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AUTOMOTIVE PARTS DISTRIBUTION AND THE FEDERAL TRADE COMMISSION

Statement by Earl W. Kintner
Chairman, Federal Trade Commission
Before Meeting of the
Automotive Service Industry Association
Los Angeles, California
February 14, 1961

I.

Your industry is a vital and dynamic part of our American economy. Over a period of many years the automotive parts industry has received constant attention from the Federal Trade Commission. A discussion of the Commission's work in general, and as it affects your business in particular, may be helpful to you in making better business decisions.

In 1960 the Federal Trade Commission demonstrated that it could be the vigorous and effective law enforcement agency originally contemplated at the time of its creation almost one-half a century ago. The year just ended, by every statistical measurement, was the high water mark in the Commission's history.

During the year, 560 formal complaint proceedings were initiated and 410 cease and desist orders were issued. The previous record year of 1959 was exceeded by 50% in formal complaints issued and by 36% in orders entered.

The largest gain was in actions to halt antitrust violations. Here the 202 formal complaints more than doubled the previous record number of 99 in 1959 and more than tripled the 66 complaints issued in 1958.

Statistics, of course, do not tell the whole story. The figures I have mentioned relate only to formal litigation. Perhaps of greater significance is the fact that, in addition to compulsory processes, the Commission energetically employed investigations, economic inquiries, programs of business and consumer education and an expanding range of consultative services to business. In using all of the tools in our arsenal, our sole objective was to encourage honest competition in American business.

I am confident that the progress of our work has meaning to you. Yours is an industry of central importance. Any governmental agency charged with the duty of eliminating unfair methods of competition throughout the entire range of our half-trillion dollar economy must necessarily devote a large proportion of its total effort to safeguarding free and fair competition within your industry. The record of the Federal Trade Commission over the past 5 years demonstrates this fact. During that period, the Commission has issued some 60 complaints and more than 40 orders to cease and desist involving automobile parts alone.

You should be familiar with the breadth of the Commission's jurisdiction over anti-competitive trade practices. The Commission administers a variety of antitrust statutes: principally, Section 2 of the Clayton Act, more commonly known as the Robinson-Patman Act, which bars price and service discriminations; Section 3 of the Clayton Act which prohibits certain forms of exclusive dealing arrangements; Section 7 of the Clayton Act, which bars unlawful mergers; and Section 5 of the Federal Trade Commission Act which broadly condemns unfair methods of competition and unfair and deceptive acts and practices in commerce.

At one time or another, members of your industry have been cited for violations of every one of these statutes. A number of your members are, today, involved in enforcement proceedings of the Commission.

II.

The Robinson-Patman Act should be of fundamental concern to you. Many automotive parts cases have been included in our Robinson-Patman enforcement proceedings. You would do well to study the past application of this statute to your industry and to review some of the current problem areas.

Each of you--whether a manufacturer, a warehouse distributor or a wholesaler--forms an important link in the chain of distribution for automotive parts. You should be aware

of the Commission's recent efforts to obtain compliance with the provisions of the Robinson-Patman Act within your industry. The names of cases like Moog, Niehoff, Edelmann, Whitaker, Thompson Products, American Motor Specialities, and Automotive Supply of Altoona are no strangers to the pages of your trade publications.

In the past several years, our principal objective has been no less than total compliance with the trade regulation laws. Passed in 1936, the Robinson-Patman Act, for a complex of reasons, had never, until recently, had a full test of its impact. When I assumed the Chairmanship of the Commission I was convinced that the time for such a test had come.

Although our antitrust laws state our national economic policies in favor of competition, the opinion has been advanced by some that the Robinson-Patman Act is anti-competitive in effect, but it is my judgment that, as interpreted by the Federal Trade Commission and the courts, and fairly and reasonably administered, this Act protects competition as it was indeed designed to do. It is generally agreed that two of the Act's primary objectives were and are, (1) to prevent unscrupulous buyers from abusing their economic power by exacting from suppliers unwarranted price reductions and other discriminatory concessions, and (2) to prevent unscrupulous suppliers from attempting to gain an unfair advantage over their competitors by discriminating among customers.

Section 2 contains six subdivisions. Section 2(a) is directed at injurious price differentials on commodities of like grade and quality, which cannot be justified under the provisos therein, including cost justification, or defended as a good faith meeting of the equally low price of a competitor, as spelled out in Section 2(b). Section 2(c) deals with brokerage payments. Section 2(d) deals with payments or allowances by the seller to the buyer for services, and requires them to be made available on proportionally equal terms to all competing customers. Section 2(e) requires that services furnished to a buyer by the seller be made available to all competing buyers on proportionally equal terms. And Section 2(f) bars the knowing inducement or receipt of an unlawful discrimination in price.

Of primary concern to your industry are the price discrimination prohibitions of Section 2(a) which have been enforced in a line of proceedings against automotive parts sellers, and the reciprocal prohibitions of Section 2(f) which, in another series of cases, have been the basis of attacks against buyer abuses in your industry. Let me review for you some of these developments.

Past Cases

In the celebrated Spark Plug cases,[1/] the Commission

1/ Champion Spark Plug Co., 50 F.T.C. 30 (1953); General Motors Corp., 50 F.T.C. 54 (1953); Electric Auto-Lite Co., 50 F.T.C. 73 (1953).

charged the three major spark plug manufacturers--Champion, General Motors, and Electric Auto-Lite--with violation of the Robinson-Patman Act in two major areas: original equipment, and replacement equipment. The Commission's complaint charged that the practice of selling original equipment spark plugs to automobile manufacturers at or near cost while selling replacement plugs at much higher prices through replacement distribution channels caused injury to smaller plug manufacturers who could not meet the original equipment price and thereby lost replacement business which was critically tied to the original equipment market. The Commission's complaint also alleged secondary line injury in a variety of competitive situations in which the spark plug companies allegedly discriminated between competing distribution outlets.

The cases were litigated over a 14-year period. The charge of discrimination with respect to original equipment sales was dismissed: no substantial evidence of injury was disclosed on the record. However, as to the secondary line price discrimination charges, the Commission found violation in a number of instances which foreshadowed later cases in this industry and reflect problems which are still pervasive today.

The Commission found that the spark plug companies had discriminated in price among direct and indirect customers.

The Commission order barred discrimination in whatever form it appeared.

Following the Spark Plug cases, the next major development, one which is unfinished to this day, came in the famed Automotive Parts cases. This series of cases, beginning in 1949, involved alleged price discriminations in violation of Section 2(a) by a number of automotive parts sellers,[2/] and knowing receipt of price discrimination, in violation of Section 2(f) on the part of a number of so-called buying groups. Among the buyers attacked were American Motor Specialties, Borden-Aicklen Supply Co., and D & N Auto Parts Co., all of whom were proceeded against at the outset of the Commission's campaign and a number of groups which have been proceeded against more recently. These cases were fought out over a number of years before both the Commission and the courts.

Several of these cases were not finally settled until Supreme Court review had been completed. While most are now finally decided, some buyer cases are still in litigation. Up to this time, however, the courts have fully endorsed and approved the Commission's decisions.[3/] Important questions

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2/ Among these sellers were Standard Motor Products, Inc., Moog Industries, Inc., C.E. Niehoff & Co., P. Sorensen Manufacturing Co., P & D Manufacturing Co., Inc., E. Edelmann & Co., Whitaker Cable Corporation, Federal-Mogul Corporation, Sealed Power Corporation, Eis-Automotive Corporation, Airtex Products, Inc., Neapco Products, Inc., Guaranteed Parts, Inc., and American Ball Bearing Co.

3/ Standard Motor Products, Inc. v. Federal Trade Commission, 265 F.2d 674 (2d Cir. 1959), cert. denied 361 U.S. 826 (1959); (cont'd)

of statutory interpretation have been resolved. Broadly speaking, in these cases the Commission's complaints attacked pricing systems which placed a premium on aggregating volume purchases over a period of time and thus gave to the large volume purchaser an unjustified and detrimental advantage over his competitor. I am sure you all recall, perhaps wistfully, this type of pricing schedule which was previously so prevalent in your industry. Recent Commission actions indicate that vestiges remain, although I would quickly add that this pricing method is now used only by the most audacious or foolhardy among you.

These cases were vigorously defended by the respondents on grounds that the pricing systems were established to meet competition or that they caused no adverse competitive effect, or that they were cost justified. In every instance the defenses were ultimately rejected. The Commission held that in an industry as fiercely competitive as this, where profit margins are narrow and sometimes almost non-existent, a price differential of as little as 2% might in some circumstances mean the difference between the business survival or failure.

3/ (cont'd from p. 7)
P. Sorenson Mfg. Co. v. Federal Trade Commission, 246 F.2d 687 (D.C. Cir. 1957); P & D Mfg. Co. v. Federal Trade Commission, 245 F.2d 281 (7th Cir. 1957), cert. denied 355 U.S. 884 (1957); C. E. Niehoff & Co. v. Federal Trade Commission, 241 F.2d 37 (7th Cir. 1957), modified 355 U.S. 411 (1958); E. Edelmann & Co. v. Federal Trade Commission, 239 F.2d 152 (7th Cir. 1956), cert. denied 355 U.S. 941 (1958); Whitaker Cable Corp. v. Federal Trade Commission, 239 F.2d 253 (7th Cir. 1956), cert. denied 353 U.S. 928 (1957); Moog Industries, Inc. v. Federal Trade Commission, 238 F.2d 43 (8th Cir. 1956), aff'd 355 U.S. 411 (1958)

The Commission further held that the "meeting competition" defense of the statute was not available to justify a general pricing system but only prices met in individual competitive circumstances.

As the Commission was proceeding at flank speed against automotive parts manufacturers, it was also proceeding against buyers charged with knowing receipt of unlawful discriminations. The original buyer cases were the other side of the price discrimination coin uncovered in the seller cases. In many cases, the discriminations involved in the seller cases were made to so-called "buying groups" which, the Commission's investigation disclosed, had been established for purposes of qualifying for the most favorable discount bracket on the seller's cumulative volume discount schedule. The Commission's complaints against these groups charged that they were composed of jobbers who established a joint buying office for the sole purpose of receiving discriminatory discounts from the automotive supplier.

In the Automatic Canteen case,[4/] the Court held that the Commission, as a part of its burden in a 2(f) case, must show that the buyers knew they were receiving a price discrimination, knew of the probable competitive effects of the price advantage received, and knew that the price was not within one of the seller's defenses under the statute such as the cost justification or meeting competition defenses. Under the

4/ Automatic Canteen Co. v. Federal Trade Commission, 346 U.S. 61 (1953).

"burden of convenience" rule established in that case, the burden is placed on Commission's counsel to come forward with evidence that the buyer is not a mere unsuspecting recipient of an unlawful discrimination.

A number of companion cases to Automatic Canteen were dismissed by the Commission before trial. However, in the pending cases against the automotive buying groups, counsel for the Commission successfully resisted determined motions to dismiss by the respondents and the cases subsequently went to hearing. These cases have now been fully litigated before the Commission and orders to cease and desist have been entered. The Commission has held that the burden of proof allocated in Automatic Canteen is not necessarily a heavy one, that trade experience in a particular situation can afford a sufficient degree of knowledge on the part of the buyer to provide a basis for proceeding and that the trade experience of the buyers in these cases was such that they could be held to have knowledge that the price advantages they received from the sellers were not cost justified nor within any of the sellers' other defenses afforded to sellers by the statute. In one of these cases, American Motor Specialties, Inc.,[5/] the Commission's order to cease and desist has been affirmed and enforced by the United States Court

5/ American Motor Specialties, Inc. v. Federal Trade Commission, 298 F.2d 225 (2d Cir. 1960), cert. denied 364 U.S. 884 (1960).

of Appeals for the Second Circuit, and a petition for certiorari was denied by the Supreme Court. In the other two, appeals are now pending in the Court of Appeals for the Fifth Circuit. 6/

As a consequence of these decisions, the Commission has issued complaints against a number of other buying groups alleging similar practices in violation of subsection 2(f). Orders to cease and desist have been entered in some of these 7/ --others are still pending. 8/

But the buying group cases do not comprise the only type of buyer cases initiated under subsection 2(f) in this industry. Of considerable interest, for example, is the complaint recently issued by the Federal Trade Commission under 2(f) against Automotive Supply Co., Docket 7142 (August 28, 1959), a large automotive wholesaler in Altoona, Pennsylvania.

6/ Borden-Aicklen Supply Co., Docket 5766, D & N Auto Parts, Docket 5767.

7/ Warehouse Distributors, Inc., Docket 6837 (order to cease and desist August 14, 1958); Midwest Warehouse Distributors, Inc., Docket 6888 (order to cease and desist September 24, 1959); Albright's, Docket 6890 (order to cease and desist March 27, 1959); Hunt-Marquardt, Inc., Docket 6765 (order to cease and desist December 23, 1958); Southern California Jobbers, Docket 6889 (November 10, 1960).

8/ Automotive Jobbers, Inc., Docket 7590 (complaint issued September 21, 1959); Ark-La-Tex Warehouse Distributors, Inc., Docket 7592 (complaint issued September 22, 1959); Southwestern Warehouse Distributors, Inc., Docket 7686 (complaint issued December 9, 1959); Automotive Southwest, Inc., Docket 7686 (complaint issued December 10, 1959); National Parts Warehouse, Docket 8038 (complaint issued July 12, 1960).

There the complaint charged as illegal practices of Automotive Supply and two affiliated organizations--a Central Warehouse Company and an affiliated company located at Tucson, Arizona--with illegal practices relating to the purchase, resale and distribution, at the wholesale level of tires and tubes and like items, household appliances, home and garden supplies,[9/] and automotive parts, equipment and accessories. The respondent had set up its Central Warehouse Company in 1946, according to the complaint, but since that time it ". . . served little purpose other than as a conduit or bookkeeping device through which respondent purchases certain of its products and supplies for sale and distribution at the wholesale level through respondent's principal place of business and branches in the State of Pennsylvania and West Virginia . . . ."

A principal charge of the complaint was that this jobber, through its wholly owned and controlled warehouse, knowingly induced and received warehouse distributor prices. The respondent also knowingly induced and received functional discounts for re-distribution through its own outlets, according to the complaint. A cease and desist order has now been entered which prohibits this jobber from knowingly inducing or receiving warehouse distributor prices.

9/ A companion action under 2(a) was brought against the supplier. Firestone Tire and Rubber Co., Docket 7141 (complaint issued May 12, 1959).

Current Proceedings in the Automotive Parts Industry

On a wide front, the Commission continues to challenge illegal pricing practices both of automotive parts sellers and buyers. You may find helpful the following review of some of these current developments.

The Commission's most recent decision has come in the case of American Ball Bearing Corp., Docket 7565, in which an order was issued several weeks ago requiring the company to cease charging different prices to purchasers competing with one another in the resale of its products. The Commission adopted the hearing examiner's initial decision finding that the respondent had classified its purchasers into three categories--jobbers, distributors, and warehouse distributors --and charged them different prices: jobbers 10% more than distributors and 20% more than warehouse distributors. The examiner's decision had found that "many purchasers, classified by the respondents as warehouse distributors and distributors, failed to perform the functions necessary to qualify under respondents' definitions for the respective discounts granted purchasers in those classifications." As a result, individual jobbers often were placed at a competitive disadvantage with other distributors classified in a higher function by respondent but, in fact, occupying no different competitive status. The Commission rejected respondents' contention that

competition could not adversely be affected unless a price advantage to a buyer is reflected in the buyer's own resale price.

Similarly of interest to you may be the recent consent order issued in Gojer, Inc., Docket 7851, which, while not an automotive parts case, has, I believe, real significance for your industry. In that case, a manufacturer of soap and cleaning products was charged by the Commission with discriminating in sales to customers within the same functional classification. The Commission charged that jobbers who owned their own warehouse facilities were classified as a "warehouse group," and obtained higher discounts than competitors in a straight "jobber" classification. The theory of the Commission's complaint, reflecting numerous court and Commission decisions, was that the two customer classes were in actual competition with one another, were thus functional equivalents, and were accordingly entitled to equal treatment by their sellers.

Another recent case of some interest is the 2(f) proceeding against Southern California Jobbers, Docket 6889, which was one of the allegedly favored group buyers in the American Ball Bearing case. The Commission found that the fact that the group operated a warehouse did not alter the situation, other than to assist the members to get warehouse distributor rebates to which they were not entitled and which were not

received by non-member competitors. To this extent the case would go beyond the earlier buying group cases where no substantial distributive facilities were operated by the group.[10/]

Another recent case involved the Heckethorn Manufacturing and Supply Co., (Docket 7499) a manufacturer of automotive shock absorbers, seat covers and other products. The Commission's complaint alleged that Heckethorn discriminated in price between competing customers of its products. A consent order entered early last year requires the company to charge the same net prices to customers who compete with each other in resale of its products. At the same time, the Commission dismissed because of insufficient evidence, a charge that the price differentials might result in a substantial lessening of competition or tendency to create a monopoly in the seller's line of commerce.

In addition to these recent decided cases, a number of Automotive Parts cases are currently pending before the Commission. Of course, it would be inappropriate for me to comment on the merits of these proceedings, but a brief listing of them, I think, will fairly describe the scope of the Commission's current activity in your industry.

10/ An appeal from this decision of the Commission is now pending before the Court of Appeals for the Ninth Circuit.

For example, in Purolator Products, Inc., Docket 7850, the Commission has charged the respondent with discriminating in price among competing customers in the sale of its automotive replacement filters. The complaint charges that Purolator grants some warehouse distributors "re-distribution allowances" on sales to dealers and users, but withholds these allowances from other competing warehouse distributors and from competing jobbers. It further alleges that all warehouse distributors are given a warehouse discount which is not made available to their competitors.

In Dayco Corp., Docket 7604, the Commission has charged that the former Dayton Rubber Company discriminated in price between direct wholesale customers and indirect wholesale customers, charging the indirect customers up to 25% more than its direct customers. Dayco is defending on the ground, among others, that the alleged practices were discontinued several years ago.

In a case against Borg Warner and its wholly owned subsidiary, Borg Warner Service Parts Co., Docket 7667, the Commission has charged discrimination in sales to competing customers, including buying groups and warehouse distributors generally. The respondents are defending on the grounds that the price differentials are cost justified, do not create any cognizable injury to competition, and are bona fide functional discounts.

In a recent complaint issued against Westinghouse Electric Corp., Docket 8053, the Commission has charged discrimination in the sale of the company's automotive miniature and sealed beam lamps. The Commission complaint charges that Westinghouse has discriminated among franchised distributors, granted more favorable terms to volume purchasers, and has also granted favorable discounts to automobile manufacturers purchasing on a negotiated basis. Westinghouse has denied that any of its price differentials create an adverse competitive effect.

A pending complaint against Perfection Gear Co., Docket 7861, challenges price advantages granted to warehouse distributors who, it is alleged, are simply group buying jobbers not performing the normal functions of a warehouse distributor and thus not meriting higher discounts. The company defends on grounds that it is not within its personal knowledge that its warehouse distributor customers do not normally function as such and further that the practices complained of have been abandoned. A similar abandonment defense is raised in a case against Inland Rubber Corporation (Docket 8052) in which the Commission charges discrimination in sales, among others, to buying groups classified as warehouse distributors.

A functional discount defense is also currently being raised in a 2(f) proceeding against National Parts Warehouse (Docket 8039) and its member jobbers, alleged to be a buying group receiving discounts not made available to individual jobber competitors in violation of subsection 2(f). The respondents there assert that National Parts Warehouse is not a buying organization for the respondent jobbers but is operated as a bona fide warehouse distributor and the respondent jobbers are merely partners in a legitimate business enterprise in which they have no right in management, direction or control. The respondents also claim that the warehouse organization has at all times bought goods for its own account, operates a 60,000 square feet warehouse and sells to hundreds of jobbers other than the named respondents.

These are typical cases currently before the Commission in your industry. A number of them raise old questions, others new issues which should more clearly define the types of distribution practices prohibited under the Act and give plainer definition to those pricing practices which are lawful under the Act.

III.

During the past year the Commission issued Guides covering Sections 2(d) and 2(e) of the Robinson-Patman Act amendments.

These Guides set out in layman's language certain basic rules of thumb concerning the requirements of the Act when any interstate seller offers promotional allowances or merchandising services or facilities to his customers. Within the past month I was afforded the opportunity of making specific suggestions to the National Food Brokers Association during its annual meeting concerning how food brokers could comply with the brokerage provision of the Robinson-Patman Act. The 2(c) suggestions or Guides represented my personal views and were neither approved nor disapproved by the Commission.

There remain only Section 2(a) and its complement, Section 2(f), where no guidelines or suggestions concerning compliance with the law have been furnished to the American businessman, except for opinions in adjudicated cases.

Proceedings instituted by the Federal Trade Commission under Section 2 of the amended Clayton Act, against both sellers and buyers of automotive parts, have established some basic principles in clarification of the statute. I am hopeful that the Commission will continue the Guides Program and that further guides may later be issued to assist those in your industry and others who seek in good faith to comply with the law against price discrimination. In the meantime, each of you should review your pricing practices and develop a successful compliance plan.

It may be of some assistance to you to study and understand the concepts which follow. These seem to me essential as a beginning in the development of careful compliance planning.

1. Any person who sells products of like grade and quality in interstate commerce to at least two purchasers at different net prices has discriminated in price within the meaning of the statutory term "to discriminate in price."

(a) The Act does not prohibit one uniform price to all purchasers. A seller may sell at the same price to wholesalers and retailers without any legal liability under Section 2(a).

(b) A seller's purchasers are not necessarily limited to persons buying direct from the manufacturing seller. A jobber obtaining a manufacturer's products through a warehousing distributor may be considered to be a "purchaser" from the manufacturer where the latter has exercised such a degree of control over the transactions between the distributor and the jobber that the sales are actually sales by the manufacturer. For example, the following factors have been considered in determining if such a jobber is a purchaser of the manufacturer:

(1) Whether the manufacturer's salesmen contact the jobber and solicit orders for the manufacturer's products.

(2) Whether the products are shipped directly from the manufacturer to the jobber, invoiced to the jobber, and payment remitted by the latter to the manufacturer.

(3) The extent to which the manufacturer sets, controls or suggests the prices at which the distributor may sell to the jobber.

(4) Whether the contracts entered into between the distributor and the jobber provide that the manufacturer may require approval before the distributor is permitted to sell any specific jobber account.

If such control is exercised, the manufacturer may be in violation of Section 2(a) when the jobber, buying through the distributor, pays a higher price than competing jobbers purchasing directly from the manufacturer.

2. While sales at different net prices may constitute discriminations in price, such sales may be illegal under Section 2(a) only where the price differences may result in adverse competitive effects. A seller, in defense, may affirmatively show (a) the price differentials do not exceed cost differences resulting from different methods or quantities in which the commodities are sold, or (b) a lower price was made in good faith to meet an equally low price of a competitor.

No magic formula permits safe prediction that any given price differential between competing purchasers will or will not be likely to result in competitive injury. The answer to this question depends upon the specific facts in particular cases.

3. Where a manufacturer is unable to justify price differences between his purchasers in accordance with the affirmative defenses provided by the statute, he may be reasonably certain that such price differences will not be illegal price discriminations if he classifies his purchasers on a functional basis and sells to all purchasers within each functional group at the same net price.

The test to be used in classifying purchasers into functional groups should be based upon how or in what manner each purchaser resells or disposes of the manufacturer's products. If this test is applied, the above rule merely recognizes that ordinarily manufacturers buying automotive parts for use as original equipment do not compete with warehouse distributors or jobbers reselling replacement parts. Similarly, distributors reselling only to independent jobbers do not usually compete with the jobbers reselling solely to dealers. Lacking any competitive relationship among such purchasers, a seller may legally discriminate in price among the manufacturer, warehouse distributor and jobber provided the distributor pays a lower price than the jobber.

Any plan for compliance with Section 2(a) would not be complete without considering that, under certain circumstances, a seller can justify a discriminatory price under the good faith defense regardless of the competitive injury such a discriminatory price might cause.

Since the good faith defense furnishes an absolute or lawful excuse for an otherwise unlawful, injurious price discrimination, Commission and court interpretations have strict limitations upon its availability. Among the more basic limitations are the following:

(1) The defense is valid only when a lower price is given to meet individual competitive situations, as a defensive measure. It cannot be used for the purpose of gaining, instead of retaining, a customer.

Example: Supplier A decides to improve his market position in one trading area and lowers his prices to several large volume purchasers in the area and not to their competitors. Such a practice would constitute aggressive action on the part of the seller without any attempt to retain a specific customer who has been offered a lower price by a competitor of the supplier.

(2) The seller may only meet, not undercut, the price of a competitor.

Example: Suppliers A and B sell to Jobber C at $1.00 and 95¢, respectively. Supplier A lowers his price to 90¢. A cannot justify the 90¢ price under the good faith defense.

(3) The equally low price of a competitor means the price for the same quantity.

Example: In selling to some of Supplier A's customers, Supplier B sells a smaller quantity at the same price as A's price for a larger quantity. The price for the smaller quantity cannot be defended under 2(b) by Supplier B.

(4) The defense cannot be applied where a seller lowers his price to enable his customers to meet their (the customers) competition.[11/]

Example: Supplier A cannot lower his price to Jobber B to permit B to meet Jobber C's competition in selling Supplier D's products.

(5) Whenever a seller intends to justify a lower price to specific customers, and relies upon the 2(b) defense, he should attempt to obtain verified written statements or invoices which reflect the exact price of the particular competitor whose price the seller is meeting.

IV.

In addition to its formal proceedings illustrated by the cases I have discussed, the Commission uses a range of techniques other than the issuance of complaints looking to

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11/ This issue is now pending in the United States Court of Appeals for the Fifth Circuit in the Commission's case involving Sun Oil Company, Docket 6934.

an order to cease and desist in its efforts to secure compliance with all the laws it enforces. One of the techniques used in appropriate cases is the tender of an opportunity to enter into a stipulation to concerns that have exhibited a cooperative attitude during the course of inquiries and have acted promptly to correct deficiencies. The Commission has just achieved a signal gain in its efforts to protect consumers and honest businessmen from deceptive practices in the sale of automotive parts by employing this technique.

Recently the Commission became aware that many rebuilt clutches and other rebuilt automotive products containing previously used parts were being placed on the market without disclosure that the parts had been rebuilt or that previously used components were used in the parts. On November 19, 1959, the Commission approved a stipulation with Borg-Warner Corporation whereby that corporation agreed to disclose in a clear and conspicuous manner that its rebuilt automotive products have been rebuilt. In the course of inquiry into this specific matter, the Commission learned that numerous other automotive parts suppliers were selling rebuilt parts without disclosing the fact of rebuilding. After investigation, 12 other suppliers were offered the opportunity to enter into stipulations. These stipulations were accepted by the Commission in September. Others have followed. Each of these stipulations contains the following prohibition:

> Offering for sale, selling or delivering to others for sale or resale to the public any product containing parts which have been previously used without a clear and conspicuous disclosure of such prior use made on the product with sufficient permanency to remain thereon after installation, as well as in advertising and on the container in which the product is packed.

Note that this inhibition requires a proper disclosure be made in advertising, labeling and on the parts themselves. It is this last requirement that has caused the stipulating companies the greatest concern, it being asserted that to cut the disclosure into the metal by die stamping would not be practical on all parts. After preliminary testing and informal conferences with technicians, the Commission's Bureau of Consultation expressed its opinion that there would be more practical and less expensive methods of marking available to stipulating parties.

While it is expected that stipulation negotiations will be continued with other automotive parts rebuilders, it is apparent that the total number of stipulating companies will comprise only a small segment of the automotive parts rebuilding trade. It is estimated that there are some 2,000 rebuilders of automotive parts. However, the Bureau of Consultation expects that the announcement of these stipulations will convince members of the industry that the Commission means to take effective steps to protect the many car owners

who pay for new parts but actually receive rebuilt parts. The stipulations already approved by the Commission furnish the impetus for the correction of this deceptive practice on a broad front by voluntary industry action. The Bureau of Consultation has already opened discussion with responsible members of the industry and with trade associations representing automotive parts rebuilders. Every opportunity for meaningful voluntary compliance will be extended. If this effort is successful this deceptive practice can be eliminated with far more speed and at far less cost than would be the case if the Commission had proceeded only by the issuance of formal complaints.

V.

The Commission has been coupling a campaign for public awareness of the prevalence of this practice with its encouragement of industry efforts to make voluntary corrections. The Commission has never condemned the use of rebuilt parts nor has it ever condemned the utility of rebuilt products. Its sole concern has been to insure that the consumer is not deceived about the condition of the parts that he buys.

The Commission's techniques for insuring compliance with the law are complementary. When voluntary correction offers the best opportunity for protection of the public at the least cost to the taxpayer, every effort should be made to encourage

voluntary action. However, the Commission should never lose sight of the fact that honest businessmen who wish to comply with the law are placed at a serious disadvantage if an unscrupulous few reject every prompting of business conscience and every consideration of public interest by continuing the use of a deceptive practice in the face of numerous warnings. Therefore, the Commission always must be ready to employ its compulsory process against this tiny minority who scorn the public interest. Only in this manner can the Commission remove the temptation to honest businessmen prompted by the consideration that "X is doing it and getting away with it and taking all the business." It can be expected that the Commission will issue complaints against automotive parts rebuilders if adequate disclosure to the public can be secured in no other way.

I realize that I have discussed only a small part of the Federal Trade Commission's program which may be of interest to members of this Association. I wish that there were time to discuss all the ramifications of the Commission's activities with you. However, I will have accomplished my purpose if I have suggested to you the wisdom of compliance with the trade regulation laws and have assisted you in doing so. In this connection, I applaud the efforts of your Association's counsel, Mr. Harold Halfpenny, to heighten awareness of the law's requirements in the industry and to encourage careful good faith compliance with the law.

Voluntary compliance with the nation's antitrust and trade regulation laws is the wisest course a businessman can follow. Self-interest dictates this course, because it avoids the costs and penalties and the tarnished public image that results from flagrant violation. And the public interest also dictates this course. Free businessmen mock our free enterprise system and invite needless and harmful additional governmental regulation whenever they fail to compete freely and fairly.

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Basically, all transactions in stock dividends should be measurable by this declared purpose. Thus, public corporations should continue, with the proper safeguards, to have little difficulty. If control was present to begin with and is effectively relinquished, the preferred stock should not be Section 306 stock.

To illustrate, there are the cases of *Marjorie N. Dean*[58] and *Elmer W. Hartzell*.[59] In the former, several elderly stockholders desiring to transfer control of the corporation to a younger group, exchanged all their common stock for preferred in a tax-free recapitalization. In the latter case, the sole stockholder of the corporation issued preferred stock to himself and then sold all the common stock. This transaction permitted the buyer to pay for the corporation out of its own earnings. In both cases, the taxpayers had divested themselves of ownership and control. The issuance of preferred stock was to enable them to retain an income, in the *Dean* case, or to receive a purchase price, as in the *Hartzell* case. It would appear that these examples would come well within the ambit of the subsection.

In addition to the exception to Section 306 treatment based upon the absence of control, there is the more specific possibility of the shareholder making a prior or simultaneous disposition or redemption of the old stock. In other words, a shareholder may dispose of so much of his Section 306 stock as he has disposed of his underlying stock, without being subject to ordinary income treatment.[60]

In conclusion, it might be said that for the title of Section 306 there could be inscribed the classic "Abandon all hope, ye that enter", but as Dante found in his tour of the Inferno, there are those who never reach the pit and also those who proceed from the abyss again "to see the stars".

58. 10 T. C. 19 (1948).
59. 40 BTA 492 (1939).
60. IRC Sec. 306 (b) (4) (B); Reg. § 306-2 (b) (3).

AUTOMOTIVE PARTS DISTRIBUTION AND THE FEDERAL TRADE COMMISSION

By

EARL W. KINTNER*

Washington, D. C.

I.

Over a period of many years the automotive parts industry has received constant attention from the Federal Trade Commission. A discussion of the Commission's work in general, and as it affects your business in particular, may be helpful to you in making better business decisions.

In 1960 the Federal Trade Commission demonstrated that it could be the vigorous and effective law enforcement agency originally contemplated at the time of its creation almost one-half a century ago. The year just ended, by every statistical measurement, was the high water mark in the Commission's history.

During the year, 560 formal complaint proceedings were initiated and 410 cease and desist orders were issued. The previous record year of 1959 was exceeded by 50% in formal complaints issued and by 36% in orders entered.

The largest gain was in actions to halt antitrust violations. Here the 202 formal complaints more than doubled the previous record number of 99 in 1959 and more than tripled the 66 complaints issued in 1958.

Statistics, of course, do not tell the whole story. The figures I have mentioned relate only to formal litigation. Perhaps of greater significance is the fact that, in addition to compulsory processes, the Commission energetically employed investigations, economic inquiries, programs of business and consumer education, and an expanding range of consultative services to business. In using all of the tools in our arsenal, our sole objective was to encourage honest competition in American business.

I am confident that the progress of our work has meaning to you. Yours is an industry of central importance. Any governmental agency charged with the duty of eliminating unfair methods of competition throughout the entire range of our half-trillion dollar economy must necessarily devote a large proportion of its total effort to safeguarding free and fair competition within your industry. The record of the Federal Trade Commission over the past 5 years demonstrates this fact. During that period, the Commission has issued some 60 com-

*Formerly Chairman, Federal Trade Commission; an address at meeting of the Automotive Service Industry Association, Los Angeles, California, February 14, 1961.

plaints and more than 40 orders to cease and desist involving automobile parts alone.

You should be familiar with the breadth of the Commission's jurisdiction over anti-competitive trade practices. The Commission administers a variety of antitrust statutes: principally, Section 2 of the Clayton Act, more commonly known as the Robinson-Patman Act, which bars price and service discriminations; Section 3 of the Clayton Act which prohibits certain forms of exclusive dealing arrangements; Section 7 of the Clayton Act, which bars unlawful mergers; and Section 5 of the Federal Trade Commission Act which broadly condemns unfair methods of competition and unfair and deceptive acts and practices in commerce.

At one time or another, members of your industry have been cited for violations of every one of these statutes. A number of your members are, today, involved in enforcement proceedings of the Commission.

II.

The Robinson-Patman Act should be of fundamental concern to you. Many automotive parts cases have been included in our Robinson-Patman enforcement proceedings. You would do well to study the past application of this statute to your industry and to review some of the current problem areas.

Each of you—whether a manufacturer, a warehouse distributor or a wholesaler—forms an important link in the chain of distribution for automotive parts. You should be aware of the Commission's recent efforts to obtain compliance with the provisions of the Robinson-Patman Act within your industry. The names of cases like *Moog, Niehoff, Edelmann, Whitaker, Thompson Products, American Motor Specialties,* and *Automotive Supply of Altoona* are no strangers to the pages of your trade publications.

In the past several years, our principal objective has been no less than total compliance with the trade regulation laws. Passed in 1936, the Robinson-Patman Act, for a complex of reasons, had never, until recently, had a full test of its impact. When I assumed the Chairmanship of the Commission I was convinced that the time for such a test had come.

Although our antitrust laws state our national economic policies in favor of competition, the opinion has been advanced by some that the Robinson-Patman Act is anti-competitive in effect, but it is my judgment that, as interpreted by the Federal Trade Commission and the courts, and fairly and reasonably administered, this act protects competition as it was indeed designed to do. It is generally agreed that two of the Act's primary objectives were and are, (1) to prevent unscrupulous buyers from abusing their economic power by exacting

from suppliers unwarranted price reductions and other discriminatory concessions, and (2) to prevent unscrupulous suppliers from attempting to gain an unfair advantage over their competitors by discriminating among customers.

Section 2 contains six subdivisions. Section 2(a) is directed at injurious price differentials on commodities of like grade and quality, which cannot be justified under the provisos therein, including cost justification, or defended as a good faith meeting of the equally low price of a competitor, as spelled out in Section 2(b). Section 2(c) deals with brokerage payments. Section 2(d) deals with *payments* or allowances *by the seller* to the buyer for services, and requires them to be made available on proportionally equal terms to all competing customers. Section 2(e) requires that services furnished to a buyer by the seller be made available to all competing buyers on proportionally equal terms. And Section 2(f) bars the *knowing* inducement or receipt of an unlawful discrimination in price.

Of primary concern to your industry are the price discrimination prohibitions of Section 2(a) which have been enforced in a line of proceedings against automotive parts *sellers,* and the reciprocal prohibitions of Section 2(f) which, in another series of cases, have been the basis of attacks against *buyer* abuses in your industry. Let me review for you some of these developments.

Past Cases

In the celebrated *Spark Plug* cases,[1] the Commission charged the three major spark plug manufacturers—Champion, General Motors, and Electric Auto-Lite—with violation of the Robinson-Patman Act in two major areas: original equipment, and replacement equipment. The Commission's complaint charged that the practice of selling original equipment spark plugs to automobile manufacturers at or near cost while selling replacement plugs at much higher prices through replacement distribution channels caused injury to smaller plug manufacturers who could not meet the original equipment price and thereby lost replacement business which was critically tied to the original equipment market. The Commission's complaint also alleged secondary line injury in a variety of competitive situations in which the spark plug companies allegedly discriminated between competing distribution outlets.

The cases were litigated over a 14-year period. The charge of discrimination with respect to original equipment sales was dismissed: no substantial evidence of injury was disclosed on the record. However, as to the secondary line price discrimination charges, the Commission found violation in a number of instances which fore-

1. Champion Spark Plug Co., 50 F. T. C. 30 (1953); General Motors Corp., 50 F. T. C. 54 (1953); Electric Auto-Lite Co., 50 F. T. C. 73 (1953).

shadowed later cases in this industry and reflect problems which are still pervasive today.

The Commission found that the spark plug companies had discriminated in price among direct and indirect customers. The Commission order barred discrimination in whatever form it appeared.

Following the *Spark Plug* cases, the next major development, one which is unfinished to this day, came in the famed *Automotive Parts* cases. This series of cases, beginning in 1949, involved alleged price discriminations in violation of Section 2(a) by a number of automotive parts sellers,[2] and knowing receipt of price discrimination, in violation of Section 2(f) on the part of a number of so-called buying groups. Among the buyers attacked were American Motor Specialties, Borden-Aicklen Supply Co., and D & N Auto Parts Co., all of whom were proceeded against at the outset of the Commission's campaign and a number of groups which have been proceeded against more recently. These cases were fought out over a number of years before both the Commission and the courts.

Several of these cases were not finally settled until Supreme Court review had been completed. While most are now finally decided, some buyer cases are still in litigation. Up to this time, however, the courts have fully endorsed and approved the Commission's decisions.[3] Important questions of statutory interpretation have been resolved. Broadly speaking, in these cases the Commission's complaints attacked pricing systems which placed a premium on aggregating volume purchases over a period of time and thus gave to the large volume purchaser an unjustified and detrimental advantage over his competitor. I am sure you all recall, perhaps wistfully, this type of pricing schedule which was previously so prevalent in your industry. Recent Commission actions indicate that vestiges remain, although I would quickly add that this pricing method is now used only by the most audacious or foolhardy among you.

These cases were vigorously defended by the respondents on grounds that the pricing systems were established to meet competition

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2. Among these sellers were Standard Motor Products, Inc., Moog Industries, Inc., C. E. Niehoff & Co., P. Sorensen Manufacturing Co., P & D Manufacturing Co., Inc., E. Edelmann & Co., Whitaker Cable Corporation, Federal-Mogul Corporation, Sealed Power Corporation, Eis-Automotive Corporation, Airtex Products, Inc., Neapco Products, Inc., Guaranteed Parts, Inc., and American Ball Bearing Co.

3. Standard Motor Products, Inc. v. Federal Trade Commission, 265 F. 2d 674 (2d Cir. 1959), cert. denied 361 U. S. 826 (1959); P. Sorensen Mfg. Co. v. Federal Trade Commission, 246 F. 2d 687 (D. C. Cir. 1957); P & D Mfg. Co. v. Federal Trade Commission, 245 F. 2d 281 (7th Cir. 1957), cert. denied 355 U. S. 884 (1957); C. E. Niehoff & Co. v. Federal Trade Commission, 241 F. 2d 37 (7th Cir. 1957), modified 355 U. S. 411 (1958); E. Edelmann & Co. v. Federal Trade Commission, 239 F. 2d 152 (7th Cir. 1956), cert. denied 355 U. S. 941 (1958); Whitaker Cable Corp. v. Federal Trade Commission, 239 F. 2d 253 (7th Cir. 1956), cert. denied 353 U. S. 928 (1957); Moog Industries, Inc. v. Federal Trade Commission, 238 F. 2d 43 (8th Cir. 1956), aff'd 355 U. S. 411 (1958).

or that they caused no adverse competitive effect, or that they were cost justified. In every instance the defenses were ultimately rejected. The Commission held that in an industry as fiercely competitive as this, where profit margins are narrow and sometimes almost non-existent, a price differential of as little as 2% might in some circumstances mean the difference between the business survival or failure. The Commission further held that the "meeting competition" defense of the statute was not available to justify a general pricing system but only prices met in individual competitive circumstances.

As the Commission was proceeding at flank speed against automotive parts manufacturers, it was also proceeding against buyers charged with knowing receipt of unlawful discriminations. The original buyer cases were the other side of the price discrimination coin uncovered in the seller cases. In many cases, the discriminations involved in the seller cases were made to so-called "buying groups" which, the Commission's investigation disclosed, had been established for purposes of qualifying for the most favorable discount bracket on the seller's cumulative volume discount schedule. The Commission's complaints against these groups charged that they were composed of jobbers who established a joint buying office for the sole purpose of receiving discriminatory discounts from the automotive supplier.

In the *Automatic Canteen* case,[4] the Court held that the Commission, as a part of its burden in a 2(f) case, must show that the buyers knew they were receiving a price discrimination, knew of the probable competitive effects of the price advantage received, and knew that the price was not within one of the seller's defenses under the statute such as the cost justification or meeting competition defenses. Under the "burden of convenience" rule established in that case, the burden is placed on Commission's counsel to come forward with evidence that the buyer is not a mere unsuspecting recipient of an unlawful discrimination.

A number of companion cases to *Automatic Canteen* were dismissed by the Commission before trial. However, in the pending cases against the automotive buying groups, counsel for the Commission successfully resisted determined motions to dismiss by the respondents and the cases subsequently went to hearing. These cases have now been fully litigated before the Commission and orders to cease and desist have been entered. The Commission has held that the burden of proof allocated in *Automatic Canteen* is not necessarily a heavy one, that trade experience in a particular situation can afford a sufficient degree of knowledge on the part of the buyer to provide a basis for proceeding and that the trade experience of the buyers in these cases was such that they could be held to have knowledge that the price advantages they received from the sellers

4. Automatic Canteen Co. v. Federal Trade Commission, 346 U. S. 61 (1953).

were not cost justified nor within any of the sellers' other defenses afforded to sellers by the statute. In one of these cases, *American Motor Specialties, Inc.*,[5] the Commission's order to cease and desist has been affirmed and enforced by the United States Court of Appeals for the Second Circuit, and a petition for certiorari was denied by the Supreme Court. In the other two, appeals are now pending in the Court of Appeals for the Fifth Circuit.[6]

As a consequence of these decisions, the Commission has issued complaints against a number of other buying groups alleging similar practices in violation of subsection 2(f). Orders to cease and desist have been entered in some of these[7]—others are still pending.[8]

But the buying group cases do not comprise the only type of buyer cases initiated under subsection 2(f) in this industry. Of considerable interest, for example, is the complaint recently issued by the Federal Trade Commission under 2(f) against *Automotive Supply Co.*, Docket 7142 (August 28, 1959), a large automotive wholesaler in Altoona, Pennsylvania.

There the complaint charged as illegal practices of Automotive Supply and two affiliated organizations—a Central Warehouse Company and an affiliated company located at Tucson, Arizona—with illegal practices relating to the purchase, resale and distribution, at the wholesale level of tires and tubes and like items, household appliances, home and garden supplies,[9] and automotive parts, equipment and accessories. The respondent had set up its Central Warehouse Company in 1946, according to the complaint, but since that time it ". . . served little purpose other than as a conduit or bookkeeping device through which respondent purchases certain of its products and supplies for sale and distribution at the wholesale level through respondent's principal place of business and branches in the State of Pennsylvania and West Virginia. . . ."

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5. American Motor Specialties, Inc. v. Federal Trade Commission, 298 F. 2d 225 (2d Cir. 1960), cert. denied 364 U. S. 884 (1960).

6. Borden-Aicklen Supply Co., Docket 5766, D. & N. Auto Parts, Docket 5767.

7. Warehouse Distributors, Inc., Docket 6837 (order to cease and desist August 14, 1958); Midwest Warehouse Distributors, Inc., Docket 6888 (order to cease and desist September 24, 1959); Albright's, Docket 6890 (order to cease and desist March 27, 1959); Hunt-Marquardt, Inc., Docket 6765 (order to cease and desist December 23, 1958); Southern California Jobbers, Docket 6889 (November 10, 1960).

8. Automotive Jobbers, Inc., Docket 7590 (complaint issued September 21, 1959); Ark-La-Tex Warehouse Distributors, Inc., Docket 7592 (complaint issued September 22, 1959); Southwestern Warehouse Distributors, Inc., Docket 7686 (complaint issued December 9, 1959); Automotive Southwest, Inc., Docket 7686 (complaint issued December 10, 1959); National Parts Warehouse, Docket 8038 (complaint issued July 12, 1960).

9. A companion action under 2(a) was brought against the supplier. Firestone Tire and Rubber Co., Docket 7141 (complaint issued May 12, 1959).

A principal charge of the complaint was that this jobber, through its wholly owned and controlled warehouse, knowingly induced and received warehouse distributor prices. The respondent also knowingly induced and received functional discounts for re-distribution through its *own* outlets, according to the complaint. A cease and desist order has now been entered which prohibits this jobber from knowingly inducing or receiving warehouse distributor prices.

Current Proceedings in the Automotive Parts Industry

On a wide front, the Commission continues to challenge illegal pricing practices both of automotive parts sellers and buyers. You may find helpful the following review of some of these current developments.

The Commission's most recent decision has come in the case of *American Ball Bearing Corp.*, Docket 7565, in which an order was issued several weeks ago requiring the company to cease charging different prices to purchasers competing with one another in the resale of its products. The Commission adopted the hearing examiner's initial decision finding that the respondent had classified its purchasers into three categories—jobbers, distributors, and warehouse distributors—and charged them different prices: jobbers 10% more than distributors and 20% more than warehouse distributors. The examiner's decision had found that "many purchasers, classified by the respondents as warehouse distributors and distributors, failed to perform the functions necessary to qualify under respondents' definitions for the respective discounts granted purchasers in those classifications." As a result, individual jobbers often were placed at a competitive disadvantage with other distributors classified in a higher function by respondent but, in fact, occupying no different competitive status. The Commission rejected respondents' contention that competition could not adversely be affected unless a price advantage to a buyer is reflected in the buyer's own resale price.

Similarly of interest to you may be the recent consent order issued in *Gojer, Inc.*, Docket 7851, which, while not an automotive parts case, has, I believe, real significance for your industry. In that case, a manufacturer of soap and cleaning products was charged by the Commission with discriminating in sales to customers within the same functional classification. The Commission charged that jobbers who owned their own warehouse facilities were classified as a "warehouse group," and obtained higher discounts than competitors in a straight "jobber" classification. The theory of the Commission's complaint, reflecting numerous court and Commission decisions, was that the two customer classes were in actual competition with one another, were thus functional equivalents, and were accordingly entitled to equal treatment by their sellers.

Another recent case of some interest is the 2(f) proceeding against *Southern California Jobbers*, Docket 6889, which was one of the allegedly favored group buyers in the *American Ball Bearing* case. The Commission found that the fact that the group operated a warehouse did not alter the situation, other than to assist the members to get warehouse distributor rebates to which they were not entitled and which were not received by non-member competitors. To this extent the case would go beyond the earlier buying group cases where no substantial distributive facilities were operated by the group.[10]

Another recent case involved the *Heckethorn Manufacturing and Supply Co.*, (Docket 7499) a manufacturer of automotive shock absorbers, seat covers and other products. The Commission's complaint alleged that Heckethorn discriminated in price between competing customers of its products. A consent order entered early last year requires the company to charge the same net prices to customers who compete with each other in resale of its products. At the same time, the Commission dismissed because of insufficient evidence, a charge that the price differentials might result in a substantial lessening of competition or tendency to create a monopoly in the seller's line of commerce.

In addition to these recent decided cases, a number of Automotive Parts cases are currently pending before the Commission. Of course, it would be inappropriate for me to comment on the merits of these proceedings, but a brief listing of them, I think, will fairly describe the scope of the Commission's current activity in your industry.

For example, in *Purolator Products, Inc.*, Docket 7850, the Commission has charged the respondent with discriminating in price among competing customers in the sale of its automotive replacement filters. The complaint charges that Purolator grants some warehouse distributors "re-distribution allowances" on sales to dealers and users, but withholds these allowances from other competing warehouse distributors and from competing jobbers. It further alleges that all warehouse distributors are given a warehouse discount which is not made available to their competitors.

In *Dayco Corp.*, Docket 7604, the Commission has charged that the former Dayton Rubber Company discriminated in price between direct wholesale customers and indirect wholesale customers, charging the indirect customers up to 25% more than its direct customers. Dayco is defending on the ground, among others, that the alleged practices were discontinued several years ago.

In a case against *Borg Warner* and its wholly owned subsidiary, *Borg Warner Service Parts Co.*, Docket 7667, the Commission has

10. An appeal from this decision of the Commission is now pending before the Court of Appeals for the Ninth Circuit.

charged discrimination in sales to competing customers, including buying groups and warehouse distributors generally. The respondents are defending on the grounds that the price differentials are cost justified, do not create any cognizable injury to competition, and are bona fide functional discounts.

In a recent complaint issued against *Westinghouse Electric Corp.*, Docket 8053, the Commission has charged discrimination in the sale of the company's automotive miniature and sealed beam lamps. The Commission complaint charges that Westinghouse has discriminated among franchised distributors, granted more favorable terms to volume purchasers, and has also granted favorable discounts to automobile manufacturers purchasing on a negotiated basis. Westinghouse has denied that any of its price differentials create an adverse competitive effect.

A pending complaint against *Perfection Gear Co.*, Docket 7861, challenges price advantages granted to warehouse distributors who, it is alleged, are simply group buying jobbers not performing the normal functions of a warehouse distributor and thus not meriting higher discounts. The company defends on grounds that it is not within its personal knowledge that its warehouse distributor customers do not normally function as such and further that the practices complained of have been abandoned. A similar abandonment defense is raised in a case against *Inland Rubber Corporation* (Docket 8052) in which the Commission charges discrimination in sales, among others, to buying groups classified as warehouse distributors.

A functional discount defense is also currently being raised in a 2(f) proceeding against *National Parts Warehouse* (Docket 8039) and its member jobbers, alleged to be a buying group receiving discounts not made available to individual jobber competitors in violation of subsection 2(f). The respondents there assert that National Parts Warehouse is not a buying organization for the respondent jobbers but is operated as a bona fide warehouse distributor and the respondent jobbers are merely partners in a legitimate business enterprise in which they have no right in management, direction or control. The respondents also claim that the warehouse organization has at all times bought goods for its own account, operates a 60,000 square feet warehouse and sells to hundreds of jobbers other than the named respondents.

These are typical cases currently before the Commission in your industry. A number of them raise old questions, others new issues which should more clearly define the types of distribution practices prohibited under the act and give plainer definition to those pricing practices which are lawful under the act.

III.

During the past year the Commission issued Guides covering Sections 2(d) and 2(e) of the Robinson-Patman Act amendments. These Guides set out in layman's language certain basic rules of thumb concerning the requirements of the act when any interstate seller offers promotional allowances or merchandising services or facilities to his customers. Within the past month I was afforded the opportunity of making specific suggestions to the National Food Brokers Association during its annual meeting concerning how food brokers could comply with the brokerage provision of the Robinson-Patman Act. The 2(c) suggestions or Guides represented my personal views and were neither approved nor disapproved by the Commission.

There remain only Section 2(a) and its complement, Section 2(f), where no guidelines or suggestions concerning compliance with the law have been furnished to the American businessman, except for opinions in adjudicated cases.

Proceedings instituted by the Federal Trade Commission under Section 2 of the amended Clayton Act, against both sellers and buyers of automotive parts, have established some basic principles in clarification of the statute. I am hopeful that the Commission will continue the Guides Program and that further guides may later be issued to assist those in your industry and others who seek in good faith to comply with the law against price discrimination. In the meantime, each of you should review your pricing practices and develop a successful compliance plan.

It may be of some assistance to you to study and understand the concepts which follow. These seem to me essential as a beginning in the development of careful compliance planning.

1. Any person who sells products of like grade and quality in interstate commerce to at least two purchasers at different net prices has discriminated in price within the meaning of the statutory term "to discriminate in price."

(a) The act does not prohibit one uniform price to all purchasers. A seller may sell at the same price to wholesalers and retailers without any legal liability under Section 2(a).

(b) A seller's purchasers are not necessarily limited to persons buying direct from the manufacturing seller. A jobber obtaining a manufacturer's products through a warehousing distributor may be considered to be a "purchaser" from the manufacturer where the latter has exercised such a degree of control over the transactions between the distributor and the jobber that the sales are actually sales by the manufacturer. For example, the following factors have been con-

sidered in determining if such a jobber is a purchaser of the manufacturer:

(1) Whether the manufacturer's salesmen contact the jobber and solicit orders for the manufacturer's products.

(2) Whether the products are shipped directly from the manufacturer to the jobber, invoiced to the jobber, and payment remitted by the latter to the manufacturer.

(3) The extent to which the manufacturer sets, controls or suggests the prices at which the distributor may sell to the jobber.

(4) Whether the contracts entered into between the distributor and the jobber provide that the manufacturer may require approval before the distributor is permitted to sell any specific jobber account.

If such control is exercised, the manufacturer may be in violation of Section 2(a) when the jobber, buying through the distributor, pays a higher price than competing jobbers purchasing directly from the manufacturer.

2. While sales at different net prices may constitute discriminations in price, such sales may be *illegal* under Section 2(a) only where the price differences may result in adverse competitive effects. A seller, in defense, may affirmatively show (a) the price differentials do not exceed cost differences resulting from different methods or quantities in which the commodities are sold, or (b) a lower price was made in good faith to meet an equally low price of a competitor.

No magic formula permits safe prediction that any given price differential between competing purchasers will or will not be likely to result in competitive injury. The answer to this question depends upon the specific facts in particular cases.

3. Where a manufacturer is unable to justify price differences between his purchasers in accordance with the affirmative defenses provided by the statute, he may be reasonably certain that such price differences *will not* be *illegal* price discriminations if he classifies his purchasers on a functional basis and sells to all purchasers within each functional group at the same net price.

The test to be used in classifying purchasers into functional groups should be based upon how or in what manner each purchaser resells or disposes of the manufacturer's products. If this test is applied, the above rule merely recognizes that ordinarily manufacturers buying automotive parts for use as original equipment do not compete with warehouse distributors or jobbers reselling *replacement parts*. Similarly, distributors reselling only to independent jobbers do not usually

compete with the jobbers reselling solely to dealers. Lacking any competitive relationship among such purchasers, a seller may *legally* discriminate in price among the manufacturer, warehouse distributor and jobber *provided* the distributor pays a lower price than the jobber.

Any plan for compliance with Section 2(a) would not be complete without considering that, under certain circumstances, a seller can justify a discriminatory price under the good faith defense regardless of the competitive injury such a discriminatory price might cause.

Since the good faith defense furnishes an absolute or lawful excuse for an otherwise unlawful, injurious price discrimination, Commission and court interpretations have strict limitations upon its availability. Among the more basic limitations are the following:

(1) The defense is valid only when a lower price is given to meet individual competitive situations, as a defensive measure. It cannot be used for the purpose of gaining, instead of retaining, a customer.

Example: Supplier A decides to improve his market position in one trading area and lowers his prices to several large volume purchasers in the area and not to their competitors. Such a practice would constitute aggressive action on the part of the seller without any attempt to retain a specific customer who has been offered a lower price by a competitor of the supplier.

(2) The seller may only meet, not undercut, the price of a competitor.

Example: Suppliers A and B sell to Jobber C at $1.00 and 95¢, respectively. Supplier A lowers his price to 90¢. A cannot justify the 90¢ price under the good faith defense.

(3) The equally low price of a competitor means the price for the same quantity.

Example: In selling to some of Supplier A's customers, Supplier B sells a smaller quantity at the same price as A's price for a larger quantity. The price for the smaller quantity cannot be defended under 2(b) by Supplier B.

(4) The defense cannot be applied where a seller lowers his price to enable his customers to meet their (the customers) competition.[11]

Example: Supplier A cannot lower his price to Jobber B to permit B to meet Jobber C's competition in selling Supplier D's products.

(5) Whenever a seller intends to justify a lower price to specific customers, and relies upon the 2(b) defense, he should attempt to

11. This issue is now pending in the United States Court of Appeals for the Fifth Circuit in the Commission's case involving Sun Oil Company, Docket 6934.

obtain verified written statements or invoices which reflect the exact price of the particular competitor whose price the seller is meeting.

IV.

In addition to its formal proceedings illustrated by the cases I have discussed, the Commission uses a range of techniques other than the issuance of complaints looking to an order to cease and desist in its efforts to secure compliance with all the laws it enforces. One of the techniques used in appropriate cases is the tender of an opportunity to enter into a stipulation to concerns that have exhibited a cooperative attitude during the course of inquiries and have acted promptly to correct deficiencies. The Commission has just achieved a signal gain in its efforts to protect consumers and honest businessmen from deceptive practices in the sale of automotive parts by employing this technique.

Recently the Commission became aware that many rebuilt clutches and other rebuilt automotive products containing previously used parts were being placed on the market without disclosure that the parts had been rebuilt or that previously used components were used in the parts. On November 19, 1959, the Commission approved a stipulation with Borg-Warner Corporation whereby that corporation agreed to disclose in a clear and conspicuous manner that its rebuilt automotive products have been rebuilt. In the course of inquiry into this specific matter, the Commission learned that numerous other automotive parts suppliers were selling rebuilt parts without disclosing the fact of rebuilding. After investigation, 12 other suppliers were offered the opportunity to enter into stipulations. These stipulations were accepted by the Commission in September. Others have followed. Each of these stipulations contains the following prohibition:

> Offering for sale, selling or delivering to others for sale or resale to the public any product containing parts which have been previously used without a clear and conspicuous disclosure of such prior use made on the product with sufficient permanency to remain thereon after installation, as well as in advertising and on the container in which the product is packed.

Note that this inhibition requires a proper disclosure be made in advertising, labeling and on the parts themselves. It is this last requirement that has caused the stipulating companies the greatest concern, it being asserted that to cut the disclosure into the metal by die stamping would not be practical on all parts. After preliminary testing and informal conferences with technicians, the Commission's Bureau of Consultation expressed its opinion that there would be more practical and less expensive methods of marking available to stipulating parties.

While it is expected that stipulation negotiations will be continued with other automotive parts rebuilders, it is apparent that the total number of stipulating companies will comprise only a small segment of the automotive parts rebuilding trade. It is estimated that there are some 2,000 rebuilders of automotive parts. However, the Bureau of Consultation expects that the announcement of these stipulations will convince members of the industry that the Commission means to take effective steps to protect the many car owners who pay for new parts but actually receive rebuilt parts. The stipulations already approved by the Commission furnish the impetus for the correction of this deceptive practice on a broad front by voluntary industry action. The Bureau of Consultation has already opened discussion with responsible members of the industry and with trade associations representing automotive parts rebuilders. Every opportunity for meaningful voluntary compliance will be extended. If this effort is successful this deceptive practice can be eliminated with far more speed and at far less cost than would be the case if the Commission had proceeded only by the issuance of formal complaints.

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The Commission has been coupling a campaign for public awareness of the prevalence of this practice with its encouragement of industry efforts to make voluntary corrections. The Commission has never condemned the use of rebuilt parts nor has it ever condemned the utility of rebuilt products. Its sole concern has been to insure that the consumer is not deceived about the condition of the parts that he buys.

The Commission's techniques for insuring compliance with the law are complementary. When voluntary correction offers the best opportunity for protection of the public at the least cost to the taxpayer, every effort should be made to encourage voluntary action. However, the Commission should never lose sight of the fact that honest businessmen who wish to comply with the law are placed at a serious disadvantage if an unscrupulous few reject every prompting of business conscience and every consideration of public interest by continuing the use of a deceptive practice in the face of numerous warnings. Therefore, the Commission always must be ready to employ its compulsory process against this tiny minority who scorn the public interest. Only in this manner can the Commission remove the temptation to honest businessmen prompted by the consideration that "X is doing it and getting away with it and taking all the business." It can be expected that the Commission will issue complaints against auto-

motive parts rebuilders if adequate disclosure to the public can be secured in no other way.

I realize that I have discussed only a small part of the Federal Trade Commission's program which may be of interest to members of this Association. I wish that there were time to discuss all the ramifications of the Commission's activities with you. However, I will have accomplished my purpose if I have suggested to you the wisdom of compliance with the trade regulation laws and have assisted you in doing so. In this connection, I applaud the efforts of your Association's counsel, Mr. Harold Halfpenny, to heighten awareness of the law's requirements in the industry and to encourage careful good faith compliance with the law.

Voluntary compliance with the nation's antitrust and trade regulation laws is the wisest course a businessman can follow. Self-interest dictates this course, because it avoids the costs and penalties and the tarnished public image that results from flagrant violation. And the public interest also dictates this course. Free businessmen mock our free enterprise system and invite needless and harmful additional governmental regulation whenever they fail to compete freely and fairly.