favored the interpretation of the proviso given by the lower court in the present case rather than the narrower interpretation given in *Enterprise*.[15] Nevertheless, the latter interpretation seems to be the better one. In the present case there is a certain emotional appeal in that Sun was coming to the aid of one of its independently owned retail customers who was immediately involved in a price war with a chain-operated competitor; however, this does not alter the fact that Sun was meeting, not its own competition, but the competition of its besieged retailer at the expense of other Sun dealers in the area. Such action is condemned by § 2(a) of the Robinson-Patman Act.[16]

prices than the company was charging the stations it supplied directly. It was shown that the reduced prices were given in order to keep the "jobbers" as customers. The Court held the § 2(b) defense was an absolute defense when the seller shows that the price differential has been made to meet a lawful and equally low price of a competitor. A seller can meet a competitor's offer to one of his customers without granting reductions to other customers even though injury might result to the unfavored customers since Congress intended to permit the natural consequences of the seller's lawful reduction.

10. Samuel H. Morse, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945), *cert. denied*, 326 U.S. 734, 66 S. Ct. 44 (1945).

11. FTC v. Standard Oil Co., 355 U.S. 396, 401, 78 S. Ct. 369, 372 (1958); FTC v. Cement Institute, 333 U.S. 683, 725, 68 S. Ct. 793, 815 (1948).

12. 79 Cong. Rec. 9078 (1935).

13. 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir. 1957), *cert. denied*, 353 U.S. 965, 77 S. Ct. 1049 (1957).

14. Note, *The Good Faith Defense of The Robinson-Patman Act: A New Restriction Appraised*, 66 YALE L.J. 935, 941-42 (1957).

15. Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991, 76 S. Ct. 545 (1956). See also American Cooperative Serum Ass'n v. Anchor Serum Co., 153 F.2d 907 (7th Cir. 1946), *cert. denied*, 329 U.S. 721, 67 S. Ct. 57 (1946); Gerber Products Co. v. Beechnut Life Savers, 160 F. Supp. 916 (S.D.N.Y. 1958).

In the present decision, the Court expressly refused to consider what the result would have been if it had appeared either that Super Test, the competitor of Sun's independent retailer, were an integrated supplier-retailer or that it had received a price cut from its own supplier — presumably, a competitor of Sun.[17] If Super Test had been an integrated supplier which owned and operated its own service stations, such stations would merely be appendages of the company. The latter could then compete directly with service stations which were independently owned but affiliated with another oil company, since it would be meeting directly its own competition. But even if Super Test were integrated, the rationale of the present case would still be applicable since Sun would be meeting its buyer's competition, not its own, and would still be discriminating against its other customers in the area. The same would be true if it appeared Super Test had received a price cut from its supplier since this would not affect Sun's behavior in discriminating against some of its own dealers in the area. Sun, in contending that its customers were in reality merely conduits and that the company was actually competing with Super Test on the retail level, was attempting to gain the competitive advantages attendant upon integration without incurring the expenses of such an operation. Under this approach, Sun could cut prices to one dealer, since it would be meeting its own competition, and still be under no obligation to grant similar price cuts to its other dealers under the claim that a seller can meet a competitor's offer to his customer without granting a reduction to its other customers.[18] The Court, in the instant case, however, rejected this contention, stating:

> In a very real sense, however, every retailer is but a "conduit" for the goods which he sells and every supplier could, in the same sense, be considered a competitor of retailers selling competing goods. We are sure Congress had no such broad conception of competition in mind when it established the section 2(b) defense and, certainly, it intended no special exception for the petroleum industry.[19]

It still can be argued, consistent with both statutory interpretation and economic policy, that if Super Test does receive a price cut from its supplier a different result should be reached. Section 2(b) does not specifically provide that the price to be met must be a competitor's price to one's own customer; the reference is to meeting a competitor's price. If Super Test's supplier is considered a competitor of Sun, as realistically he is, Sun, by cutting its price to its retailer, is merely meeting its competitor's price. The economics of the situation would also seem to dictate a different result since Super Test's supplier, through the retailer, would be competing with Sun's retailer, that is, the competition would no longer be retailer versus retailer. Although this argument

17. FTC v. Sun Oil Co., ——— U.S. ———, 83 S. Ct. 358, 363 and n.7 (1963).
18. *Supra* note 9.
19. FTC v. Sun Oil Co., *supra* note 17 at ———, 83 S. Ct. at 369.

has great appeal, it should be noted that the Court in the present decision reversed the lower court instead of remanding the case,[20] leading one to believe that the Court would have reached the same result even had the facts been as suggested above.

In any event, it appears that what Sun was seeking, in effect, was a special application of the law as applied to the petroleum industry. Indeed, a change may very well be necessary since the major focus of competition in the petroleum industry is at the retail level; but the change, if it is to be made, must be as the result of congressional action. The Court recognized the danger to independent retailers if the major oil companies should integrate, but also acknowledged that it was not the function of the Court to determine broad economic policy.[21] In the *Enterprise* case, it was noted that speaking of price competition at the level of sales by the oil company to the station may be a fiction. But, under the present law, the "good faith meeting of competition" defense of § 2(b) only enables a seller to meet his own competition. Restricting this defense to the situation where there is direct competition at the seller's level certainly seems to be rather harsh doctrine and has been criticized as such.[22] Under this strict interpretation, it is questionable whether the oil company could grant an area-wide price reduction since the proviso of § 2(b) places emphasis "on individual competitive situations rather than upon a general system of competition."[23] Further, a widespread price reduction could be interpreted either as not having been made in good faith or as a non-defensive price cut.[24] Although these alternatives involve price cuts and the dangers inherent in them, this rigid doctrine has its beneficial aspects as well. It adds incentive to research in the oil industry to find cheaper methods for manufacturing gasoline since now the industry knows it cannot compete with minor oil companies simply by discriminatorily cutting prices. The major oil companies are well established and known to the motoring public as producers of high quality products, whereas the minor oil companies are relatively unknown and, in fact, because of their lower prices, may be suspected by some consumers of marketing a product which is not equal to the major company's products. The major oil companies have the resources for nationwide advertising campaigns which benefit their independently owned retail customers. It must be remembered that the owner of a service station is like any other small merchant who must survive or fail according to his own talents, ingenuity and personal

20. *Id.* at ———, 83 S. Ct. at 372. The separate memorandum of Justices Harlan and Stewart urge this result.

21. *Id.* at ———, 83 S. Ct. at 371.

22. See Steele, *Meeting Competition Under the Robinson-Patman Act*, 8 VILL. L. REV. 43 (1962).

23. E. Edelmann & Co., 51 F.T.C. 978, 1006-07 (1955).

24. Standard Motors Products Inc. v. FTC, 265 F.2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826, 80 S. Ct. 73 (1959), where it was stated that discrimination can be justified when it is necessary to retain an old customer but not to gain a new one. *But see* Sunshine Biscuits, Inc., 306 F.2d 48 (7th Cir. 1962).