INTRODUCTION TO THE ROBINSON-PATMAN ACT

REMARKS

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In introducing this "Introduction to the Robinson-Patman Act," I shall be briefly chronological.

The Patman Bill (H.R. 8442) was introduced June 11, 1935. The House Judiciary Committee in July 1935, heard five days of testimony on this bill and two others introduced by Representative Mapes (H.R. 4995 and H.R. 5062). Twenty-five witnesses testified and the printed testimony and exhibits comprise 517 pages. No accord being reached, the bills were referred to a subcommittee whose competent chairman (Judge Utterback) thereafter introduced a bill on the same subject (H.R. 10486). The Judiciary Committee on March 31, 1936, reported out an amended Patman Bill, accompanied by an adverse minority report.

In the Senate the Robinson Bill (S. 3154) introduced on June 26, 1935, was favorably reported by the Judiciary Committee in amended form on January 16, 1936. During the hearings on the Borah-Van Nuys Bill (S. 4171), a penal measure directed to discrimination introduced March 4, 1936, twenty-seven witnesses testified. The printed record consists of 165 pages. The testimony was directed to the general subject of discrimination, so that the practical effect was a discussion of the provisions of the Robinson and Patman Bills as well. Thereafter the Senate considered the Robinson Bill, passed it with amendments on April 30, and sent it to the House. The House, however, on May 28, passed, with floor amendments, the Patman measure. Finally on June 1, 1936, the Senate passed the House Bill after amending it by substituting the provisions of the Senate Bill.

The Conference Committee report was submitted on June 6 and June 8, respectively to the Senate and House. The House accepted it June 15, the Senate June 18, and the President signed it June 19, 1936. As enacted it represented a mixture of the Borah-Van Nuys Bill plus the Patman Bill as passed by the House and plus the Robinson Bill as passed by the Senate.

DISCRIMINATION DEFINED

In the foregoing narrative I twice have used the word "discrimination." Whenever I use that word I do so in the sense Congress used it in the Robinson-Patman Act, i. e., as House Conferee Judge Utterback succinctly defined it:1/

> "In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other."

DISCRIMINATION'S 19th CENTURY BACKGROUND

When the Constitution granted to Congress the power to regulate commerce between the States, interstate traffic other than that carried

1/80 Congressional Record 9559.

by coastwise vessels was insignificant. When inland trade did accelerate, it moved over State-chartered highways or on canals dug on land provided by the States. National intervention was superfluous, even intrusive. About the middle of the 19th century, rail carriers, encouraged by liberal grants, began outstripping their canals and turnpike competition. As the rail network expanded, traffic geographically belonging to one line was sought by another, often at rates so low as to be destructive, followed by the other's inevitable retaliation. Of such struggles the key cities and important shippers took full advantage. Even when the rivalry was less intense, open or secret rebates or special facilities were exacted by large or aggressive shippers and special arrangements extended from person to person. The need for secrecy was enhanced and it has been said that the memorandum book reposing in the general agent's pocket sometimes was the only record of the road's rates made to its different shippers.

There was favoritism between persons, places and things plus an almost universal acquiescence in the proposition that there must be a privileged rate class. The roll call of discrimination's methods and forms included "commissions for securing traffic," "handling allowances," "false classification of product," "rebates" and "secret rates." A whim here, a caprice there and one town or business could boom; others wither.

Where no competition between roads existed, rates were on higher level, sometimes grievously exorbitant. When competition did exist, its continuance was not assured--this was the era of consolidation and "pools." Preferential rates contributed enormously to the growth of some large businesses. As these shippers grew, moreover, their potential for securing greater concessions for themselves or for having adverse rates imposed on their competitors grew accordingly.

In 1887 Congress enacted legislation designed to curb railroad rate discrimination; but despite the Interstate Commerce Act, discrimination continued and was reported to have reached a new high during 1898. Additional legislation and administrative action proved necessary to alleviate this evil in the present century.

THE SHERMAN ANTI-TRUST ACT

But the tendency toward monopoly was not confined to the railroad field. As industrial consolidations and mergers assumed such proportions as to threaten to destroy the competitive system, Congress in 1890 enacted the Sherman law with only one dissenting vote in either House of Congress.

A vivid description of the national background and need for such legislation is that given by Mr. Justice Harlan in Standard Oil Company v. U. S.:2/

> "All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery--fortunately, as all now feel--but the conviction was

2/221 U. S. 1, 83.

universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life."

INADEQUACY OF THE SHERMAN LAW

As stated in 1911 by Senator Newlands, it was commonly believed that the railroad question had been "practically settled" but that the settlement of the trust question "has hardly been commenced."3/ It was widely believed, too, as President Wilson said in January 1914 in his message to Congress, that the country needed "further and more explicit legislative definition of the policy and meaning of the existing anti-trust laws." Those sharing this belief urged that sufficient familiarity with the actual processes and methods of monopoly or its pedigree, and of the many hurtful restraints of trade associated with both, made definition possible, at least to the limits of that experience.

Businessmen were said to desire and need the advice, guidance and information of an administrative agency to guide them into the channels marked out by appropriate legislative enactment and to aid their perception and understanding as to the best form of dissolution or adjustment of those businesses which fair legal process has declared unlawful.

Despite a prevalent notion to the contrary, the Federal Trade Commission set up at that time was neither authorized nor directed by Congress to advise businessmen or to draft a business code of forbidden and permissible practices. The Congress on the contrary shared the view of Senator Cummins, one of the leading champions of the Federal Trade Commission Act, who said:4/

> "* * * if I thought that the Commission which we hope to create would sit down and attempt to write out an instruction to the businessmen of this country as to the things they could lawfully do and the things which it would be unlawful for them to do, there is no power that could induce me to favor it."

Under a free competitive system, allocation of income among the various groups of producers adjusts itself according to relative efficiency. So long as business efficiency is permitted free play without restraint, this automatic competitive adjustment will tend toward better quality and lower prices. When competition ceases, prices tend to rise. The public, however, can pay only so much for over-capitalization and inefficiency. Purchasers have only so much money with which to buy. They can pay only so much tribute. When their purses are empty, trading must cease until they earn more money. Thus failure on the part of competitors to maintain healthy competition results in the end to their own disadvantage as well as to the disadvantage of those from whom the tribute is exacted.

3/Congressional Record Jan. 11, 1911.
4/51 Congressional Record 14189, July 30, 1914.

To prevent the employment of such artificial restraints as tend to harden the arteries of trade, shutting off or diminishing the flow of benefits of free and fair competition, Congress in 1914 in the Federal Trade Commission Act enunciated a general rule of conduct proscribing unfair methods of competition, and (also in 1914) in the Clayton Act it condemned specified practices which it deemed conducive to or climatically compatible with monopoly.

SECTION 2 OF THE CLAYTON ACT OF 1914

Section 2 of the Clayton Act made it unlawful to discriminate in price between different purchasers of commodities within the United States or under its jurisdiction "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The report of the Judiciary Committee of the House stated:5/

> "Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. * * * The necessity for legislation to prevent unfair discriminations in prices with a view of destroying competition needs little argument to sustain the wisdom of it. * * *
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> "* * * In seeking to enact section 2 into law we are not dealing with an imaginary evil or against ancient practices long since abandoned, but are attempting to deal with a real, existing, widespread, unfair and unjust trade practice that ought at once to be prohibited in so far as it is within the power of Congress to deal with the subject."

A United States Circuit Court of Appeals in 1923 6/ interpreted this section to apply only to the lessening of competition between the discriminator and his competitors, but five years later this interpretation was discarded 7/ when the Supreme Court, Mr. Justice Sutherland speaking, said:

> "The fundamental policy of the legislation is that, in respect of persons engaged in the same line of interstate commerce, competition is desirable and that whatever substantially lessens it or tends to create a monopoly in such line of commerce is an evil. Offense against this policy, by a discrimination in prices exacted by the seller from different purchasers of similar goods, is no less clear when it produces the evil in respect of the line of commerce in which they are engaged than when it produces the evil in respect of the line of commerce in which the seller is engaged."

5/63rd Cong., 2nd Sess. House Judiciary Committee Report No. 627.
6/Mennen Co. v. Federal Trade Commission, 288 Fed. 774 (C.C.A. 2nd, 1923).
7/George Van Camp & Sons v. American Can Co., 278 U. S. 245, 254.

This Supreme Court decision also in effect overruled another United States Circuit Court of Appeals decision 8/ upon which the Supreme Court had previously denied certiorari,9/ and which had held not to be unlawful a sales policy affording a graduated quantity discount based on total purchases of all stores of a chain but denying to single store owners opportunity to pool their purchases for the purpose of computing discounts.

F.T.C.'S CHAIN STORE INVESTIGATION

The Federal Trade Commission's exhaustive investigation of the chain store problem, undertaken at the direction of Congress and completed in 1934, developed in a comprehensive way the character and extent of price discrimination. Comprehensive analyses of special discounts and allowances made by hundreds of manufacturers of grocery, drug and tobacco products appearing in the Commission's Reports demonstrated in detail the much greater frequency of special offers to chains and larger accounts than to independent distributors.

For illustration, in the grocery manufacturing industry, out of a total of 2,939 manufacturer-customer accounts carrying allowances in 1930, a total of 1,864 or 63.4 percent, showed an average rate of allowance on sales of less than 5 percent. About 1/5 of the accounts showed allowances ranging from 5 percent to 10 percent; slightly more than 1/10 showed allowances of 10 percent to 15 percent; and 165 accounts, or 5.6 percent, showed allowances of 15 percent or over.

The chains greatly exceeded the independent wholesalers and cooperatives in a number of allowances under 5 percent. In the 5 percent to 10 percent allowance group, the chains exceeded the independent wholesalers by far, both in number and proportions. Of the allowances over 15 percent, there was no marked difference in the proportion received by chains and cooperatives, but both of these groups exceeded the independent wholesalers in these larger allowances.

In the tobacco industry, out of a total of 691 manufacturer-customer accounts carrying allowances in 1930, a total of 418 or just over 60 percent showed a rate of allowance on sales of less than 5 percent. Slightly over 1/5 of the accounts showed rates ranging from 5 percent to 10 percent, and over 1/8 showed rates ranging from 10 percent to 15 percent. Only 6½ percent of the total allowances were in excess of 15 percent. The independent wholesalers exceeded the chains in the number and proportion of allowances under 5 percent, while the chains exceeded the independent wholesalers in all of the other and higher rates of allowance groups. No allowances of 20 percent or more were given to independent wholesalers, and only one allowance of 15 percent or more. Between 6 percent and 7 percent of the total chain allowances, on the other hand, carried rates of 20 percent or more on sales, and over 11 percent showed allowances of 15 percent or more.

In the drug trade, out of a total of 4,185 manufacturer-customer accounts carrying allowances in 1930, a total of 1,652 or nearly 40 percent carried an average rate of allowance on sales of less than 5 percent. About 30 percent of the accounts showed allowances of between

8/National Biscuit Co. v. Federal Trade Commission, 299 Fed. 733 (C.C.A. 2nd, 1924).
9/266 U. S. 613.

5 percent and 10 percent, and about 15 percent carried allowances ranging from 10 percent to 15 percent of sales. The total number of accounts carrying allowances in excess of 15 percent was 651, or approximately 15 percent, of the total accounts.

The proportions of accounts upon which allowances of 15 percent to 20 percent were made, were about equally divided between chains and independent wholesalers, but both exceeded the proportion of allowances for independent department stores. In the 20 percent to 30 percent allowance group, the independent department stores had the highest proportion of accounts. The chains were second, and the independent wholesalers third. In the largest allowance group, 30 percent and over, the chains exceeded both the independent department stores and wholesalers.

From the wide variation in sales allowances it was apparent that many arrangements were negotiated in secrecy and many never were open to the light of public knowledge in the trade.

To its own citizens and to those of other lands alike, America has long been a symbol of freedom of opportunity. Though many of foreign descent now know that its streets are not paved with gold, their conviction runs deep that it remains the land of economic opportunity. Eternal vigilance is still the price of such freedom; discrimination among its chief antagonists.

INADEQUACY OF SECTION 2

The country became convinced by 1935 that Section 2 of the Clayton Act had two fatal loopholes. As judicially interpreted, it placed no limit upon differentials permissible on account of difference in quantity; it was understood to permit all discriminatory price differences made to meet competition, thus in effect licensing oppressive retaliation.

In 1935-1936 disquiet and anxiety over our country's economic and social future went deep. One phase of it, the political unrest, recently had swept a new President into the White House and had elected a Congress pledged to enact social legislation and a program of sweeping economic reform. The bank holiday was not a mere memory--it was a painful and fresh experience. The wolf might have retreated from before the door, but his dog house, the depression, was still there smelling of his recent occupation. The general Washington atmosphere during the period 1933-1936 was that of an economic experimental laboratory.

Many catch phrases and slogans were employed by men in and out of Congress to describe their apprehension concerning the accelerated tendency toward concentration of wealth. Recipients of discriminations were called a "cruel and relentless monopoly" and "a mere handful of men enslaving the multitude." It was stated that "the individual store is at stake, the organized community is at stake, the individual man is at stake." The general over-all theme was to the effect that absentee ownership was not good for the country. Opponents of the proposed legislation did not defend predatory or ruthless use of bargaining power; they decried the remedy as a move to put industry in a straight jacket. Some questioned if rugged individualism really could be saved from economic feudalism. One Congressman advocating new legislation quoted Adolph Hitler, with the comment, "of whom I do not approve much," as stating that for his country's ultimate good he would prefer ten thousand Germans owning ten thousand stores to one German owning ten thousand stores.

The following is a typical example of the manner in which many proponents of new legislation soberly appraised the problem:10/

> "There is no question but that the sentiment of the country favors the retention wherever possible of the independent merchant and local ownership, and the enactment of this legislation will go as far as the Congress can go in a legitimate effort to bring this about."

To those who feared that the effect of the proposed legislation would be to raise prices, proponents replied that no physical economy either inherent in mass buying, mass distribution, mass production, or otherwise achieved by the ingenuity of the seller, was to be infringed.

The following excerpt from a House Report 11/ typifies the country's intuitive and intellectual faith in competition and its instinctive antipathy to the monopolistic principle:

> "It is not believed that the restoration of equality of opportunity in business will increase prices to consumers. Unfair trade practices and monopolistic methods which in the end destroy competition, restrain trade, and create monopoly have never in all history resulted in benefit to the public interest. On the contrary, for the most part, they have been symbolic of lower wages, longer hours, lower prices paid producers, coercion of independent manufacturers, domination of that field of industry, and in the end high prices to consumers and large profits to the owners.
>
> "It is the design and intent of this bill to strengthen existing anti-trust laws, prevent unfair price discriminations, and preserve competition in interstate commerce. It is believed to be in the interest of producer, consumer and distributor. No business institution need have any fear of this legislation if it will conduct its business honestly and without the use of unfair trade practices, and unjust price discriminations."

Anxious and conscientious others conceding mass distribution to be legitimate per se still believed that its sins were such that only legislation could restore the independents' freedom of opportunity. To them, clarification and enlargement of the moral principle of section 2 of the Clayton Act by way of a new law seemed worthy of trial. If the effort missed its objective, either by failing to do what its proponents hoped or by adversely affecting business, could it not be repealed or amended forthwith? The enactment of economic and social legislation invariably combines rational expectations and emotional aspirations. The Robinson-Patman Act was no exception.

10/80 Congressional Record 10745.
11/74th Cong., 2nd Sess. House Judiciary Committee Report No. 2287.

CONCLUSION

Statutes invariably constitute political documents as well as legal writings. Since complex economic situations may engender complicated laws, extraordinary difficulties have faced the draftsmen of our anti-trust laws. That busy legislators are willing to undertake the sponsorship or advocacy of such laws generally stems from the challenge of a crystallized and critical public opinion demanding their enactment as essential to keeping America the "Land of the Free."

I thank you for the honor of introducing this program, and for the pleasure of being able now to sit back and enjoy hearing how the Commission and the Courts have interpreted the law the historical background of which I appeared here to describe for you in considerable detail for one purpose only--to afford you a "backdrop" against which to highlight the addresses of the distinguished speakers scheduled to follow me on the program today.

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