SECTION 2 (a)[1] OF THE CLAYTON ACT AS AMENDED BY THE ROBINSON-PATMAN ACT - ITS APPLICATION TO THE QUANTITY PRICE

By

Everette MacIntyre, Chief
Division of Antimonopoly Trials
Federal Trade Commission

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It is essential to understand that the opinions and conclusions I express here are not necessarily views held by the Federal Trade Commission.

By Act of Congress injurious quantity price discriminations are condemned. They stand condemned second only to regional or community price discriminations.

The term "discrimination" as used in Section 2 of the Clayton Act, as amended, has been defined in many ways. A definition frequently quoted is that given by House Conferee Utterbach in reporting favorably to the House of Representatives upon the Robinson-Patman Act, in 1936.[2]

It is correct to say that the term "discrimination" involves more than a relationship between parties. It contemplates a relationship between prices. There must be a price higher than another price. Any act of discrimination, therefore, may logically be viewed from either the viewpoint of the higher price or the lower price and the factor of good faith, as that term is used in 2 (b) of the Clayton Act, as amended.

For the purpose of this discussion, the definition of discrimination through the use of a quantity price is viewed by the speaker from the standpoint of the seller exacting a higher price from his small customers than he exacts from larger competing customers, and because of the volume of the purchases.

Community discrimination by railroads in the latter half of the Nineteenth Century resulted in legislative action to prevent the destruction of local trade and industry in one area in favor of another. The Interstate Commerce Act of 1887 and the Sherman Act of 1890 as public necessities became a part of our federal law. The reports of the numerous public investigations made during that period are filled with flagrant examples of discriminations involved. A typical case related to rebates granted by railroads for a number of years to the Standard Oil Company.[3]

1/Section 2 of the Clayton Act contains the provisions of the Robinson-Patman Anti-Discrimination Act, approved June 19, 1936.
2/Congressional Record, p. 9559, June 15, 1936.
3/50th Congress, 1st Session, Record of Investigation of Trusts, p. 717.

While it was recognized to be the primary purpose of section 2 of the Clayton Act, as approved in 1914, to reach the practice of destroying competition in certain sections by lowering prices below costs therein and later recouping such losses at the expense of the general public when monopoly had been achieved, that was not the sole purpose.5/

The Goodyear case.6/ The Federal Trade Commission, acting on the basis of the provisions of section 2 of the Clayton Act and factual information in its hands relating to practices which appear to be covered thereby, on March 1, 1935, issued its amended complaint in which it alleged that The Goodyear Tire & Rubber Company was discriminating in price in connection with the sale of tires to Sears Roebuck & Company in violation of section 2 of the Clayton Act. It was alleged that since May 1, 1926, The Goodyear Company had discriminated in price between its customers by giving and allowing Sears Roebuck & Company a lower price than given or allowed to other purchasers competitively engaged and that said discrimination in price had not been made and was not being made on account of differences in grade, quality or quantity of the commodity sold, nor had such discriminations made only due allowance for differences in costs. It was further alleged that the discriminations had the effect of substantially lessening competition. During the course of the hearings, the respondent adduced evidence to show that the differences in the prices alleged in the Commission's complaint were based upon and accounted for by the quantity of the commodity sold. Briefly, the facts were as follows: Under its several contracts with Sears, Goodyear manufactured and sold to Sears, during the eight-year period, 1926-1933, more than 19,000,000 tires, for which Sears paid to it a gross sum of $129,252,984, and a net sum of $116,359,367. The Commission made an exhaustive study of the cost of tires sold by Goodyear under the Sears contracts and that of tires sold to its independent dealers upon a similar volume of business. It found that based upon the profit and loss statement of Goodyear adjusted as the result of such study, Goodyear realized on its sales to Sears during the entire period a total net profit of $7,715,794.56, and on its sales of equal volume to service-station dealers a net profit of $20,425,807.21. The difference of $12,710,012.65 in net profit it found to be the aggregate net price discrimination not accounted for by differences in cost of transportation and selling according to the respondent's own calculations and based upon the method which it itself suggested. It concluded that this price discrimination in favor of Sears against independent service-station dealers was not justified by differences in cost of transportation or selling. Conceding that quantity discounts were to some extent permitted because they involved some economic utility that should be preserved, the Commission found that the quantity exception did not permit price discrimination without limit or restraint, that while a difference in quantity of the commodity sold was given reasonable weight in determining whether the discriminatory price was warranted, yet in arriving at a price on account of quantity it was necessary that the difference in price be reasonably related to the difference in cost, though remote and unsubstantial differences in cost might be disregarded.

The Commission concluded that in arriving at a price on account of quantity sold, some standard of comparison is necessary. It concluded that

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5/George Van Camp & Sons v. American Can Company, 278 U.S. 245, 254; American Can Company v. Ladoga Canning Company, 44 F.(2d) 763 (CCA 7, 1930).
6/22 FTC 232-334.

such standard is the relation between price and quantity. It held that factors going to make up price on account of quantity are to be taken into account and given reasonable weight in determining whether a price discrimination under the original section 2 of the Clayton Act was legal or illegal. It recognized that quantity sales are more economical than small ones and to such extent economically justifiable but at the same time it stated that a quantity discount based on the amount of annual sales was a price discrimination contrary to section 2 of the Clayton Act unless it could be shown that it represented and fairly approximated lower costs. It observed that a manufacturer, if allowed to do so, might hand over the whole trade in his line of commerce to a few dealers or a single dealer, or he might at will make the discount equal to or greater than the ordinary profit in trade and thus competition by those who could not get the discount allegedly given because of quantity would obviously be out of the question. It found that the discriminations in the Goodyear case involved such a situation and gave an unfair competitive advantage to Sears Roebuck & Company producing an unjust competitive situation as between the latter and independent tire dealers. The Commission stated that the discrimination was not grounded on efficiency and cost. It, therefore, held that they were in violation of section 2 of the Clayton Act, as approved October 15, 1914.

The Circuit Court of Appeals for the Sixth Circuit, in reviewing the Commission's findings and order, held that section 2 of the Clayton Act as approved in 1914 did not give the Commission power to prohibit price discrimination on account of quantity when unrelated to differences in cost.7/ It concluded that the findings and conclusions of the Commission that the discrimination in price was not on account of quantity were all based on the Commission's interpretation of the law and stated that the Commission had found no standard in the law by which a discrimination on account of quantity unrelated to savings in cost was to be judged. Judge Hamilton dissented and stated that he believed the court had included in the proviso of section 2 of the Clayton Act as then written a case that lies beyond its direct expression and not within its letter or spirit. In that connection, he said:

> "This statute should be construed in the light of attendant conditions and the state of the law at the time of its enactment and applied to carry out the intention and meaning of the legislature gleaned from its language. A proviso which operates to limit the application of the general provisions of a statute should be strictly construed to include no case not within its letter. The last rule is especially applicable to the case here under consideration."

In the meantime the Federal Trade Commission had reported to Congress, on December 14, 1934, on its Chain Store investigation and, in discussing section 2 of the Clayton Act, stated:

> "That unless the price discrimination permitted 'on account of' quantity shall make 'only due allowance' therefor, Sec. 2 of the Clayton Act may be readily evaded by making a small difference in quantity the occasion

7/The Goodyear Tire & Rubber Company v. Federal Trade Commission, 101 F. (2d) 620.

> for a large difference in price. If the section is to have any vitality it must either be interpreted and enforced to that effect or it should be amended to that effect."8/

Thereafter, the factual information submitted by the Commission to the Congress in its reports on the Chain Store investigation and other factual information collected by a special committee of the House of Representatives during 1935, pursuant to House Resolutions 203 and 239, was considered by the Congress in connection with proposals to amend section 2 of the Clayton Act. Those proposals took the form of the Patman Bill (H.R. 8442) introduced June 11, 1935, the Mapes Bills (H.R. 4995 and H.R. 5062), the Utterbach Bill (H.R. 10486), the Robinson Bill (S. 3154) introduced June 26, 1935, and the Borah-Van Nuys Bill (S. 4171) and resulted in what is now commonly referred to as the Robinson-Patman Act, approved June 19, 1936, as an amendment to section 2 of the Clayton Act.

Honorable John E. Miller, a member of Congress who participated in presenting the House bills, commented upon the significance of quantity limits when he referred to the example of Armour & Company who, he stated, at that time alone out of nearly a thousand meat packers then produced one-fourth of the Nation's meat products moving in interstate commerce. He stated that Armour was then offering a special discount on fresh meats applicable only to customers who purchased quantities in the aggregate in excess of $10,000,000 a year. Congressman Miller stated:

> "At the time it was offered, no one buyer in the United States took that much fresh meat from anyone. No one buyer exceeded 75 percent of it. None except that one buyer exceeded 20 percent of it. None but two meat packers exceeded 75 percent of it to any one customer, and that was the same customer. None except two packers sell as much as one-fourth to any one customer. It was a discount, in short, offered by an overshadowing manufacturer to an overshadowing buyer to induce him to switch business away from competitors, so as to make that manufacturer still more overshadowing, and offering in return a price advantage on which that buyer could also grow to ever greater size."

It was recognized that it was harmful to the public interest for a seller to discriminate on the basis of volume purchased when the result would be the driving out of small efficient traders in favor of larger, less efficient traders.

But for the advent of monopolistic conditions arising from discriminations in favor of large buyers we might never have undertaken the effort to govern individual price behavior. It was information concerning the monopolistic effects of such discriminations before Congress, and available for its consideration in 1914 and 1936, that carried conviction legislation was necessary. Congress was convinced that curbs on individual pricing practices were required if small independent competing enterprises were to survive. On the basis of those considerations, section 2 of the Clayton Act was amended in 1936 to curb the growth of monopolistic conditions flowing from individual price discriminations. The amendment took the form of the Robinson-Patman Act.

8/Senate Document No. 4, 74th Congress, 1st Session, in response to Senate Resolution No. 224 of 1928.

The first provision contained in the amendment makes it unlawful to discriminate in price but permits a respondent the defense, with respect to discriminations based on quantities, when it is shown that the discriminations make only due allowance for differences in cost of manufacture, sale or delivery resulting from the differing quantities in which the commodity was sold or delivered. Thus, since 1936 we have had a statutory provision operating to dispel the uncertainty which might have otherwise clouded the jurisdiction of the Commission, after the decision by the court in the Goodyear case, supra.

Pursuant to that provision in section 2(a) as amended, the Commission has moved in numerous cases against discriminations which were based upon differences in volumes sold, and when the discriminations were not accounted for by differences in cost. Time will permit reference to only a few of those cases as examples of the problems involved and the manner in which disposition was made.

In one of the first cases to arise the Commission on November 21, 1936, alleged that Standard Brands, Inc.9/ had discriminated in price in the sale of yeast to bakers in violation of section 2 of the Clayton Act, as amended. It was alleged that the discriminations were based on differences in quantities purchased by the customers of Standard Brands, with those who purchased from 1 to 150 pounds per month being charged 25 cents per pound and purchasers purchasing 50,000 pounds or more per month being charged only 14 cents. As a matter of fact, only 10 buyers of bakers' yeast in the United States were able to buy in large enough quantities to be favored with the price of 14 cents per pound.

Cost accounting and related problems made the trial of the Standard Brands case a tedious one. However, it was disposed of through the issuance of a cease and desist order.

Since the issuance of the order the respondent has made changes in its pricing of bakers' yeast. The buyers of the smallest quantities now pay only 19 cents and the buyers who are able to buy as much as 2500 pounds or more monthly pay only 12 cents per pound. Recently the Commission has held hearings at which evidence of respondent's present practices was placed in the record for consideration by the Commission of the question of whether the respondent is violating the order to cease and desist.

Subsequent to the complaint in the Standard Brands case, complaints were issued alleging unlawful discriminations based on cumulative quantity discounts in a number of cases. They are now well known to those members of the Bar dealing with this law. I mention here only the cases of American Optical Company, et al.,10/ Bausch & Lomb Optical Co., et al.,11/ and the Morton Salt case.12/

They involved the type of cumulative quantity discounts readily open to challenge, namely, those given on the basis of a purchaser's actual or

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9/29 FTC 121. Modified Findings and Order, 30 FTC 1117.
10/28 FTC 169.
11/28 FTC 186.
12/39 FTC 35.

prospective purchases for a given period. In some cases the period is for a month, as in the Standard Brands and the Optical cases. In other cases it is for a year, as in the Morton Salt case. In many of its cases the Commission has demonstrated the vice of this type of cumulative quantity discounts. They bear no relation to costs of the individual deliveries made during the period involved, and they inherently favor large buyers at the expense of small buyers. I shall discuss briefly the Morton Salt case as one of the better known cases of that class.

In that case the record shows that since 1936 the respondent has been discriminating in price between competing wholesalers and competing retailers by means of its so-called "quantity discount system" and otherwise. Respondent sells its Blue Label salt to both wholesalers and retailers at $1.60 a case when purchased in less than carload lots, and at $1.50 a case when purchased in carload lots. Respondent grants, in addition, a rebate of 10 cents from the carload price to those who purchase 5,000 or more cases in any consecutive 12-month period and a rebate of 15 cents from the carload price to those who purchase 50,000 or more cases during any consecutive 12-month period. Only four customers - National Salt Company, National Tea Company, Safeway Stores, Inc., and Great Atlantic & Pacific Tea Company - have ever purchased a sufficient quantity to qualify for the latter rebate. In connection with its sale of other brands of salt than Blue Label, respondent grants a one unit, or approximately 5 percent, discount to wholesalers and retailers who purchase in carload lots; and to those who purchase during a consecutive 12-month period table salt of the value of $50,000 or more, respondent allows an additional unit discount. Purchases of Blue Label salt are included in determining the total amount of table salt purchased.

Respondent has also discriminated in prices between different purchasers of like grade and quality of salt by means of special allowances or discounts to favored customers. For example, respondent has for several years made to Consolidated Company, Inc., of Plaquemine, Louisiana, a special allowance of 7-1/2 cents a case from the carload price of $1.50 on its Blue Label salt. Consolidated is a wholesaler operating 22 units or branches throughout the State of Louisiana in competition with other wholesale grocers who do not receive this special discount.

The Commission found that customers of respondent who received the benefit of the special discounts have a substantial advantage in selling respondent's salt in competition with other customers; the latter either reduced their possible profits or lost business by charging higher prices than their competitors. The effect of the large price differentials granted the chain stores is particularly harmful to the competition between the small retailers and the chains.

The Commission found that these price differences constituted the discriminations in price and resulted in adverse effects such as are specified in the statute. It further found that the respondent had failed to show that the discriminations were made in good faith to meet an equally low price of a competitor or that the price differences were justified by differences in costs. It thereupon issued an order that respondent cease and desist from discriminating in the price of its salt products of like grade and quality as among wholesale or retail dealers when the differences in price are not justified in

"* * * differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered (a) by selling such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers; (b) by selling such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such retailers; (c) by selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer. For the purposes of comparison, the term 'price' as used in this order takes into account discounts, rebates, allowances, and other terms and conditions of sale."

The respondent before the Commission petitioned the United States Circuit Court of Appeals for the Seventh Circuit to review and set aside the order to cease and desist. The Seventh Circuit decided the case May 27, 1947. In so doing it granted the petition, set aside the Commission's order and directed that the complaint be dismissed.13/

As the court saw it, the Commission had not proceeded to its ultimate finding of injury on the basis of evidence that injury had actually existed but instead on the basis of an inference of injury or a threat of it from the price structure alone. It held that the Commission was not empowered under the Act to infer injury or threat of injury from the price structure. It held further that the relationship of quantity price differentials to due cost allowances is not an affirmative defense to discrimination as contemplated or provided for by section 2 (b).

The Commission on July 1, 1947, filed a petition for rehearing on the point as to whether there was substantial evidence that the petitioner's price differentials may substantially lessen competition and, if so, whether the burden is on the Commission to prove that the price differentials based on quantity are not based on the cost of manufacture, sale and delivery. That petition for rehearing was denied. Thereafter, a petition for writ of certiorari was filed in the United States Supreme Court on December 2, 1947. The petition for certiorari was directed to the points raised in the petition for rehearing and to an additional point concerning the scope of the order. Last week on January 12, 1948, the Supreme Court granted the petition for certiorari.

Pending the Supreme Court's decision in the Morton Salt case, we are ever mindful of what that court stated in its opinion, on April 7, 1947, with respect to quantity discounts when it decided the Bruce's Juices case.14/ There the court observed that while section 2 of the Clayton Act, as amended, does not prohibit all quantity discounts, the Federal Trade Commission is the

13/162 F. (2d) 949.
14/Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743.

appropriate tribunal to hear in the first instance the complicated issues giving rise to questions as to what quantity discounts are permitted. There the court also said:

"The economic effects on competition of such discounts are for the Trade Commission to judge. Until the Commission has determined the question, courts are not given guidance as to what the public interest does require concerning the harm or benefit of these quantity discounts on the ultimate public interests sought to be protected in the Act."

The Quantity Limit Proviso.

The Patman Bill (H.R. 8442), introduced in the House on June 11, 1935, did not contain the quantity limit provision presently appearing in section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, or any provision similar to it. The same may be said of the Mapes, Utterbach and other bills introduced at about that time for the purpose of amending section 2 of the Clayton Act. A provision somewhat to that effect first appeared in the Robinson Bill (S. 3154).

The quantity limit proviso which thus first appeared in the Robinson Bill (S. 3154) fixed a definite maximum limit at a carlot. It prohibited allowances of discounts on account of quantities greater than a carlot. That provision was drafted by an attorney in Washington, D. C., who at the time represented United States Wholesale Grocers Association.15/ He testified on that point as follows:

"I want to make this little historical explanation. I drew this bill /H.R. 8442/ originally without the carlot provision. I felt satisfied at that time to rely upon differences in cost as a guaranty against abuse of the price differentials.

"A demand was presented by important interests, including Members of Congress, that a quantity limit be inserted beyond which quantity differentials should not be permitted, and I found that that principle had been observed by the Interstate Commerce Commission practically since the time of its organization."16/

The quantity limit proviso thus proposed for inclusion in the proposed amendment to section 2 (a) of the Clayton Act was not without precedent in the law. The Commodity Exchange Act of September 21, 1922,17/ empowered the Commodity Exchange Commission to fix limits on the amount of trading in commodities on commodity exchanges. Prior to that the Interstate Commerce Commission, in one of its first cases, Providence Coal Co. v. Providence & Western Railway,18/ in 1887 dealt with the problem of determining whether it was justifiable for a carrier to give lower rates on shipment of more than 30,000 tons of coal a year than applied on its regular carload coal rates. Judge Cooley, the first Chairman of that Commission and one of the greatest jurists in American history, wrote the opinion for the Commission. In condemning the discrimination involved as unjust, he said:

15/See Hearings Before Committee on Judiciary, House of Representatives, 74th Congress, 1st Session, on H.R. 8442, H.R. 4995 and H.R. 5062, beginning July 10, 1935, pp. 27 and 222.

16/Ibid. p.222.

17/See 7 USCA Chap. 1, Sec. 6a.

18/1 ICC 107.

"A discrimination which should so limit the offer that a part of those who could and might desire to accept it would be excluded from its benefits, would for that very reason be unjust and indefensible."

In later cases the Interstate Commerce Commission dealt with the problem in conformity with its earlier decision. Some of the later cases are Anaconda Copper Mining Co. v. C. & E. Railway,19/ Planters Compress Co. v. Railways,20/ and Rickards v. Atlantic Coast Line Railway.21/ In the Anaconda case the Commission stated:

"Whatever difference there may be in cost to the carrier between traffic in trainloads and traffic in carloads, it appears from the general course of legislation with respect to commerce between the States, from the debates and reports of various committees of Congress when the act to regulate interstate commerce was under consideration, from the better-considered court opinions, and from the reports and opinions of this Commission that to give greater consideration to trainload traffic than to carload traffic would create preferences in favor of large shippers and be to the prejudice of small shippers and the public."

In other words, conceding that there may be economies in handling trainload as against carload, nevertheless, the granting of a preferential rate in terms of many carloads or trainloads creates rates available to so few shippers of large enough size to use them that in the nature of the case that sort of rate constitutes an unjust discrimination. Thus, the principle which had been established in these early cases before the Interstate Commerce Commission, and which underlies the trading limit provision in the Commodity Exchange Act, provided precedent for inclusion of the proposed carlot quantity limit in the proposed amendment to section 2 of the Clayton Act.

However, the problem as dealt with by the Interstate Commerce Commission does not appear to have come precisely before the Supreme Court of the United States for decision. Nevertheless there is dictum on the point in a case dealing with a related problem decided by the Supreme Court. The case of Interstate Commerce Commission v. Baltimore & Ohio Railroad 22/ dealt with passenger fares and not freight rates. In that case the railroad was sustained in its right to charge a higher rate for 1-party tickets than for 10-party tickets. However, the Supreme Court in its opinion in that case stated:

"The real question is whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rates be allowed to everyone doing the same amount of business, such discrimination may, if carried

19/19 ICC 592
20/11 ICC 382, 402.
21/23 ICC 239.
22/145 U.S. 263.

too far, operate unjustly upon the smaller dealers engaged in the same business and enable the larger ones to drive them out of the market."

Thus, with a background of precedents in administrative law as dealt with by the Interstate Commerce Commission and the Commodity Exchange Commission supporting the principle, and information before it concerning the harmful effects of quantity price discriminations as practiced in trade, Congress moved to empower the Federal Trade Commission, through an amendment of section 2 of the Clayton Act, to fix and establish quantity limits for commodities or classes of commodities.

That move met with opposition. The Secretary of the National Volunteer Groups Institute (an organization representing large cooperative buying groups in the grocery trade) opposed the provision claiming that it was not practical for the grocery trade and would create inequities. An official of American Stores, Inc., pointed to the seasonal character of the canning industry and contended that it would operate against large buyers taking advantage of the seasonal aspect of that industry in making large purchases. The Secretary of the American Mining Congress pointed to the seasonal aspect of the coal industry and also to the great differences in value of various mineral products. He observed that what would be equitable as quantity limit on one mineral of one value would not apply to a mineral of another value. The Executive Vice President of Food & Grocery Chain Stores of America, Inc. (an association of chain store companies) opposed the proposed quantity limit proviso on the ground that it was unreasonable, vague and would add to improper delegation to an administrative agency.

Thereupon, at the request of members of Congress handling the proposed legislation, the attorney who had drafted the carlot quantity limit proviso drafted a revision.23/ The proviso as thus redrafted is as follows:

"Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established:"

The revised draft did not escape opposition. A number of those who had opposed the carlot quantity limit proviso reappeared at the hearings in opposition to the revision. Included among those who opposed the revised proviso was the General Counsel for the Associated Grocery Manufacturers of America. He stated that in his judgment the effect of the revised proviso would be to give the Federal Trade Commission undoubted legislative power to fix quantity limits within its judgment and discretion. He stated that if he were correct in that conclusion then the section must fall because it would be a plain delegation of legislative authority without any standard to guide the Commission in its power. He proposed amendments to the quantity limit proviso and in that connection suggested that the prohibition should

23/See Hearings on H.R. 8442, p. 257.

be made as wide and broad as possible, providing that nothing in the law should prevent economic price variations for economic reasons, but that price variations should not operate to destroy the competition which the bills then pending in Congress sought to preserve and, further, that the manufacturer should be permitted to make any price variations required by the evolution of normal business. On the occasion of another appearance at the hearings, he restated his opposition to the bill but in response to a question from Judge Utterbach, as to whether in his opinion it was constitutional, he replied:

> "Well, I have made and expressed the opinion that the provision is questionable as to its constitutionality; but on that, Mr. Chairman, there may be even a division of opinion, for the reason that while the Congress is giving this power to fix the limitation on the quantity price, nevertheless, a standard is inserted as a basis for your administrative determination. If I were venturing a prediction, I am inclined to believe that the Court would probably sustain the validity of that provision in the Robinson bill, although I have previously expressed an opinion which did question the validity; but upon due reflection I am willing to take the position that there is a good prospect, a reasonable prospect, that that provision would be sustained."24/

As one of your speakers on the subject today, I want to say I am in agreement with that latter conclusion.

Notwithstanding the opposition to the revised quantity limit proviso, Congress adopted it and made it a part of section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. The proviso as enacted first appeared in an amendment to S. 3154 (Robinson Bill) reported by Mr. Logan from the Senate Committee on the Judiciary in report No. 1502 on February 3, 1936. This report had the following comment on the above proviso:

> "This proviso is added by recommendation of your committee. It is designed to enable, when necessary, the determination of quantity limits as to various commodities, beyond which quantity price differentials shall not be permitted even though supported by differences in cost. It rests upon the principle that where even an admitted economy is of a character that is possible only to a very few units of overshadowing size in a particular trade or industry, it may become in their hands nonetheless the food upon which monopoly feeds, a proboscis through which it saps the lifeblood of its competitors; and that in forbidding its use and foregoing its benefits the public is but paying a willing price for its freedom from monopoly control. A similar limitation has been applied without challenge for nearly half a century in the field of transportation, in refusing to extend freight rate differentials beyond the car lot quantity."

Fears which were expressed during the course of hearings that the Commission would use the power in an unreasonable and unjustified manner were groundless. Although the Commission has not since the date of the enactment of the Robinson-Patman law in 1936 fixed quantity limits on any commodity, its record of keeping a proper balance and in meeting out justice throughout the 34 years of its existence is assurance of what to expect.

24/Record of House Hearings, Part 2, pp. 433-435.

Although quantity limits have not been fixed on any commodity, the Commission did on July 7, 1947, make a move in that direction. It adopted a resolution directing that an investigation be made of the rubber tire industry for the purpose of securing information for use in determining whether the Commission should, with respect to that industry, fix quantity limits. That investigation is in progress. In addition, the Commission has received during the past year applications from representatives of a number of industries requesting the Commission to invoke the quantity limit proviso relative to their respective industries.

Inadequacy of funds and personnel has not permitted appropriate handling of all of these requests. In fact, the investigation into the tire industry was undertaken only after a vast number of complaints by representatives of independent tire dealers. The complaints were made to the Commission and to the Congress that the action of tire manufacturers in charging the independent dealers higher prices than were being charged large buyers was driving the independent dealers out of business and promoting monopoly. Representatives of independent tire dealers proposed that if the present antitrust laws were not adequate for relief, then Congress enact new legislation designed not only to fix quantity limits with respect to rubber tires but to prohibit absolutely certain methods of distribution. Lengthy hearings have been held by committees of Congress on some of those proposals. Some of those hearings were before the Small Business Committee of the House of Representatives. During the course of the hearings representatives of the Commission were called upon to state whether under existing law any relief could be afforded. In that connection opinion was expressed that the quantity limit proviso in section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, offers some prospect of relief. In the course of those hearings Commission representatives agreed to study the limits of that prospect and to recommend to the Commission that it take action where feasible and appropriate. Thereafter, the Commission has, as hereinabove noted, taken action to investigate the tire industry.

On December 18, 1947, the Select Committee on Small Business in the House of Representatives made its annual report, in which it stated:

> "The cooperative attitude taken by the Department of Justice and the Federal Trade Commission with respect to the tire industry represents a definite step forward in protecting the interests of small business in this industry. The Committee is keeping in close touch with both of these agencies to see if, under the existing antitrust laws, they have sufficient power to take effective action and whether they will take such action. Should effective action under the antitrust laws not be possible, the committee is prepared to urge upon the Congress amendments to the antitrust laws which will cure their inability to rectify trade conditions in the tire industry and other industries afflicted with similar conditions."25/

In view of the foregoing, many questions are in order. That is particularly true with respect to the application of the quantity limit proviso. In that connection, I present for your consideration the following questions:

25/Annual Report No. 1 Reporting Activities of the Select Committee on Small Business, House of Representatives, Pursuant to House Resolution 18, Eightieth Congress, First Session, p. 5.

1. Under the Administrative Procedure Act would action taken by the Commission in fixing quantity limits on a commodity amount to an adjudication or the making of a rule?

2. What constitutes "few" within the meaning of that term as it is used in the quantity limit proviso?

3. For commodity X, should the quantity limits fixed be in terms of monetary value, weight, or number of units?