THE WORLD SYNDICATE PUBLISHING CO., ET AL. v. FEDERAL TRADE COMMISSION

No. 10479—F. T. C. Docket 4634

(Court of Appeals, Second Circuit. Apr. 7, 1952)

Dismissal, for failure to prosecute, of petition to review order of November 22, 1949, 46 F. T. C. 223, requiring respondent manufacturers and publishers of dictionaries to cease and desist from representing any of their dictionaries as those of Noah Webster, as edited and revised by a staff of eminent authorities in philology and lexicography, and as new and different from dictionaries previously published by respondents.

Wittenberg, Carrington & Farnsworth, New York City, attorneys for petitioners.

Mr. James W. Cassedy, Assistant General Counsel, Washington, D. C., for Federal Trade Commission.

Petition to review dismissed in open court on April 7, 1952, for want of prosecution and for failure to comply with the court's rules.

W. H. BRADY & COMPANY, ET AL. v. FEDERAL TRADE COMMISSION [1]

No. 11226—F. T. C. Docket 5298

(Court of Appeals, District of Columbia. Apr. 12, 1952)

Order dismissing, upon stipulation of parties, petition to review order of Aug. 8, 1951, 48 F. T. C. 113, prohibiting interstate sale and distribution of push cards, punchboards, or other lottery devices.

Mr. Thurman Hill, of Washington, D. C., and *Mr. John C. Kelley*, of Chicago, Ill., for petitioners.

Mr. James W. Cassedy, Assistant General Counsel, of Washington, D. C., for Federal Trade Commission.

ORDER

This case came on for consideration on the petition for review of an order of the Federal Trade Commission and on petitioners' motion for leave to adduce additional evidence before the Federal Trade Commission and respondent having filed a stipulation for the dismissal of the petition for review and for the dismissal of the motion for leave to adduce additional evidence, it is

Ordered by the Court that the petition for review of an order of the

[1] Not reported in Federal Reporter. For case before the Commission, see 48 F. T. C. 113.

Federal Trade Commission and the motion to adduce additional evidence before the Federal Trade Commission filed herein be, and they are hereby, dismissed.

PER CURIAM.

FEDERAL TRADE COMMISSION v. RUBEROID CO.[1] RUBEROID CO. v. FEDERAL TRADE COMMISSION

Nos. 448, 504—F. T. C. Docket 5017

(United States Supreme Court. May 26, 1952)

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—AS PREVENTIVE AND PROSPECTIVE

Orders of Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—WHETHER LIMITED TO PRECISE FORM OF ILLEGAL PRACTICE

The Federal Trade Commission is not limited to prohibiting illegal practice in the precise form in which it is found to have existed in the past, but may close all roads to the prohibited goal.

CEASE AND DESIST ORDERS—IN GENERAL—COMMISSION DISCRETION

The Federal Trade Commission has wide discretion in choice of a remedy deemed adequate to cope with unlawful practices disclosed.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—COMMISSION DISCRETION—APPELLATE LIMITATION

Congress expected Federal Trade Commission to exercise special competence in formulating remedies to deal with problems in the general sphere of competitive practices, and courts will not interfere except where the remedy selected has no reasonable relation to unlawful practices found to exist.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—DIFFERENTIALS—IF VERY SMALL, COMPETITIVELY SIGNIFICANT

Where Federal Trade Commission found that very small differences in price were material factors in competition among manufacturer's customers, and manufacturer offered no evidence to the contrary, Commission was not required to limit its prohibition against price discrimination to specific differential of five percent or more shown to have been adopted in past violations, but properly prohibited all price differentials between competing purchasers.

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[1] Reported in 72 S. Ct. 800, 343 U. S. 470. For case before Commission, *see* 46 F. T. C. 879. For last decision of Court below, herein concerned, see 191 F. (2d) 294, and, in this volume, at p. 1699.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—CUSTOMER CATEGORIES AND FUNCTIONAL DIFFERENCES

Where there was ample evidence that roofing material manufacturer's classification of its customers did not follow real [801] functional differences, as between wholesalers, retailers, and contractors or applicators, and Federal Trade Commission found that some purchasers operated as both wholesalers and applicators, cease and desist order properly prohibited discrimination between any purchasers who in fact compete, without limitation to categories of customers among which previous discrimination had been found.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—DISCRIMINATING IN PRICE—PURCHASERS COMPETING IN RESALE AND DISTRIBUTION OF ROOFING MATERIALS—WHETHER PROHIBITION APPLICABLE TO SALES TO COMPETING MANUFACTURERS OF PREFABRICATED HOUSES

A cease and desist order prohibiting price discrimination among purchasers competitively engaged "in the resale or distribution" of roofing materials would not apply to sales to competing manufacturers of prefabricated houses, and was not too broad.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—STATUTORY EXCEPTING PROVISOS—IF NOT INCLUDED IN ORDER

Statutory provisos permitting price differentials which merely allow for differences in cost of manufacture, sale or delivery, or are made to meet equally low price of competitor, are necessarily implicit in every order issued under authority of the statute and hence need not be included in Federal Trade Commission's cease and desist order.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—STATUTORY EXCEPTING PROVISOS—IF NOT INCLUDED IN ORDER—AS NOT PRECLUDING PRICE DIFFERENTIATING BY SELLER IN NEW COMPETITIVE SITUATION

The absence, from Federal Trade Commission's cease and desist orders prohibiting price discrimination, of statutory exceptions of differentials allowing for differences in cost of manufacture, sale or delivery, or made to meet equally low price of competitor, cannot preclude seller from differentiating in price in a new competitive situation involving different circumstances pursuant to statutory provisos.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—IF PRICE REDUCTION THEREAFTER BY COMPETITOR

Seller is not required to seek modification of Federal Trade Commission's cease and desist order prohibiting price discrimination each time that a competitor's price reduction requires it either to lower price in good faith or lose a sales opportunity.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—STATUTORY EXCEPTING PROVISOS—IF NOT INCLUDED IN ORDER—WHETHER BURDEN OF JUSTIFICATION SHIFTED THEREBY, OR ISSUES THERETOFORE SETTLED SUBJECT TO RE-LITIGATION

The implied inclusion of statutory provisos permitting price reduction in Federal Trade Commission's cease and desist order prohibiting price discrimination does not shift from seller the burden of proof of justification,

or allow seller to relitigate issues already settled by prior proceedings before the Commission which resulted in an order that was affirmed in the courts.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—VIOLATION—DISCRIMINATING IN PRICE—DEFENSE JUSTIFICATION—COSTS AND COMPETITION—IF THERETOFORE DECIDED AGAINST SELLER OR AVAILABLE SUPPORTING EVIDENCE NOT INTRODUCED

If questions of justification for price discrimination, claimed upon basis of facts relating to costs or meeting competition, have once been finally decided against seller or evidence supporting such defense was available to seller although not produced, seller cannot again interpose the same defense upon substantially similar facts when Federal Trade Commission seeks to show that its order has been violated.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—AFFIRMANCE AND ENFORCEMENT—CLAYTON ACT—DISCRIMINATING IN PRICE—VALIDITY OF ORDER—WHETHER ISSUE OF, AFTER ESTABLISHMENT, OPEN ON VIOLATION

Where Federal Trade Commission seeks both affirmance and enforcement of its order prohibiting price discrimination in one proceeding, contending that seller has continued unlawful practices since the order was issued, court will review Commission's determination in the ordinary manner, but questions thus settled will not be open in deciding whether the order has [802] been violated, and should therefore be enforced.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT AND CONTEMPT PROCEEDINGS—DISCRIMINATING IN PRICE—DEFENSE JUSTIFICATION—AS LIMITED TO STATUTORY, WHERE OPPORTUNITY TO PRESENT NOT THERETOFORE AVAILABLE

In contesting enforcement or contempt proceedings under cease and desist order prohibiting price discrimination, seller may plead only those facts constituting statutory justification which it has not had a previous opportunity to present.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT—CLAYTON ACT—VIOLATION SHOWING AS PREREQUISITE

The Federal Trade Commission cannot obtain a decree directing enforcement of an order issued under the Clayton Act in absence of showing that violation of the order has occurred or is imminent.

STATUTES AND STATUTORY CONSTRUCTION—FEDERAL TRADE COMMISSION AND CLAYTON ACTS—AFFIRMANCE AND ENFORCEMENT OF ORDERS—THAT FORMER, BUT NOT LATTER, ACT, AMENDED TO REQUIRE ENFORCEMENT, BASED UPON VIOLATION, UPON AFFIRMANCE

Where Congress amended Federal Trade Commission Act so as to require enforcement of order based upon violation thereof, upon affirmance of such order, but failed to pass bills seeking similar amendment of the Clayton Act, court would not reinterpret the Clayton Act so as to achieve the same result as the amendment sought.

STATUTES AND STATUTORY CONSTRUCTION—CLAYTON ACT—ENFORCEMENT—IF HANDICAPPED BY PROVISIONS OF ACT

That effective enforcement of Clayton Act may be handicapped by present provisions of such Act is a question of policy for Congress, and not a question for court in interpreting the Act.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT—PETITIONS AND CROSS-PETITIONS—CLAYTON ACT—VIOLATION SHOWING AS PREREQUISITE

Violation of cease and desist order prohibiting price discrimination, as a statutory prerequisite to enforcement of such order, applies when Federal Trade Commission seeks enforcement by cross-petition after review has been set in motion by the party subject to the order, as well as when the Commission makes the original application.

(The syllabus, with substituted captions, is taken from 72 S. Ct. 800)

On writs of certiorari to the Court of Appeals for Second Circuit, judgment affirmed, Mr. Justice Black, otherwise concurring, thinking that the order should expressly except permitted cost and competitive differentials; and Mr. Justice Douglas and Mr. Justice Jackson dissenting.

Mr. James W. Cassedy, of Washington, D. C., for Federal Trade Commission.

[471] *Mr. Cyrus Austin*, of New York City, for Ruberoid Co.

[472] MR. JUSTICE CLARK delivered the opinion of the Court.

In this case we granted cross-petitions for certiorari to review the decree of the Court of Appeals affirming, but refusing to enforce, a cease and desist order issued by the Federal Trade Commission to the Ruberoid Co.

Ruberoid is one of the Nation's largest manufacturers of asphalt and asbestos roofing materials and allied products. The Commission found that Ruberoid, in a number of specific instances, had discriminated among customers in the prices charged them for roofing materials. Further finding that the effect of those discriminations "may be substantially to lessen competition in the line of commerce in which [those customers] are engaged, and to injure, destroy, or prevent competition between [those customers]," [2] the Commission held that the discriminations were violations of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.[3] 46 F. T. C. 379. Ruberoid was ordered to:

"[C]ease and desist from discriminating in price:

"By selling such products of like **[803]** grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." [4]

Upon Ruberoid's petition for review, the Court of Appeals affirmed

[2] 46 F. T. C. 379, 386.
[3] 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. § 13.
[4] 46 F. T. C. 379, 387.

and granted enforcement of the order. 189 F. (2d) 893. However, on rehearing, the Court of Appeals amended its mandate to strike that part which directed enforcement. 191 F. (2d) 294. We granted certiorari to review questions, important in the administration of the Clayton Act, as to the scope and enforcement of Federal Trade Commission orders. 342 U. S. 917.

[473] We first consider the contentions of Ruberoid, which are mainly attacks upon the breadth of the order. Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.[5] Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U. S. 608, 611 [42 F. T. C. 902; 4 S. & D. 476] (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices.[6] Therefore we have said that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.*, at 613.

In the light of these principles, we examine the specific objections of Ruberoid to the order in this case. First, it is argued that the order went too far in prohibiting *all* price differentials between competing purchasers, although only differentials of 5 percent or more were found. But the Commission found that very small differences in price [474] were material factors in competition among Ruberoid's customers, and Ruberoid offered no evidence to the contrary. In this state of the record the Commission was not required to limit its prohibition to the specific differential shown to have been adopted in past violations of the statute.[7] In the absence of any indication that a lesser discrimination might not affect competition there was no need

[5] *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 51–52 [44 F. T. C. 1499; 4 S. & D. 716] (1948); cf. *International Salt Co.* v. *United States*, 332 U. S. 392, 398–400 (1947).

[6] *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 726–727 [45 F. T. C. 1063; 4 S. & D. 676] (1948); 38 Stat. 722, 15 U. S. C. § 47.

[7] *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 51–52 [44 F. T. C. 1499; 4 S. & D. 716] (1948); cf. *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437 (1941).

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to afford an escape clause through which the seller might frustrate the whole purpose of the proceedings and the order by limiting future discrimination to something less than 5 percent.[8]

[804] The roofing material customers of Ruberoid may be classified as wholesalers, retailers, and roofing contractors or applicators.[9] The discriminations found by the Commission were in sales to retailers and applicators. The [475] Commission held that there was insufficient evidence in the record to establish discrimination among wholesalers, as such. Ruberoid contends that the order should have been similarly limited to sales to retailers and applicators. But there was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding, the Commission disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers, and stated its order in terms of "purchasers who in fact compete." Thus stated, we think the order is understandable, reasonably related to the facts shown by the evidence, and within the broad discretion which the Commission possesses in determining remedies.

Finally, Ruberoid complains that the order enjoins lawful acts by failing to except from its prohibitions differentials which merely make allowances for differences in cost of manufacture, sale or delivery, or which are made in good faith to meet an equally low price of a competitor. Differences in price satisfying either of these tests are permitted by the terms of the act.[10] It is argued that the Commission

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[8] "True, the Commission did not merely prohibit future discounts, rebates, and allowances in the exact mathematical percentages previously utilized by respondent. Had the order done no more than that, respondent could have continued substantially the same unlawful practices despite the order by simply altering the discount percentages and the quantities of salt to which the percentages applied." *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 52–53 [44 F. T. C. 1499; 4 S. & D. 716] (1948). The discussion following these words in the *Morton Salt* case, of certain aspects of the order in question there, manifestly affords no support to Ruberoid's contention here. *Id.*, at 53–54.

[9] Ruberoid suggests a fourth category of purchasers—manufacturers—and contends that the order is too broad in that it prohibits discrimination in sales to that group, e. g., in sales of shingles to competing manufacturers of prefabricated houses. We need not consider whether such an order would be too broad because we do not think the order here applies to such sales. By its terms, the order covers only sales to those competitively engaged "in the resale or distribution of such products [i. e., 'asbestos or asphalt roofing materials']," and not sales to those who use roofing materials in the fabrication of wholly new and different products.

[10] "[N]othing 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. * * * 49 Stat. 1526, 15 U. S. C. § 13 (a). "[N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor. * * *" 49 Stat. 1526, 15 U. S. C. § 13 (b), *Standard Oil Co.* v. *Federal Trade Comm'n*, 340 U. S.

has radically broadened its prohibitory [476] powers through failure to include these provisos in the order. We do not think so because we think the provisos are necessarily implicit in every order issued under the authority of the act, just as if the order set them out *in extenso*. Although previous Commission orders have included these provisos, they gained no force by that inclusion. Their absence cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos. Nor is the seller required to seek modification [805] of the order each time, for example, that a competitor's price reduction requires it either to lower its price in good faith to meet the lower competing price or to lose a fleeting sales opportunity. On the other hand, the implied inclusion of the provisos in the order does not shift from the seller the burden of proof of justification.[11] Neither does recognition of the implicit availability of these defenses allow the seller to relitigate issues already settled by prior proceedings before the Commission which resulted in an order that was affirmed in the courts. If questions of justification, claimed upon the basis of facts relating to costs or meeting competition, have once been finally decided against the seller, it cannot again interpose the same defense upon substantially similar facts when the Commission seeks to show that its order has been violated.[12] [477] The same result follows where the evidence supporting the defense, although not produced in the previous proceedings, was then available to the seller. In short, the seller, in contesting enforcement or contempt proceedings, may plead only those facts constituting statutory justification which it has not had a previous opportunity to present.

The sole question presented by the Commission's petition concerns the lower court's holding, with one dissent, that the Commission could not "obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred or is imminent." [13] The pertinent parts of the Act provide:

"If such person [subject to the order] fails or neglects to obey such

231 [47 F. T. C. 1766] (1951). Ruberoid does not complain of the omission from the order of the statutory provisos relating to the seller's right to select its own customers and to price changes in response to changing conditions affecting the market for, or the marketability of, the goods concerned. Hence we do not deal with those defenses here.

[11] Cf. *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 44–45 [44 F. T. C. 1499; 4 S. & D. 716] (1948) (cost justification); *Federal Trade Comm'n* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 [40 F. T. C. 906; 4 S. & D. 346] (1945) (meeting-competition justification).

[12] Where the Commission seeks both affirmance and enforcement of its order in one proceeding, contending that the seller has continued in its unlawful practices since the order was issued, the court, in deciding whether the order should be affirmed, will of course review the determination of the Commission in the ordinary manner. But questions thus settled will not be open in deciding whether the order has been violated and should therefore be enforced.

[13] 191 F. (2d) 294, 295.

order of the commission * * * while the same is in effect, the commission * * * may apply to the circuit court of appeals of the United States * * * for the enforcement of its order. * * * [T]he court * * * shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order of the commission. * * *

"Any party required by such order of the commission * * * to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission * * * be set aside. * * * [T]he court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission * * * as in the case of an application [478] by the commission * * * for the enforcement of its order. * * *

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission * * * shall be exclusive." [14]

The Commission argues, first, that the provision authorizing it to apply for enforcement "if such person fails or neglects to obey such order" is merely "a Congressional directive to the Commission as to the circumstances under which it may go into court to seek enforcement," which does not amount to a prerequisite [806] to the court's granting of enforcement.[15] We cannot subscribe to this argument, which disregards the unequivocal language of the statute and its consistent interpretation over the 38 year period of its existence.[16] Congress, in 1938, amended similar language in the Federal Trade Commission Act, so that the reviewing court is now plainly required, upon affirmance, to enforce an order based upon violation of that act.[17] The Commission has [479] repeatedly sought similar amendment of the Clayton Act provisions involved in this case.[18] We will not now achieve the same

[14] 38 Stat. 735, as amended, 15 U. S. C. § 21.

[15] Brief for the Federal Trade Commission in No. 448, p. 16.

[16] E. g., *Federal Trade Comm'n* v. *Whitney & Co.*, 192 F. (2d) 746 [48 F. T. C. 1723] (C. A. 9th Cir. 1951); *Federal Trade Comm'n* v. *Standard Brands, Inc.*, 189 F. (2d) 510 [47 F. T. C. 1831] (C. A. 2d Cir. 1951); *Federal Trade Comm'n* v. *Herzog*, 150 F. (2d) 450 [41 F. T. C. 426; 4 S. & D. 399] (C. A. 2d Cir. 1945); *Federal Trade Comm'n* v. *Baltimore Paint & Color Works*, 41 F. (2d) 474 [14 F. T. C. 675; 2 S. & D. 75] (C. A. 4th Cir. 1930); *Federal Trade Comm'n* v. *Balme*, 23 F. (2d) 615 [11 F. T. C. 717; 1 S. & D. 666] (C. A. 2d Cir. 1928); *Federal Trade Comm'n* v. *Standard Education Society*, 14 F. (2d) 947 [10 F. T. C. 751; 1 S. & D. 567] (C. A. 7th Cir. 1926). The last three cases cited arose under the Federal Trade Commission Act, but since the Clayton Act provisions involved here are identical with the corresponding provisions of the Federal Trade Commission Act prior to 1938, 38 Stat. 720, the decisions make no distinction between them.

[17] "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." 52 Stat. 113, 15 U. S. C. § 45 (c). Unless the party subject to an order issued under the provisions of the Federal Trade Commission Act files a petition for review within 60 days, the order becomes final and its violation punishable. 52 Stat. 113–114, 15 U. S. C. § 45 (g) and (1).

[18] E. g., F. T C. Ann. Rep. 7–8 (1951); F. T. C. Ann. Rep. 12 (1948); F. T. C. Ann. Rep. 13 (1947); F. T. C. Ann. Rep. 12 (1946).

result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it.[19] Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions, but that is a question of policy for Congress.

Alternatively, the Commission argues that, even though disobedience of the order is a condition to enforcement upon the application of the Commission, there is no such condition where the order comes before the court upon petition for review by the affected party. This argument begins with the difference in language between the statutory paragraphs providing for review at the instance of the respective parties, but consideration of the section as a whole convinces us that the most that can be said for the argument is that the section is ambiguous. We think the statutory prerequisite to enforcement applies when the Commission seeks enforcement by cross-petition after review has been set in motion by the party subject to the order as well as when the Commission makes the original application.[20] There is no reason why one who has complied with the order, but who seeks to have it reviewed and modified or set aside, should be placed in a worse position than one who does not exercise that right. We doubt that Congress intended its requirement for enforcement to depend entirely upon which party goes to court first.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment and opinion of the Court, except that he thinks the Commission's order should expressly except from its prohibitions differentials which merely make allowances for differences in the cost of manufacture, sale, or delivery, or which are made in good faith to meet an equally low price of a competitor.

[807] MR. JUSTICE FRANKFURTER, not having heard the argument, owing to illness, took no part in the disposition of this case.

MR. JUSTICE DOUGLAS dissents from the denial of enforcement of the order.

MR. JUSTICE JACKSON, dissenting in No. 504.

The Federal Trade Commission, in July of 1943, instituted before itself a proceeding against petitioner on a charge of discriminating in price between customers in violation of subsection (a) of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936, U. S. C. Title 15, sec. 13 (a).

Several violations were proved and admitted to have occurred in 1941. No serious opposition was offered to an order to cease and

[19] E. g., H. R. 10176, 75th Cong., 3d Sess.; H. R. 3402, 81st Cong., 1st Sess.

[20] Accord, e. g., *Federal Trade Comm'n* v. *Fairyfoot Products Co.*, 94 F. (2d) 844 [26 F. T. C. 1507; 2 S. & D. 444] (C. A. 7th Cir. 1938); *Butterick Co.* v. *Federal Trade Comm'n*, 4 F. (2d) 910 [8 F. T. C. 602; 1 S. & D. 378] (C. A. 2d Cir. 1925); *L. B. Silver Co.* v. *Federal Trade Comm'n*, 292 Fed. 752 [6 F. T. C. 608; 1 S. & D. 327] (C. A. 6th Cir. 1923).

desist from such discriminations, but petitioner did object to being ordered to cease types of violations it never had begun and asked that any order include a clause to the effect that it did not forbid the price differentials between customers which are expressly allowed by statute.

[481] However, the Commission refused to include such a provision as "unnecessary to assure respondent [petitioner here] its full legal rights." It also rejected the specific and limited order recommended by its Examiner and substituted a sweeping general order to "cease and desist from discriminating in price: By selling such products of like grade and quality to any purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." It wrote no opinion and gave only the most cryptic reasons in its findings.[21]

On proceedings for review, petitioner attacked this order for its indeterminateness and its prohibition of differentials allowed by statute. The Court of Appeals, however, affirmed, saying:

"We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." [22]

This appraisal of the result of almost 10 years of litigation exposes a grave deficiency either in the Act itself or in the administrative process by which it has been applied. Admitting that the statute is "vague and general in its wording," it does not follow that a cease and desist order implementing it should be. I think such an outcome of administrative proceedings is not acceptable. We would rectify and advance the administrative process, [482] which has become an indispensable adjunct to modern government, by returning this case to the Commission to perform its most useful function in administering an admittedly complicated act.

If the Court of Appeals were correct, it would mean that the intercession of the administrative process between the Congress and the Court does nothing either to define petitioner's duty and liabilities or to impose sanctions. Congress might as well have declared, in these comprehensive terms, a duty not to discriminate and provided for prosecution of violations in the courts. That, of course, would impose on the courts the task of determining the meaning and application of the law to the facts. But that is just the task that this order

[21] A comprehensive study has pointed out the early failure of this Commission (and it applies as well to others) to clarify and develop the law and thereby avoid litigation by careful published opinions. Henderson, The Federal Trade Commission 334.

[22] *Ruberoid Co. v. Federal Trade Commission,* 189 F. (2d) 893, 894 [47 F. T. C. 1838].

imposes upon the courts in event of a contempt proceeding. The courts have derived no more detailed "guiding yardsticks" from the Commission than from Congress. On the contrary, the ultimate enforcement is further confused by the administrative proceeding, because it winds [808] up with an order which literally forbids what the Act expressly allows and thus adds to the difficulty of eventual sanctions should they become necessary.

If the unsound result here were an isolated example of malaise in the administrative scheme, its tolerance by the Court would be less troubling, though no less wrong. But I think its decision may encourage a deterioration of the administrative process of which this case is symptomatic and which invites invasion of the independent agency administrative field by executive agencies. Other symptoms, betokening the same basic confusion, are the numerous occasions when administrative findings are inadequate for purposes of review and recent instances in which part of the government appears before us fighting another part—usually a wholly executive-controlled agency attacking one of the independent administrative agencies—the Departments of Agriculture (*Secretary of* [483] *Agriculture* v. *United States*, 344 U. S. 298) and Justice (*United States* v. *Interstate Commerce Commission*, 337 U. S. 426) against the Interstate Commerce Commission, the Department of Justice against the Maritime Commission (*Far East Conference* v. *United States*, 342 U. S. 570), the Secretary of the Interior against the Federal Power Commission (*United States ex rel. Chapman* v. *Federal Power Commission*, 345 U. S. 153). Abstract propositions may not solve concrete cases, but, when basic confusion is responsible for a particular result, resort to the fundamental principles which determine the position of the administrative process in our system may help to illuminate the shortcomings of that result.

I. The Act, Like Many Regulatory Measures, Sketches a General Outline Which Contemplates Its Completion and Clarification by the Administrative Process Before Court Review or Enforcement.

This section of the act admittedly is complicated and vague in itself and even more so in its context. Indeed, the Court of Appeals seems to have thought it almost beyond understanding. By the act, nothing is commanded to be done or omitted unconditionally, and no conduct or omission is *per se* punishable. The commercial discriminations which it forbids are those only which meet three statutory conditions and survive the test of five statutory provisos. To determine which of its overlapping and conflicting policies shall govern a particular case involves inquiry into grades and qualities of goods, discrimina-