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REMARKS OF

EVERETTE MACINTYRE, CHIEF, DIVISION OF
ANTIMONOPOLY TRIALS, FEDERAL TRADE COMMISSION

ON

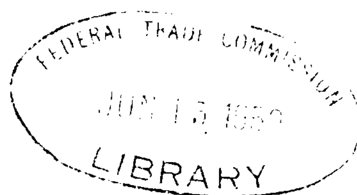
THE ROBINSON-PATMAN ACT AND OUR ANTIMONOPOLY POLICY

BEFORE

ANNUAL MEETING OF NATIONAL FIBRE
CAN AND TUBE ASSOCIATION

NEW YORK CITY

May 25, 1950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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.

No government policy has received such long and unquestioned public acceptance as that expressed by Congress in the language of our antimonopoly laws. It is not difficult to understand why the American people have so readily accepted the policy expressed by those laws because underlying the law is the philosophy of a political economy providing for free enterprise and free government.

Americans have always held dear their economic freedom and personal liberty. However, at present it is widely recognized that powerful forces are at work to undermine our free competitive enterprise. That fact was pointed out to the President in a report by the Council of Economic Advisers, December 1949, where it was stated:

> "On the right, powerful economic groupings allied themselves with counterrevolutionary movements to destroy free government. On the left, powerful statist revolutions swallowed up free enterprise. We now know how similar are the weeds growing from these different seeds, and how their pollen stiffles genuine economic progress, intellectual inquiry, and spiritual aspiration."

It has been contended that the Sherman Antitrust Act and other antimonopoly laws should be amended so as to specify the acts and practices prohibited thereby. Representatives of the Department of Justice have pointed out that the strength and in many instances safeguards provided for by the Sherman Act lie in the breadth of its present general language. Congress appears to have had good reason for writing the antimonopoly laws in the terms in which we now find them. It has been demonstrated that the laws in this field have elasticity. They have been applied by the executive and the judicial branches of the government with logic and realism in meeting changed conditions. It is recognized that pressing antimonopoly problems cannot be solved by an inelastic rule of thumb. Exercise of sound judgment and discretion is not only necessary but is required.

Of one thing we are sure. The purpose of the antimonopoly legislation is to promote and maintain a free and competitive enterprise system. The accomplishment of that purpose requires condemnation of monopoly, the antithesis of free and competitive enterprise. Condemnation of monopoly entails like condemnation of acts and practices which promote and support monopoly. It has long been recognized that discrimination in trade and commerce in many instances promotes monopoly. Therefore, discriminations when practiced under certain circumstances and with certain specified results have been declared by the Congress to contravene our antimonopoly policy.

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.

Outside of the field of public service, however, the individual trader was left free to fix his own prices under federal law. This did not prove to give complete protection to the public interest. Monopoly grew apace. The Interstate Commerce Act and the Sherman Act were found insufficient. Therefore, Congress in its consideration of the trade problems enacted the Clayton and the Federal Trade Acts in 1914. In so moving, the Congress acted only because public policy felt the necessity to prevent monopolistic pricing — indeed, to prevent pricing practices of individuals such as discriminations which were felt would enhance the growth of monopolistic conditions. At that time it was widely recognized not only by Congress but by President Wilson, and so stated by him in a message to the 63rd Congress, that the public need demanded the Federal Trade Commission Act and the Clayton Act to prohibit discriminations and other specific trade practices. He said:

"We are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limit of which experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain."

A study of the debates upon these measures in Congress clearly discloses the intent of Congress to declare illegal all practices regarded as likely to promote monopolies and to get at them in their incipiency, nipping them in the bud, and forestalling an evil before its development into full bloom.

During the course of the debates, Senator Walsh of Montana, in referring to the Clayton Act, said:

"The purpose of the legislation of which the pending bill forms a part is to preserve competition where it exists, to restore it where it is destroyed and to permit it to spring up in new fields."

To that end the Clayton Act was approved October 15, 1914. Section 2 of that Act provided:

"Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the

grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition."

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. It was considered that section of the law also placed beyond the pale those discriminations which injured or destroyed or tended to substantially lessen competition in a particular geographical area by favoring some traders as against others competitively engaged in the same area. While attempt was made to apply the law to prevent such discriminations, the interpretations placed upon it by the courts so limited its application that it was not effective. The ineffectiveness of Section 2 of the Clayton Act in preventing price discriminations was pointed out by the Federal Trade Commission in a report to Congress December 14, 1934. That and other evidence placed before the Congress prompted proposals to amend Section 2 of the Clayton Act. In its report the Commission analyzed the concessions of various kinds forced by large distributors from manufacturers and pointed out that unwholesome effects were traceable to those concessions. The Report traced the rapid growth of chain store organizations in the retial food field and the corresponding drop in the number of independent retail merchants and volume of business carried on by them. The report to the House of Representatives by the Patman Committee confirmed the Commission's findings that manufacturers and other sellers were granting discriminatory price concessions and trade advantages to favorite buyers. That Committee recommended legislation. Thereafter bills were introduced by Congressman Wright Patman in the House of Representatives and Senator Joseph Robinson in the Senate. Out of these and other bills developed the present law known as the Robinson-Patman Antidiscrimination Act, which was approved June 19, 1936.

The present section 2 of the Clayton Antitrust Act as amended by the Robinson-Patman Act of 1936 strengthened the prohibitions against price discriminations which had been specified in the original Clayton Act as enacted in 1914 so as to empower the Commission to deal with additional discriminations. Congressional condemnation of discriminatory prices was broadened to prohibit sales of commodities in interstate commerce at discriminatory prices where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. That amendment also cataloged and declared as unlawful the granting of certain types of brokerage, commissions, discriminatory advertising or promotional allowances and discriminatory services or facilities.

For example, subsection (c) makes it unlawful for a seller to grant, or a buyer to accept, commissions, brokerage, discounts or other compensation in lieu thereof when the payment is made by the seller to the buyer or to anyone acting for, in the behalf of, or under the control of the buyer. Subsections (d) and (e) deal with the payment for and the furnishing of advertising allowances and services by sellers. The text of those subsections is as follows:

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any service or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

The legislative history clearly discloses why Congress has so legislated as to prohibit discriminations in the payment for or furnishing of advertising or other services and facilities, as well as in terms of price. Crude methods of discrimination against a tradesman in favor of another by charging him a higher price have given way to more subtle forms of indirect price discriminations. The newer methods have included the practice of refusing to promote the business of one customer while willingly and unstintingly carrying the expense of promotional activities for another competing customer. An example of that is in the evidence collected by the Patman Committee in the House of Representatives during 1935, showing that two sellers of food products during the course of a single year made payments totaling $720,000 to one large chain retailer as "allowances for advertising." During that period other customers of those two sellers competing with the said large favored buyer were granted nothing to enable them to advertise through their outlets the products of the two sellers offered for sale. In the light of the evidence of that and many other similar instances Congress was prompted to include in the Robinson-Patman Act subsections (d) and (e) of Section 2. The leaders in the House and the Senate who were handling the legislation explained the reasons for including those two provisions as follows:

"Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in purported payment of advertising and other sales-promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when, in any case, the customer is deriving from it equal benefit of his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so."

Thus it is clear that Congress became aware of what you and other businessmen knew, namely, that when less emphasis is placed on direct competition, greater emphasis is naturally placed on indirect price competition such as advertising, visual merchandising, including window and counter displays, and other sales promotional activities. It is within that area of indirect price competition that subsections (d) and (e) apply to indirect discriminations. That is done only for the purpose of saving small businessmen from being destroyed as a result of these indirect discriminations with which their large competitors may be favored.

At the time the Act became law many lawyers believed that the courts would rule subsections (d) and (e) unenforceable and invalid because it was considered by such lawyers that the provisions were too vague, indefinite and uncertain. However, courts have found it necessary to deal with and interpret those sections in deciding contested cases and declared them to be sufficiently clear. A United States Circuit Court of Appeals in a case involving Elizabeth Arden Sales Corporation, in ruling on one of the defenses of the Arden Company, stated:

> "We reject the contention that the standard in 2(e) is so indefinite that men of common intelligence cannot adequately grasp its meaning and that therefore it is invalid as an improper delegation of legislative power and violative of due process. We have read portions of petitioners' brief in the Blass Company case which show that they experienced no difficulty in giving the standard a clear meaning. Aside from that, subsection (e) fully conforms to the doctrine as to delegation and due process enunciated in many recent cases."

In fact, it would appear from the complaints I have heard made about these two subsections that the dislike for them is based not upon vagueness, indefiniteness and uncertainty in their meaning but, on the contrary, upon a desire to get rid of a law that is all too clear for those who do not believe in its objectives.

Subsection (f) of section 2 declares that it shall be unlawful for any person engaged in commerce in the course of such commerce knowingly to receive or induce a discrimination in price which is prohibited by that section.

In summary, it should be noted that the only price discrimininations prohibited by section 2(a) are those which, as a matter of fact, may have the effect of substantially lessening competition or tending to injure, prevent or destroy competition or the business of competitors. Even discriminations having those results are not unlawful when they make only due allowances for differences in costs.

The protection from unjust discriminations afforded businessmen by the Clayton Antitrust Act, as amended by the Robinson-Patman Act, is now becoming clear and widely recognized. That protection is apparently the factor motivating many businessmen in asking that no actions be taken to weaken the Clayton Antitrust law. Undoubtedly they have come to regard that law as a bill of rights for American businessmen as much as the Sherman Antitrust Act has been regarded as the charter of economic freedom for American businessmen.

The Federal Trade Commission is not only charged with the duty of administering and enforcing section 2 of the Clayton Act as amended by the Robinson-Patman Act but also other provisions of the Clayton Act and other federal statutes, including the Federal Trade Commission Act.

The Federal Trade Commission Act is the organic act under which the Federal Trade Commission was created 35 years ago last September. By this legislation there was, in 1914 for the first time, introduced into the laws of our country that short and far-reaching clause which reads "Unfair methods of competition in commerce are hereby declared unlawful." This provision against unfair methods of competition was, and still is, the cornerstone of the regulation of competitive practices in interstate commerce. The Commission was set up under this act as the administrative and enforcing agency of the government with powers to carry out its provisions, and with authority, in the interest of the public, to issue cease and desist orders against persons, partnerships or corporations found using such unfair methods of competition in interstate commerce. Experience in the application of this law, since it was signed by President Woodrow Wilson in 1914, has brought to the Commission many cases of administrative and judicial determination. These reveal that the phrase "unfair methods of competition" is not only of comprehensive character, but also is a living organism capable of being applied to new, or as yet unknown practices, which may arise from time to time in the conduct of business and prove to be unfair.

The statutes I have cited are included in the source of the Commission's authority. They chart its duties with respect to the regulation of business practices in interstate commerce. They are all directed toward the maintenance of free and fair competition and to the control of methods which, in the eyes of the law, are harmful to industry, trade and the public; which obstruct or interfere with the free flow of merchandise in the channels of distribution under sound and equitable conditions.

As the official body set up to deal with these matters, the Commission was created in 1914 as a nonpartisan independent agency of the government and a quasi-judicial tribunal, having not only powers and facilities for administration and investigation, but also the determination of issues by judicial processes.

In the work of the Commission directed toward preventing the use of unfair trade practices in industry and trade, three well-defined courses of procedure are followed. One might somewhat descriptively refer to them as the compulsory method, the consent method, and the cooperative method. All three are designed to do just what our Act says; that is, prevent unfair competition, and unfair and deceptive acts and practices in interstate commerce.

Where compulsory action against an offender is required to bring about correction and the protection of the public interest, the Commission, as I have already indicated, is authorized, upon due process, to issue cease and desist orders against the offender. In such cases, findings of fact are made upon pleadings and evidence and, of course, after full opportunity is afforded the respondent for the taking of testimony, the filing of briefs and the submission of oral argument. Such cease and desist orders may be appealed to the United States Circuit Courts of Appeal for review, and may eventually be taken to the Supreme Court of the United States upon certiorari. If no appeal is taken, the order becomes final at the end of sixty days. For violation of a final order, the offender may be subjected to civil penalties of not more than $5,000 for each violation, collectible through the courts.

Included among practices which have been construed as unfair within the meaning of Section 5 of the Federal Trade Commission Act are those which restrain, restrict, hinder or lessen competition. Where competition in price is lessened by agreement it is per se a violation of the Sherman Antitrust Act. Such agreement is unlawful per se because it contravenes the declared public policy written into the Sherman Antitrust Act by Congress in 1890. The Supreme Court has held that practices in interstate commerce which are against public policy because of their tendency unduly to hinder competition, also contravene the Federal Trade Commission Act. Thus it was determined that the Federal Trade Commission had jurisdiction over price-fixing agreements and other trade-restraining practices.

It would appear that members of your Association would be particularly interested in the work the Commission has done respecting trade associations.

Although a trade association is a combination of businessmen, such combination is not illegal per se. It is only when these combinations engage in trade-restraining activities that they contravene provisions of federal law. The Federal Trade Commission made clear its position on that point in its report on "Open-Price Trade Associations" to the United States Senate, on February 11, 1929 (Senate Document No. 226, 70th Cong., 2d Sess.), responsive to Senate Resolution No. 28 (69th Cong., Special Session). In its letter of transmittal the Commission noted that it had studied in a broad way the activities of about ninety open-price trade associations or groups.

The Commission's position, as evidenced by that report and by its decisions in its legal cases, is to the effect that only those trade association activities are beyond the pale which are susceptible to abuse with trade-restraining effect. In taking that position the Commission has not blazed a trail but followed one clearly marked by the decisions of the United States Supreme Court.

An example of recent Commission action in ferreting out the bad activities of a trade association, ordering their cessation, and leaving undisturbed the association and its other activities not found to have trade-restraining effects is demonstrated by the record of *F.T.C. v. Cement Institute, et al.*, a case decided by the Supreme Court April 26, 1948.

It is my belief that a satisfactory development of trade statistics, including price information, for each industry group can be accomplished. In order for the development of such program to meet the test of the law it must not become susceptible of abuse and trade restraints. Such program can meet that test only when it is limited to *market information* and when such information is so collected, compiled, and disseminated that one trader cannot identify any part of the information as applicable to the operations of any particular seller or buyer.

For example, trade associations are free to promote and arrange for each member of any particular industry to prepare and submit to an impartial agency, in confidence, information concerning his prices and statistics concerning the volume of his business. The information thus collected by such agency from all members of an industry could be compiled and disseminated so that it would inform the public and all members of the particular industry concerned what the range of the high and the low *market* prices for the

industry's products were on the last date for which such information was obtainable. Also the public and the members of the industry concerned could by that method be enabled to ascertain what had been the total volume of the product of a particular industry produced and consumed over a given period of time. Undoubtedly, arrangements could be made for public agencies to compile that information for industries whose members are willing to furnish it without public expense. The publication and dissemination could serve a useful purpose. Trade associations in promoting such program could render useful service in that connection. Of course it is appreciated that the results would not permit any particular member of an industry who had lost business to a price cutter to utilize this information in determining who the price cutter was, and in turn utilizing the offices of a trade association or the "persuasion" of its members in causing the price cutter to adopt different pricing policies.

Likewise, members of trade associations are not prohibited by law from collectively promoting development of methods for independent use by individual members of an industry in the determination of their respective costs. Such promotion of the development of methods should not be confused with or involve the collective determination of particular elements to be included in computing costs. Of course collective determination of what weight to give a particular element of costs is to be questioned. The Department of Justice and the Federal Trade Commission have prosecuted a number of cases in which trade associations were accused of violating the law by having collectively considered, determined and acted upon elements of costs. In some of those cases it has been found that the members of an industry collectively considered, determined and acted on percentage gradations and other expressions of variations in cost for a given commodity above and below what had been collectively determined to be the cost of a "base" product. In one case recently handled by the Federal Trade Commission it was found that the members of a trade association had collectively determined an average cost for all of them for each variation of a given product to the extent of 60,000 variations in size above and below the size of the "base" product. It was also found that the prices for the product in different sizes for each member of the industry varied in direct proportion to the collectively determined variations in cost.

Facts such as those have, when considered along with other facts, been found to add up to a showing that an unlawful price-fixing conspiracy had been maintained. This demonstrates that the members of trade associations and those who manage the affairs of such associations should be ever mindful that a charge of an unlawful price-fixing agreement can be sustained without proof of an agreement in writing, signed by the parties. The Supreme Court of the United States more than a quarter of a century ago, in deciding a case brought by the Department of Justice under the Sherman Antitrust Act, stated:

> "It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the Association, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred."

Later, in a similar case brought under the Sherman Antitrust Act the Court also stated:

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators."

and

> "While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such an agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate;***"

I trust that these few remarks will prove helpful to each of you. I shall consider that they have been worthwhile if they should serve to make you more conscious of our antimonopoly laws. I say that because it behooves each of you who must conform to those laws to be mindful of your responsibility as well as your liability under them.