GOOD FAITH MEETING OF COMPETITION

Remarks of

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Good Faith Meeting of Competition

Mr. Chairman, members of the Antitrust Section of the New York State Bar Association, and fellow guests:

Because of the high purpose and good fellowship that necessarily dominate any meeting sponsored by Charles Wesley Dunn and presided over by Thurlow Gordon, I must assume, at least for tonight, that all parties to the "Good Faith Meeting of Competition" controversy are motivated by "good faith" and the desire to do what is best for all segments of our economy.

Needless to say, that is an assumption I would make, in any event, with respect to any controversy to which the distinguished Senator from Wyoming, Joseph O'Mahoney, lends his brilliant and considerable talents.

As long as I am engaged in the pleasant task of assuming and presuming, I should like to go on and presume that most of us subscribe, in general, to the following propositions:

(1) That the general objective of our antitrust laws is to protect the public, primarily the consumer, by the promotion of free competition in open markets;

(2) That the three statutes, which are the core of our antitrust policy, the Sherman Act, the Federal Trade Commission Act, and the Clayton Act including its Robinson-Patman amendment, were intended to be in pari materia and treated as interrelated expressions of the national antitrust policy;

(3) That while there may be some inconsistency between legislative policies which enforce price competition (Sherman

Act and Federal Trade Commission Act) and those which regulate price discrimination (Robinson-Patman Act), this inconsistency should not be accentuated and magnified by unrealistic and antithetical interpretations or amendments;

(4) That the promotion of price competition and the prohibition of unfair and discriminatory pricing practices can be made to constitute a dual program of fostering competition in the public interest;

(5) That the gearing of the privilege to compete with the obligation to compete fairly is not necessarily inconsistent except as made so by non-harmonizing neo-political interpretations or congressional enactments; and

(6) As the Supreme Court put it, "It is our duty" to reconcile the text of the Robinson-Patman Act "with the broader antitrust policies that have been laid down by Congress."[1/]

If these propositions are valid, and I think they are, then the proposed Kefauver amendment to the Robinson-Patman Act, known to most of us as S. 11, should be rejected.[2/]

1/ Automatic Canteen Company v. F.T.C., 346 U. S. 61, 74 (1953).

2/ Bills S. 11 and H.R. 11 have again been introduced by Senator Kefauver and Congressman Patman, respectively, in the present (85th) Congress. They propose that the good faith meeting of competition defense shall continue to be a "complete" defense to a change of price discrimination, "unless the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce."

In antitrust cases, the Federal Trade Commission and the courts are called upon to measure the actual or probable effect on competition of the challenged business practice. It seems necessary, therefore, before discussing the Kefauver amendment and the Standard Oil "Detroit" case which it seeks to negate, to undertake the difficult task of defining competition.

What is Competition?[3/]

Perhaps the best way to approach this much talked of but still abstruse subject is to discuss the generic concepts of competition and monopoly. The essence of full monopoly power in a seller is the fact that he is the sole source of a product, so that the buyer must meet the seller's terms or go without. The essence of competition, on the other hand, is to free the buyer from this power by access to alternative sources of supply.

The shorthand definition of monopoly power is the power to determine the market price and exclude competitors. The idea of competition is the antithesis of this. It denotes the presence of more than one -- usually many -- sellers in a particular market and suggests a condition of independent rivalry among them. This rivalry prevents the existence of monopoly power over price and output.

3/ See Ch. VII of the Report of the Attorney General's National Committee to Study the Antitrust Laws, entitled "Economic Indicia of Competition and Monopoly," pp. 318-324.

To answer the question whether a particular market is competitive or non-competitive, more evidence is needed than the simple fact that the market contains two or more sellers. One must consider such things as pricing policies, the number and relative size of buyers and sellers, their location with reference to their clientele, conditions affecting the entry of new firms and growth of existing firms, and the relations among rivals in the process of making marketing decisions.

In a competitive market, the individual seller must respond to or meet, in one way or another, his rival's offerings both as to price and as to product. He must, in the light of his own costs, adjust his offerings to the prices offered by others in the same market. As the Attorney General's Committee said: "The market pressures which effective competition imposes upon each seller, derive from the self-interested rivaly of his competitors. The essential character of this rivalry is to promote the competitor's economic interest by offering buyers inducements attractive enough to cause them to deal with him, in free bargaining, and in the face of inducements offered by his rivals."[4/]

In the recent Cellophane case, which involved the competitive product market rather than the geographic market, the Supreme Court said, "An element for consideration as to cross elasticity of demand between products is the responsiveness

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4/ Ibid. at p. 321

of the sales of one product to price changes of the other. If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market."5/

In sum, if one seller is in competition with another, he must compete with or respond to the latter's inducements. These inducements deal primarily with price, but may also include such other enticements as quality, service, and facilities.

For the purpose of analysis, the competitive "market" is the area of competitive rivalry within which the transfer of the buyers' patronage from one supplier to another takes place. One should combine into one market, two or more geographical areas if an appreciable decline in the price of the product in one area will promptly lead to a relatively large diversion of purchasers from the other area.

From the foregoing it seems clear that a gasoline filling station on the corner, for example, is in competition with the filling station down the street, where either station (or both) may be required, for his own best interests, to meet or respond to the other's prices, terms and conditions. If the independent action of one, with respect to any of these

5/ U. S. v. E. I. du Pont de Nemours & Co., 351 U. S. 377 (1956) factors, has no substantial effect on the gallonage or patronage of the other, then they are not in competition. On the other hand, if the inducements offered by one require speedy responses by the other in order to hold his position and gallonage, then effective competition exists between the two. In some cases, the distinction between effective and ineffective competition may depend in part upon the speed and the certainty of these responses.

From this brief discussion of the concept of competition, it can be concluded, it seems to me, that a market becomes non-competitive the minute sellers fail to respond to each other's inducements, or to put it another way, do not "meet the equally low prices of competitors."

It will be noted that I have used the small businessman on the corner for my example. This was because I wanted to stress the fact, assuming interstate commerce, that the Robinson-Patman Act applies to the small as well as the large businessman. Markets exist in great variety, and they can be classified at many points along a spectrum extending from the oligopoly of a few sellers at one end, to the markets of thousands of small suppliers and purchasers, at the other; and the relevant market area may be national, regional or local.[6/]

6/ Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 319

Approach to Robinson-Patman Act Enforcement.

Another preliminary problem which may profitably be considered is the general approach which should be made to anti-price discrimination enforcement.

The Robinson-Patman amendment to Section 2 of the Clayton Act is one of the most complicated and controversial provisions in antitrust law. Proponents of the law have called it the Magna Charta of Small Business, designed to protect the small wholesaler and retailer from the mass buying power of the chain, mail order houses and department stores. Opponents of the law, with about the same degree of emotion, have characterized it as a "price fixing statute hiding in the clothes of anti-monopoly and pro-competition symbols," a "price control measure," and a "noncompetitive method of price determination."

Rightly or wrongly, the Federal Trade Commission has become the focal point of the controversy. Both the opponents and the protagonists are unsparing in their criticism of the way the Commission has administered the law.

The Department of Justice, although it has the same statutory enforcement jurisdiction as the Commission, remains aloof from the controversy and therefore unscathed. This is due to the fact that it has been content to let the Commission wrestle with and enforce Section 2, while it has limited its dual enforcement program to the other sections of the Clayton Act.

The question, as I see it, is whether it should be the goal of Congress and the Commission to obtain, by means of reasonable application and interpretation, wide-spread compliance with the law, or, whether the Act's already stubborn provisions should be made more unyielding to the demands of a highly competitive and dynamic economy.

Certain it is that no legislative enactment in our recent history, with the possible exception of the prohibition law, has been more widely disregarded by the persons to whom it applies.

Why is this?

In my view, it is due to the fact that in the hurly-burly of the market place, it is only human nature to engage in price bargaining. As Mr. Justice Frankfurter asked in the Automatic Canteen case, should the Court, in the light of congressional policy as expressed in other antitrust legislation, read the "ambiguous language" of the Act "as putting the buyer at his peril whenever he engages in price bargaining"? "Such a reading," he answered, "must be rejected in view of the effect it might have on the sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated."[7/]

It has always seemed to me that the enforcement agencies could best serve the public interest, particularly the interests of the small businessman, by seeking ways and means of making the Act work. The alternative is to spend their

7/ Automatic Canteen Company v FTC., 346 U.S. 61, 73-74 time, effort and money on test cases that seek to expand the Act's provisions to new situations, which may be of academic interest, but which may have little or no effect on the day-to-day buying and selling of commodities.[8/]

One important thing, as I see it -- and I like to think the Commission has made great strides in this direction in the last few years -- is to build up a body of case law through written narrative opinions that set forth yardsticks which can be followed by those desiring to comply with the law. Public explanation of the application of the Act in a viariety of cases and to all types of existing situations, rather than the pursuit of isolated and extreme theories, can do more than anything else to obtain public support and individual compliance.

The "Detroit" Case and S. 11.

Turning now to the Standard Oil decision and S. 11:

In the "Detroit" case, Standard sold gasoline in the Detroit area to four jobbers at prices which were 1 1/2¢ per gallon less than prices to service station customers in the same area. It was alleged that the effect of these price

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8/ In addition, "the conclusion seems hard to avoid that the Commission has taken the natural, understandable but fallacious road for any official agency -- that of processing cases on the basis of specific complaints and the easy availability of evidence rather than in terms of . . . economic importance . . . ," Timberg, Trade Regulation Series #3, Federal Legal Publications, Inc., p. 3.

reductions was felt by competing retail service stations in part through the retail stations operated by the jobbers and in part through retail stations which purchased from the jobbers at less than the prevailing price.

Standard introduced evidence to show that the lower prices to the four jobbers were made in good faith to meet an equally low price of a competitor. The Commission concluded, however, as a matter of law, that "this does not constitute a defense in the face of affirmative proof that the effect ofthe discrimination was to injure, destroy, and prevent competition with the retail stations operated by the said named dealers /jobbers/ and with stations operated by their retailer customers." The Commission said that a showing by the respondent that its lower price was made to meet competition, while it would rebut a _prima facie_ case, was not an absolute defense, and that "where competitive injury is . . . shown . . . /such proof/ replaces the rebuttable presumption of the _prima facie_ case."

The Supreme Court rejected this theory, saying:

> "There is nothing to show a congressional purpose . . . to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offerings to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs. There is, on the other hand, plain language and established practice which

permits a seller, through section 2(b) to retain a customer by realistically meeting in good faith the price offered to <u>that</u> customer, without necessarily changing the seller's price to its other customers."[9/]

S. 11, as I have indicated, seeks to negate the Supreme Court decision in the "Detroit" case by amending the "meeting competition" proviso so as to provide that where the lower price may result in a lessening of competition, it is <u>not</u> a defense for the seller to show that he acted in good faith and merely met competitive prices. The amendment is, of course, phrased in a much more clever, subtle and ambiguous fashion than this, but no one has denied that such is its purpose and effect.

The fundamental question then is whether the ordinary day-to-day meeting of competition "may" have an adverse effect. If so, S. 11 will do away with price competition among sellers in a particular market and require each seller to sell to all his customers at the same price.

9/ <u>Standard Oil Company v. F.T.C.</u>, 340 U.S. 231, 250.

It is worth noting, in passing, that the Court had, much much earlier, in the <u>Staley</u> case, dealt at length with the evidence offered in support of good faith defense. While such evidence was rejected as insufficient, there was no suggestion that the defense was inadequate as a matter of law. There would have been no case for this extended review of the evidence, except on the assumption that the good faith meeting of competition was a complete defense -- see, <u>Federal Trade Commission v. Staley Manufacturing Co.</u>, 324 U. S. 726 (1945).

I should have said that the amendment would seek to do this. Actually, it will not do away with price competition any more than the prohibition laws did away with the consumption of alocholic beverages. Human nature being what it is, competition will always exist as it has existed, in one form or another, from the beginning of time. However, S. 11 will succeed, I am afraid, in making a law violator of almost everyone who is in the business of buying and selling goods.

Injury to Competition

One difficulty, perhaps the principal one, is that words don't seem to mean what they used to mean. This is true of the statutory words "substantial lessening of competition" and "tendency toward monopoly." The Commission and the courts are now much more prone to find injury and sometimes even to presume injury where formerly such findings usually followed proof of some type of bad faith or predatory prectice, or at least something above and beyond the normal consequences of vigorous competition.

While there is still some confusion among lawyers and economists as to what constitutes injury to competition within the meaning of the Robinson-Patman Act, the Commission has placed major emphasis on whether the discriminatory prices have caused or may cause a diversion of business. Mr. Justice Black's opinion in the Morton Salt case is frequently cited as going one step further and holding that price differentials between competing customers, sufficient in amount to influence resale prices, are themselves adequate evidence to support a finding that the effect of the discrimination "may be substantially to lessen competition."

But whatever the Morton Salt case may hold, there seems to be no doubt that the favorite method of proving injury is to show that the lower price either diverted or may divert trade to the seller or to the favored customer who buys for resale. The latter, it is contended, may either pass the price advantage on to his customer or use the differential to increase his advertising or improve his services to customers.

If this is the law, and the Federal Trade Commission says it is, then it is clear that any price difference, whether or not made in good faith, "may" result in injury to competition. The Supreme Court in the "Detroit" case clearly recognized this when it said, "It must have been obvious to Congress that any price reduction to any dealer may always affect competition at the dealer's level, as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory."[10/]

In sustaining the validity of the "meeting competition" defense, the Court added, "It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor."[11/]

10/ Standard Oil Company v. F.T.C., 340 U. S. 231, 250

11/ Ibid. at p. 249.

The Supreme Court quoted with approval (in a footnote) a statement by the late Walter Wooden, whom many of you will remember as a strong partisan of the Act and one of the Commission's chief architects of Robinson-Patman enforcement. "The amended /Clayton/ Act," he said to the TNEC in 1941, "now safeguards the right of a seller to meet an equally low price of a competitor . . . This right is guaranteed by statute and could not be curtailed by any mandate or order of the Commission . . . The right of self defense against competitive price attacks," Mr. Wooden said trenchantly, "is as vital in a competitive economy as the right of self defense against personal attack."[12/]

The Court might well have gone on and quoted other experts of prior administrations -- you can see, Mr. Chairman, I am trying very hard to be bi-partisan -- including Dr. John D. Clark, member of President Truman's Council of Economic Advisors. In testifying before a congressional committee in favor of an earlier proposal contrary to the Kefauver bill, Dr. Clark said: "All competitive effort is burdensome and harmful to those who cannot keep pace, but if we said it must stop short before it hurts anyone we would completely abandon competition."

The evidence in the "Detroit" case indicated that the price differentials in the Detroit area were non-collusive

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12/ Ibid. at p. 246.

and non-systematic and were the product of business rivalries. They were, in fact, the result of sharp competition at all levels of the market -- refinery, wholesale and retail. In such circumstances, the effect of the discriminations would naturally and inevitably be felt at all levels. But as the Court indicated, this is part and parcel of the competitive system.

Application to Small Business

Meeting a rival's price is, of course, the essence of the competitive process. The right to meet competition is not only indispensable to our form of economy and to the protection of the consumer, but it is in my judgment, an essential armament for the small businessman in his effort to develop and hold his share of the market. The local retailer and wholesaler, more than any other type of seller, must be responsive to competitive pricing.

They recognize this, but they have been led to believe that the Robinson-Patman Act in its entirety does not apply to them because of the lack of interstate commerce. The report of the Senate Committee on the Judiciary went to the unprecedented, and I think dangerous, lengths of advising jobbers in the gasoline business, who appeared in opposition to the bill, that the Robinson-Patman Act did not apply to them because they were not engaged in interstate commerce "even though they may have purchased their gasoline from an out-of-state refinery." 13/

13/ Report No. 2817, 84th Cong., 2d Sess., July 27, 1956, pp. 21-22.

The very decision which the Senate report seeks to overrule held that sales to jobbers from storage tanks located in Detroit were "in commerce" within the meaning of the Act.[14/] There is no assurance that I would want to rely on, the Senate Committee notwithstanding, that the sale of the same gasoline from the jobbers' bulk plants to retailers may not be held to be "in commerce."

Counsel for one important jobber group tried to point out the uncertainty of the modern-day concept of interstate commerce by testifying that it was "as elastic as an old-maid's girdle."[15/]

Freight Absorption

One of the most effective arguments against S. 11 has been that it would prevent freight absorption.

If a small producer in a distant rural area, for example, were to be prevented from absorbing freight and meeting his competitor's price in the city, where the demand exists, he might soon be driven out of business. The man with a freight rate advantage would be granted a monopoly in his area by operation of law. If he were a large producer, with several plants located in different areas, his monopolistic advantages

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14/ Standard Oil Co. v. F.T.C., 340 U. S. 231, 237-238.

15/ Mr. Otis Ellis of the National Oil Jobbers Council, testifying in opposition, before the subcommittee of the Senate Committee on the Judiciary, June 29, 1956, Hearings p. 343.

would thus be multiplied as against the small producer with one plant.

To deny businessmen the right to compete in this manner would be to require every buyer to purchase from the closest supplier and to limit each seller to those customers located closer to his plant than to the plant of any other seller.

Permitting competitive freight absorption, on the other hand -- so that a seller may meet the prices of more favorably located competitors -- gives buyers a greater number of suppliers competing for their business and gives sellers a greater number of potential customers.

At the hearings held before the Senate Judiciary Committee last June, Senator Kefauver denied that it was his purpose to prevent freight absorption. When it was explained that the term "freight absorption" was merely a coined phrase or a colloquialism adopted by the heavy goods industries to express the need for granting lower prices to meet competition, the Senator persisted in differentiating freight absorption from the meeting competition concept. Finally, in an attempt to put the matter at rest, he proposed an amendment to his bill providing that nothing therein contained "shall be construed to alter the law applicable to the absorption of freight or shipping charges."

This, if it can be done, is certainly on the plus side. <u>But</u>, one must ask, how can such language be added to a bill designed to eliminate from the statute the very provision upon which validity of freight absorption has always depended? To say that you cannot lower your price to meet competition, but can absorb freight, may be a neat use of the English language, but it is, of course, a complete paradox and from the standpoint of statutory interpretation may well prove to be a *non-sequitur*.[16/]

However, it does serve one useful purpose. It highlights the fact that the principal proponents of S. 11, a number of trade associations representing light consumer goods at the local wholesale and retail level, are primarily interested in developing a uniform price system for themselves but not for all business.

If we could reduce the bill to this, in plain language, then we would all know what we are talking about. But in that event instead of adding a freight absorption proviso, the bill should simply say that sellers of food, drugs, cosmetics, and the like, may not, on sales to chains or other large purchasers, defend their price differentials on the ground that they were made in good faith to meet competition.

Conclusion

As I stated in the beginning, the Kefauver proposal is adroitly drafted. It provides that a seller may defend a

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16/ Since preparing these remarks I have been told that Congressman Patman has introduced a companion bill without the freight absorption proviso, and that he disagrees with Senator Kefauver with respect to permitting freight absorption.

charge of price discrimination by showing that he had in good faith met the equally low price of a competitor, unless the effect of his doing so may be to lessen competition.

This is merely another way of saying that the good faith meeting of competition defense is hereby repealed, for it is this very competitive effect which must be present before the Robinson-Patman Act comes into play at all -- if there is no competitive injury then there can be no illegality, but if there is competitive injury, then there can be no recourse to the meeting competition defense. If Senator O'Mahoney were not on the platform I would be tempted to say that this is the most outrageous sort of legislative sophistry. And yet, this is what makes S. 11 a "natural" from a political standpoint. It permits the proponents of the bill to say to a protestant -- "Why you are entirely mistaken! You can meet competitive prices. All we ask is, that in doing so, you don't hurt competitors."

It reminds me of the old nursery rhyme that goes something like this:

> "Mother, may I go out to swim?
> Yes, my darling daughter.
> Hang your clothes on a hickory limb,
> But don't go near the water."

I am told that a number of congressmen, who wouldn't dream of voting for the measure if they fully understood its portent, have said, "Yes, I'm for the bill; I'm against any business practice that lessens or injures competition." This may explain the incredible fact that only three congressmen voted against a companion bill when it was hurriedly brought to the floor of the House during the closing hours of the last session, and why its final enactment was only prevented by the ringing of the adjournment bell -- this in face of the fact that in both the Truman and Eisenhower administrations, the White House, the Bureau of the Budget, the President's Council of Economic Advisors, the Department of Justice, and the Department of Commerce all opposed this type of legislation.

It was only the Federal Trade Commission, I regret to say, which was both for and against the measure at various times and which reversed itself by a 3-2 vote during the closing days of the last session and came out in support of the bill. Chairman Gwynne, however, along with Assistant Attorney General Barnes, testified in opposition.

Let me return now to my original theme, namely, that the public interest and competitive distribution at all levels, including small business, can best be protected by resolving statutory doubts and ambiguities in favor of the Sherman Act's basic antitrust policy. The Supreme Court has sought to do this. In Automatic Canteen Co. v. F.T.C., which I argued before the Court prior to my service on the Commission, Mr. Justice Frankfurter stressed the fact that the extreme position taken by counsel in support of the complaint in that case might foster a "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." The Court then set forth a basic formula, namely, that "In the light of congressional policy," it was the Court's "duty to reconcile [Interpretations of the Robinson-Patman Act] with the broader antitrust policies that have been laid down by Congress."17/

In closing, gentlemen, I put it to you, that S. 11 flies directly in the face of this basic formula and constitutes a bold step toward price uniformity and the destruction of free competition in open markets.

17/ Automatic Canteen Company v. F.T.C., 346 U.S. 61, 63, 73-74 (1953); see also, Report of the Attorney General's Committee to Study the Antitrust Laws, pp. 13, 132.