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The effects of the Robinson-Patman act on the food distribution system

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The Effects of the Robinson-Patman Act on the Food Distribution System

by

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CHAPTER I

Evolution of the Food Distribution System

The story of the development of the modern food market is a history of economic change--growth in urban population, decline in home production, discovery and use of modern means of transportation and preservation, discovery and use of technological improvement and scientific management, transition from the general store to the super market of today.

There could be no extensive growth of the food distribution system until there were means of transporting bulky and perishable food stuffs from distant growers to places of consumption. However, there was no need for food stores as such as long as families produced most of their own food supply. As towns grew, skilled crafts developed and craftsmen opened shops to take orders from customers or to display their wares. Food stuffs were still largely home-produced, supplemented by weekly purchases in the central market place to which nearby farmers brought their surplus products. The traveling peddler carried spices with other luxuries primarily for the wealthy. Then came the spice dealer, the forerunner of today's grocer, who gradually added to his stock other articles not locally producible such as salt, sugar, tea and coffee. In the general store, which was the characteristic retail establishment of our early history, these articles were the major items of the grocery department.

As towns flourished, more and more families found it expedient to buy their flour and meal instead of taking their own grain to the

mill for grinding. They also found it convenient to have fresh meat all the year round by the establishment of a local slaughter house and meat market. The individual grocer, the food manufacturer and processer, and the wholesaler came on the scene. With the development of rapid means of transportation, the less perishable of the fruits and vegetables could be shipped long distances and city populations could be fed. By means of the refrigerator car and other cold storage methods, even the most perishable foods could come to the city market. Before long, meats from central packing houses and eggs and dairy products from central warehouses became part of the grocer's stock in trade. The canning industry sprung up, home baking decreased and we soon had the traditional channels of distribution--manufacturer to wholesaler to retailer.

Each member of this chain had a vital interest in its preservation; it insured to both the wholesaler and retailer not only a maximum flow of goods but their life's blood. They were compensated for the services they rendered by a system of markups. (This does not apply to brokers, selling or purchasing agents who operate on a commission basis.) Should a retailer buy directly from the manufacturer and secure equal or more favorable terms than those granted to and by his wholesaler, he was then able to undersell competitive grocers in the retail market. The wholesaler located in his territory would lose his business and other retailers in the area would lose customers. Few manufacturers, therefore, would care to risk offending the wholesalers and retailers handling their products. Thus, if they sold direct at all, they were careful to protect the wholesaler's margin by offering

goods at higher prices than those available to middlemen. This differential is known as the "functional discount" and represents recognition of and compensation for the services of assembly, warehousing and credit extension performed by wholesalers. A similar discount guards the differential between the price to the retailer and the price to the consumer.

The "quantity discount" represents recognition of the economies of manufacture or distribution resulting from the placing of large orders while "functional discounts" constitute payment for services performed. Discounts based solely on quantity were regarded in far less favorable light since any special advantages secured by a large distributor which were not available to smaller competitors of the same level might result in a disturbance of the resale market. In general, therefore, manufacturers and processors avoided any significant discrimination between their wholesalers who followed similar policies with respect to retailers. Hence, this channel of distribution became well entrenched and was accepted as the natural order of things.

Since the turn of the century, however, various new methods of distribution have appeared and have constituted an increasing challenge to the traditional system. Such methods are the chain store, the various adaptations of the chain store method of operation and recently, the super market. While a number of chains were established during the latter half of the nineteenth century, (The Great Atlantic & Pacific Tea Company in 1858), their real growth occurred during the present century. It is estimated that in 1900 there were but 700 chains of all kinds with 4500 stores. In 1920 there were 9,400 chains operating 49,200 stores, in 1930,

7,061 chains operated 159,638 stores, and in 1939 there were 123,195 chain store outlets. (1) Chain store sales for all types of business rose from 4% of all retail trade in 1919 to 22.8% in 1935. (2) In the field of food distribution the chain plays its most important role for in 1939, one-third of all chain store retail units and 31% of all sales made by those units were accounted for by grocery chains.

The most important single type of outlet utilized by grocery manufacturers has been the wholesaler. Over one-third of the total sales of grocery and meat products has been distributed through this type of middleman.

Manufacturers' wholesale branches accounted for approximately one-fourth of the total sales of all food and grocery producers. They were used by manufacturers of processed foods other than meat for the disposal of nearly 15% of their sales and by producers of inedible grocery items for the distribution of 30% of their volume. In the meat trade, packers' branches were used for slightly over 45% of the total meat sales. Sales were made direct from manufacturers to retailers to the extent of 27.7% of total grocery sales and through manufacturers' retail branches to the consumer to the extent of 3.2% of all grocery sales. (3) Thus by 1929, the wholesaler's share of the business had been greatly reduced by various devices, although he still retained a

(1) U. S. Department of Commerce, Bureau of Census, 1940, Retail Trade, 1939, page 5.
(2) Beckman, T. N. and Nolen, H. C., The Chain Store Problem, New York, McGraw-Hill, 1938, p. 38.
(3) Engle, "The Marketing Structure in the Grocery Industry", Harvard Business Review, Vol. XII, No. 3, April, 1934, pp. 321-323.

position of dominance in the trade.

Operating expenses during 1929 of the brokers and agents, the cash and carry wholesalers and the chain store warehouses were the lowest of all types of wholesale distributors and reflects the limited marketing functions they perform. Of the 234 chain warehouses studied, total expenses of 108 were less than 4% of net sales while 1,853 of the 4,776 general line wholesalers had operating expenses ranging from 4 to 8% of net sales and 1,504 had expenses of from 8 to 12%. (1)

Because they have eliminated many of the functions of the independent retail grocer, chains have cut their operating expenses per store down below that of the independent. Chains have eliminated, in the main, credit extension and delivery service and have instituted the cash and carry system. Self-service, characteristic of the super market which was borne of the depression and introduced by independents, reduced costs still more by reducing the size of the sales force per dollar of sales. Since 1940, chains have taken the lead away from the independents and have converted almost entirely to super market operation. More extensive advertising due to regional unity and the use of leader tactics because of superior financial resources have enabled the chain to gain more volume per unit and thereby reduce costs. It is doubtful if scientific management and specialization as used by chains has reduced expenses per se but such division of labor must be used to maintain efficient operation. Of course the integration of wholesaler-retailer functions makes for lower chain expenses. Even the large independent super market operator integrates such functions

(1) Ibid., p. 332.

when he buys direct and uses part of his store as a warehouse.

The net cost of merchandise sold by chains and super markets, be they chain or independent, is lower than that sold by service independents because their size enables them to purchase large quantities and thereby secure quantity discounts. The quantity discounts may or may not reflect actual savings in cost of production and distribution but may represent the bargaining power of the larger chain buyer.

Promotional allowances are given to chains and seldom to independents for many reasons. Some manufacturers feel that their advertising is more effective if it appears in the advertisements of a well-known retail chain. Others feel that window and counter displays can best be handled by the central headquarters of a chain rather than dealing separately with numerous independents. These promotional allowances are payments for a specific service and reach considerable totals. In 1934, the Kroger Grocery & Baking Company received $534,758 in promotional allowances, the First National Stores, Inc., received $342,121 and The General Foods Corporation allowed the Great Atlantic & Pacific Tea Company 5% off its list price for promotional services. (1)

With regard to brokerage fees, these may or may not reflect actual services performed for a manufacturer and are very controversial in nature. A manufacturer who prices his goods on the assumption that he will have to pay a brokerage fee may pay said fee to a chain which purchases through its regional buying offices direct from the manufacturer. In 1934 Kroger's brokerage earnings on canned food and flour alone totaled $236,209, while

(1) Hearings before the Special Committee on Investigation of American Retail Federation, House of Representatives, 70th Congress, 1st Session, 1935.

the total brokerage earnings of A. & P. for the same year were about $2,000,000. (1)

The proportion of sales going to chains and independents has varied slightly from 1929 to 1945. Prior to 1947

Table 1.

Sales of Grocery and Combination Stores

	Year										
	1929	1931	1933	1937	1939	1941	1943	1945	1946	1947	1948
Chain	32%	34%	37%	32%	34%	37%	32%	32%	34%	38%	39%
Independent	68	66	63	68	66	63	68	68	66	62	61

Source: Facts in Food & Grocery Distribution as of January, 1949, Progressive Grocer, New York, 1949, p. 3.

chains received their largest share of the retail grocery market in 1933 when the depression forced many independents to go by the board. The 1936-1937 recovery plus state chain stores taxes aided the growth of independents in 1937. Except for the war years when scarcity of goods, OPA ceilings and labor shortages caused chains to lose ground, the trend of grocery chains' share of the retail grocery market has been climbing since 1940 due in large part to their advocacy of the super market method of operation and the growth of small chain organizations.

During the early thirties the wholesaler and the independent retailer faced, in their opinion, the threat of possible extinction because of inroads made by the chain grocery stores. The history of the many attempts on the part of both distributors to seek a panacea to maintain themselves and their traditional methods of distribution is a long and interesting

(1) Ibid., p. 11

one. A review of the Sherman Act, the Clayton Act, the Federal Trade Commission Act, the National Recovery Act and the Robinson-Patman Act would be in most instances a review of such attempts.

CHAPTER II

History of the Robinson-Patman Act

A. Background

1. Evolution of Anti-Trust Laws

The Robinson-Patman Act is not a new type of government regulation; it is rather an attempt to define and amplify the price discrimination section (Section 2 (a)) of the Clayton Act. This latter act has been on the statute books since 1914 and in itself was an endeavor to improve the administration of the Sherman Act of 1890.

The Sherman Anti-Trust Act was passed primarily as a result of the wave of resentment and antipathy toward the trust movement of the 1870's and 1880's. Previous to the rise of the great industrial combinations such as the Standard Oil combine, the prevailing governmental philosophy, especially with regard to the food industry, had been one of laissez faire. By preventing monopolistic interference with free competition, this law was designed to restore the economic conditions on which the laissez faire policy was predicated. The Sherman Law was to outlaw all contracts, combinations and conspiracies which restrained trade, and it barred monopolies and attempts to monopolize trade. Price discrimination in the oil industry and in the form of railroad rebates were the first examples of discrimination, as such, that attracted public attention.

The language of the Sherman Act was too vague to encompass many undoubtedly monopolistic practices, however, and in 1914 the Clayton Act and the Federal Trade Commission Act were passed in an attempt to supplement, fortify and reenforce the Sherman Act and to create an agency whose

duty it was to detect and prohibit unfair methods of competition.

These two acts marked a new step along the road of industrial legislation for they altered both the scope and method of government regulation. The aims of policy were reaffirmed, but now direct regulation of specific business practices and policies to assure free competition in the production and distribution of goods was added to the negative regulation of business relationships which had been instituted in 1890. An administrative process of detection and condemnation of "unfair methods of competition" was added as well as the outlawing of certain types of competitive methods such as price discrimination, interlocking directorates, the tying of contracts and the acquisition of capital stock in competing corporations which had been found to be particularly dangerous to the public interest.

Section 2 of the Clayton Act forbade discrimination in price, "between different purchasers of commodities" not based upon

> "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 made in good faith to meet competition, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (1)

It left to the courts the problem of deciding when competition was "substantially lessened" or a monopoly was being created, and as a result, this seriously limited the instances of discrimination with which the Federal Trade Commission could deal.

The Clayton Act, like the Sherman Act, had a checkered course of

(1) U. S. Government Printing Office, "Antitrust Laws with Amendments 1890-1945", 1945, p. 22.

enforcement.

> "During the period in which the chain stores were enjoying an extensive growth, the courts held that discrimination which injured only competition of the buyer and not of the seller was subject to law." (1)

In 1929, however, the Supreme Court ruled in the Van Camp Case that the section applied to a lessening of competition among buyers as well as sellers. (2) In the decision involving the Ládogo Canning Company and the American Can Company wherein a buyer was permitted to recover substantial damages from a seller who had discriminated against him in favor of another customer, this interpretation of section 2 of the Clayton Act was reen-- forced. (3) Nevertheless, the broad problem of price differentials was virtually untouched due to poor legislative drafting, bungling by the lower courts, an unimaginative and ineffectual commission and an unconcerned public. Hardly any effort had been made under Section 2 to restrain the buying methods of mass distributors.

When the National Industrial Recovery Act was passed in 1933, it appeared to be a fair way to limit the methods of doing business. However, it soon became evident that code proposals were not entirely limited by any abstract concept of unfairness but that attempts were being made to use the code structure as a weapon to maintain the traditional channels of distribution. This was especially true of the food and drug business. In these industries, those who followed the traditional methods were still in the majority and were considered and accepted by the NRA as the accredited

(1) Mennen v. Federal Trade Commission, 288 Fed. 744, cert. denied 262 U. S. 759; National Biscuit Co. v. Federal Trade Commission 299 Fed. 733.
(2) Van Camp & Sons Co. v. American Can Co. 278 U. S. 245.
(3) American Can Co. v. Ládoga Canning Co. 44 Fed. (2d) 763

spokesmen for their respective industries. Accordingly, the mass distributors who failed to conform to the orthodox pattern of distribution found themselves targets of many attacks. Code proposals were drafted to limit such competitive advantages as the favorable purchasing benefits which were enjoyed by the big fellows. Wholesalers, in particular, in drawing up their code programs sought to insure an adequate flow of goods through their hands by stemming its diversion to newer channels. A code which gave explicit recognition to the principle of the wholesale differential was formulated and a boycott of manufacturers was even resorted to in order to enforce this code. The buying advantages (brokerage, discounts and promotional allowances) granted to the chains were assailed in an attempt to use the codes as instruments for strengthening the traditional methods of distribution. Retailers centered their attention on the price level and codes were drawn up that set a floor to prices, limited losses and restricted leader merchandising. However, with the abolishment of the NRA, these efforts failed and newer, more specific means of curtailing the advantages of the mass distributors were examined.

Buying advantages of the chain stores now came under direct attack. Proponents of this attack claimed that the cause of distress among independent dealers, both wholesalers and retailers, was the ability of the mass distributors to receive unjustifiable concessions from producers. They proposed to set a legal limit based on the cost of such price differentials. This principle is the basis of the Robinson-Patman Act.

2. Federal Trade Commission Chain Store Inquiry

The soil for the Robinson-Patman Act was prepared in an investiga-

tion of chain store practices conducted by the Federal Trade Commission. The Senate, becoming increasingly concerned over the distress of small dealers, the growth of chains and the huge concentration of buying power in the hands of the latter, directed the Federal Trade Commission to make a thorough study of the chain store system of marketing and distribution, to report its findings and to recommend what legislation, if any, should be enacted to regulate and control that form of distribution. (1)

After seven years, during which time the Commission had prepared thirty-three individual reports covering various phases and activities of chain store growth and operation, a final report was submitted to Congress on December 14, 1934. The investigating body found that the growth and development of chain stores resulted not only from their scientific managerial efficiency, but also from their ability to obtain goods at lower costs and to undersell the independents. (2) The report analyzed in detail the various methods used by chains to gain special concessions and allowances from manufacturers. It summarized the preferential treatment granted chains by manufacturers into the following general classifications: volume allowances, promotional allowances, allowances in lieu of brokerage, freight allowances and guarantees against price decline.

Volume allowances were classified as straight volume allowances with or without specified quotas, progressive discounts increasing with volume, discounts for increases in volume over some prior period(s) and all other volume allowances not specified.

(1) Senate Resolution No. 224, 70th Congress, 1st Session, May 12, 1928.
(2) Federal Trade Commission, Final Report on Chain Store Investigation, Senate Document No. 4, 74th Congress, 1st Session, December 14, 1934.

Promotional allowances were classified as allowances granted for newspaper advertising, window and counter displays and special promotions and deals featured by the buyer.

> "Where preferences are granted in the form of promotional allowances without the rendition of services in return, they are, in effect, price concessions having no direct relation to quality of goods, quantity purchased or cost of selling." (1)

Apparently chains benefited to a much greater extent than the wholesalers from these allowances. The Commission's figures indicated that,

> "more manufacturers make allowances to chains than make such allowances to wholesalers, and the proportion of chain accounts carrying allowances was far greater than the proportion of wholesale accounts." (2)

> "In 1930, for example, the rates of special allowances on total sales of all reporting manufacturers to grocery chains was 2.02% as compared with 0.91% to wholesalers. In groceries, the chain allowances were between 15 and 16 times those paid to the wholesalers, though the chain bought less than 8 times the amounts purchased by the wholesalers included in this study." (3)

Table 2.

Manufacturers Allowances Granted to Chains and Wholesalers, 1930

Type of Business	Total Allowances	Chain Allowances	Wholesale Allowances	Per cent of Total	
				Chain	Wholesale
Tobacco	$6,928,000	$6,122,000	$806,000	88	12
Grocery	6,439,000	5,840,000	354,000	91	5
Drug	3,798,000	2,848,000	911,000	75	24

Source: Federal Trade Commission, Final Report on Chain Store Investigation, Senate Document No. 4, 74th Congress, 1st Session, December 14, 1934, p. 58

(1) Ibid. p. 60
(2) Ibid. p. 57
(3) Ibid. p. 59

The Commission reviewed the extent to which chains were engaged in interstate commerce and found that, since chains transported their own goods across state lines to their various stores, purchased for shipment in other states and took delivery in still other states, they were therefore engaged in interstate commerce. In considering the chain system from the point of view of possible monopolies, the Federal Trade Commission reported that,

> "in view of the competition between different chains and the independent dealers and the extent to which the chains have invaded the retail distribution field, there was no indication of a monopolization of the field." (1)

As a result of the investigation, the Commission submitted a list of recommendations which divided the factors contributing to the competitive advantages of chains into two groups--those which appear to be susceptible to federal regulatory legislation and those which would be amenable only to extraordinary governmental measures.

In the first group were included:

1. The special discounts and allowances made to chains.
2. The use of leader and loss-leader merchandise sold at prices below cost.
3. Short weighing which was found to be more prevalent among chains than among independents.

The second group was comprised of

1. The services granted by the independents which have been eliminated by the chains.
2. The lower wages paid by the chains in some localities.
3. Elimination of the wholesale selling expenses by the integrated set-up of chains.

(1) Ibid. p. 68

4. The wider profit margins on the chains' private branded merchandise.

5. Profits from the chain wholesaling operation.

6. More advantageous newspaper advertising of the chains.

7. The ability of the chains to average profits obtained from their stores in various localities.

The Commission pointed out that in prosecuting those practices of the first group which have been amenable under Section 2 of the Clayton Act, its efforts had been blocked by the courts. It was not until 1929 in the Van Camp Case that the Supreme Court held that the price discrimination provision of Section 2 of the Clayton Act applied to a lessening of competition in the resale of a commodity. Prior to that time, the courts had held that only a lessening of competition in the line of commerce of the seller was intended by the Act.

The Federal Trade Commission finally recommended that Section 2 of the Clayton Act be amended to prohibit unfair and unjust price discrimination to read as follows:

> "It shall be unlawful for any person engaged in commerce, in any transaction in or affecting such commerce, either directly or indirectly, to discriminate unfairly or unjustly in price between purchasers of commodities, which commodities are sold for use, consumption or resale within the United States or any Territories thereof or the District of Columbia or any insular possessions or other place under the jurisdiction of the United States." (1)

The Commission's suggestions were incorporated in bills introduced in the First Session of the 74th Congress in January, 1935, by Representative Mapes, but they were ultimately superseded by the more drastic Patman Bill.

(1) Federal Trade Commission, op. cit, p. 96

B. The Robinson-Patman Act

1. Legislative Course

The bill which eventually became the Robinson-Patman Act was drafted and sponsored by the United States Wholesale Grocers Association which represented at that time 20% of the wholesale grocery trade. Food brokers through the National Food Brokers Association, an organization composed of almost 65% of the general food brokers, joined the fight. In a speech delivered before the annual convention of the National Association of Retail Grocers on June 19, 1935, at Indianapolis, Indiana, Mr. Howard L. Scott, president of the N. F. B. A. stated the broker's position as follows:

> "The policy of the Association is clear and simple. The food broker is fighting to have unfair price discrimination abolished by law or agreement. As right thinking men and women raise their voices in protest against the evils of price discrimination in favor of the large and powerful in the grocery industry and against the small and independent, we will find a perfectly proper, legal and constitutional way to abolish the evil." (1)

Joined with the wholesale grocers, brokers and independent retailers was an association of retail druggists who had lost, as a result of the N. R. A. decision, a code which gave them far greater privileges than any other retail code. Anxious to recover these lost privileges, the druggists joined the food distributors to form a powerful lobby. (2)

This militant minority achieved the enactment of legislation affecting virtually every business in the United States. Originally drafted by Mr. H. T. Teegarden, attorney for the United States Wholesalers Associ-

(1) National Food Brokers Association, "Unfairness in the Food Industry", 1935, p. 1
(2) Sammons, "Legislative History", Business and the Robinson-Patman Law, 1938, pp. 103-104

ation, the bill had a tortuous congressional course and the form in which it was finally enacted represented an amalgamation of a series of legislative proposals originating with the Patman Act, introduced by Representative Wright Patman on June 11, 1935. Joint hearings were held beginning on July 10, 1935 and extending through the last session of the 74th Congress covering the Patman Act and H. R. 4995 and H. R. 5062 introduced by Representative Mapes. (1) Unable to reach a conclusion on the basis of its first hearings, the Committee entrusted the bills to a subcommittee headed by Representative Utterback who then introduced his own bill, H. R. 10486, some features of which were ultimately incorporated in the Patman Bill. On March 31, 1936, the House Committee favorably reported the Patman Bill in somewhat modified form.

On June 26, 1935, shortly after the introduction of the Patman Bill in the House, Senator Robinson introduced an identical measure, S. 3154. The Senate Committee on Judiciary favorably reported the bill with amendments on February 3, 1936. In the interim, Senators Borah and Van Nuys introduced separate measures designed to prohibit price discrimination. They consolidated their bills into a single measure, S. 4171, on March 4, 1936, and when the Robinson Bill came to a vote in the Senate on April 23 and 24, the Borah-Van Nuys measure was attached to it as a floor amendment.

The Patman Bill was passed by the House on May 28, 1936, and after a short conference with the Robinson Bill, the Committee reported a revised bill on June 8, 1936, which was adopted by the House and Senate without

(1) Hearings before the House Judiciary Committee on H. R. 8442, H. R. 4995, H. R. 5062--74th Congress, 1st Session.

further change. (1)

The lobbying groups promoted the law as an anti-chain store bill and employed the catch-word "monopoly" in its efforts to save the independent dealer. The background of the investigation dealt primarily with chain store competition and most of the congressional discussion evolved about the food distribution system.

Scant attention by industry as a whole was paid to the measure until it had been favorably reported by the Senate on April 24, 1936. Since the Act was rushed through to completion in little more than a month's time, the opposition had little chance to consolidate forces or to bring pressure to bear upon Congress.

Actually the Act represented another manifestation of the widespread feeling against "big business" which commenced with the Sherman Act and gained acceleration under the New Deal.

2. Provisions of the Robinson-Patman Act

This Act has been well named the "Anti-Price Discrimination Act" for the fundamental idea underlying its various provisions is that any two competing buyers must be treated alike, first, as to the price they are asked to pay for the merchandise, and second, as to the availability of allowances and services which are reflected in price or which constitute a disguised reduction in price. (2) In addition, certain subterfuges such as the allowance of brokerage where no services are rendered or where commission is given to a buyer are to be abolished. Also, the buyer who knowingly receives

(1) Washington Post, The Robinson-Patman Act--Its History and Probable Meaning, 1936, pp. 8-9.
(2) For the official wording of the Act see Appendix.

the benefit of a discriminatory price is made equally responsible with the seller who grants it.

In structure, the Act consists of four sections. The first of these amends Section 2 of the Clayton Act by substituting for it six new subsections lettered (a) to (f) respectively. Section 2 is a purely procedural provision relating only to right of action and proceedings pending at the time of the enactment of the law. Section 3 is a wholly new criminal statute embodying the provisions of the Borah-Van Nuys Bill. It is not an amendment to the Clayton Act but a separate and distinct law making certain types of discrimination a criminal offense. Section 4 of the Act relates to cooperative associations and exempts the internal functions of the cooperative from the operation of the law.

Subsection (a) is the basic provision prohibiting discrimination in price between customers of a seller. It is designed to regulate sellers from discriminating in price between different purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale within the United States or possessions, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

This section of the law does not prohibit all differentials in price; under it, all six of the following factors must be present before a differential is deemed unlawful. These factors are:

1. There must be discrimination between two or more customers of a given seller.

2. The difference in price must be made in connection with commodities of "like grade and quality".

3. At least one of the purchases involved must be in interstate commerce.

4. The commodities involved must have been sold for "use, consumption, or resale" within the jurisdiction of the United States.

5. The transaction must involve the sale of commodities and not the sale of services.

6. Although each of the above factors is present, a discrimination is not unlawful unless, in addition to the above, its effect may:

    (a) Substantially lessen competition in any line of commerce; or

    (b) Tend to create a monopoly in any line of commerce; or

    (c) Injure, destroy, or prevent competition.

The presence of a price differential does not by itself make the differential a violation of Section 2 (a). The law specifically allows for quantity discounts to different purchasers where the discrimination in price makes allowances for differences in the cost of manufacture, sale or delivery.

A price discrimination which has in it the required elements may be justified if it is merely due to price changes made from time to time in accordance with changing conditions affecting the marketability of the goods concerned, such as deterioration of perishable goods, sales by court process, obsolescence of seasonal goods, or discontinuance sales of the goods concerned. There are market factors which induce price variations such as changes in raw material prices, labor and selling cost changes, changes in consumer demand and other trade conditions which influence price. A price differential may also be justified if it is shown that it meets an equally low price of a competitor. This statement allows for a defensive differential made to meet the competition that exists between national and local distributors.

The right of a seller to select his customers and to refuse to deal with purchasers for any reasons deemed sufficient by him is guaranteed by subsection (a). This continues in effect the provision of the original Clayton Act and does not compel a seller to sell to any particular customer at a particular price merely because at the same time he is selling the same product to another customer at that price.

Functional discounts are not affected by the Act--this is borne out by a careful analysis of the law itself, its history and the influence which led to its construction. It would be difficult to show competitive injury where a price structure is based upon a broad and simple classification among different types of customers in the channels of distribution. (1)

The brokerage section of the Act, Subsection (c), prohibits, in connection with an interstate sale, the payment or receipt of anything of value as a commission, brokerage, or other compensation except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the party, or to any intermediary acting for or subject to the direct or indirect control of that party making the purchase. This provision has its antecedents in the brokerage clauses which were included with variations in many of the codes under N. R. A. and was a natural evolution of the facts developed by the Federal Trade Commission investigation of the chain stores. The aim of this clause is to prohibit the splitting of brokerage and to eliminate payments made directly to buyers or to agents of buyers, and to buyer-owned or controlled brokers.

(1) Zorn and Feldman, Business under the New Price Laws, 1937, Chapter X, pp. 166-188.
Van Cise, "Functional Prices", Robinson-Patman Act Symposium, Commerce Clearing House, Inc., January 22, 1947, pp. 89-98.

Subsection (d) prohibits the granting of any allowances for any services or facilities rendered by the buyer unless such payment is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. This includes allowances for advertising, window and counter display, sales promotional work, and all other forms of allowances in connection with the processing, handling, or sale of a commodity.

Section 2 of the Act relates only to procedure that was pending before the Federal Trade Commission at the time of the passage of the Act. It merely continued the rights of action legation and orders of the F T C that were based on former Section 2 of the Clayton Act. Such matter was not affected by the new law, but if the Commission had reason to believe that provisions of the Robinson-Patman Act were being violated, the F T C was empowered to reopen any proceeding in which a cease and desist order had been entered prior to the effective date of the new law.

Section 3 of the Act, the criminal provision, was introduced as a separate bill in the Senate and was subsequently added without change as a floor amendment to the Robinson Bill.

Perhaps more than any other anti-trust law, the application of the Robinson-Patman Act to particular situations is completely dependent upon the specific facts and circumstances involved. Accordingly, questions as to the lawfulness of selling methods of individual manufacturers or distributors can be determined only in the light of complete knowledge of their particular prices, customers, discounts, allowances and other sales practices. Therefore, any decision as to the legitimacy of a particular selling method must be limited to the relationship among the sales involved

and would not necessarily apply to any other sales by the same manufacturer, and could not apply to the selling practices of a different manufacturer or distributor. The results of each case in one industry may be applied to the methods and practices used by all industries for, while the specific facts may be different, the principles established are common to all businesses.

3. Immediate Reactions

The reaction produced in the six months following the passage of the Robinson-Patman Act was sheer tumult, fear and condemnation. But by September, 1936, the law was regarded as of little significance and business would carry on as usual.

Immediately following President Roosevelt's signature, on June 19, 1936, analyses and interpretations poured forth from trade associations warning and suggesting to their members to review in detail their merchandising and customer policies, to re-examine their quantity discount schedules, to stick to published list prices and to overhaul and revise accounting methods to determine what was the most economical size of order. Predictions were made which proclaimed that the Act would not only create new methods of doing business but would bring under federal surveillance every commercial transaction from the point of original raw material production through to the final retail sale of the finished product. (1)

Some prophesied that there would be greater customer selection, simpler customer classifications and price structures. Special customer classifications that were created for the purpose of making special

(1) "Shakeup in Selling Practices", Business Week, No. 355, June 20, 1936, pp. 13-15.

concessions would survive only to the degree that they could be justified by demonstrable cost differences. There would be more quantity brackets to prevent the jumps between brackets from being so big and vulnerable. Price structures would be simplified because of the elimination of many customer classifications resting purely on discriminatory bases. The small buyer would probably suffer for, by focusing attention on the costs and economies arising from the size of orders, the principle that small transactions are costly would be brought home to manufacturers and wholesalers.

Others maintained that existing spreads between prices for different quantities would be somewhat diminished as manufacturers and wholesalers examined their quantity discount schedules and tightened them to agree with costs and conform to the law.

It was predicted that advertising by retailers would be reduced because of the possibility of cancellation of promotional allowances by manufacturers. Because of such possible cancellation some claimed that private brands would be used more than national brands.

Others believed that the functions of cooperative and voluntaries would be more closely examined to see which of them was really entitled to the considerations permitted by the Act. It was believed that the brokerage fees paid to many cooperative buying groups would be eliminated and hence reduce the price advantages they held. (1)

As a result of the possible cancellation of advertising allowances and brokerage fees by manufacturers, packers and processors, many predicted that the price of food to consumers would rise. Since the ability of chains

(1) Thorp, "Possible Effects of the Robinson-Patman Act on Business Practices", Dun & Bradstreet Monthly Review, Vol. 44, No. 2100, July, 1936, pp. 2-7.

and cooperatives to undersell competitors stemmed in large part from these concessions, prices would rise once these advantages were wiped out. (1)

It was pointed out by many that chains and other large buyers would be forced into manufacturing their own requirements and thus put the small purchaser in a worse position than before. (2)

The quick acting Associated Grocery Manufacturers of America, composed of many of the larger food manufacturers and packers, advised their members to pursue the following course:

> "1. Carefully study quantity discounts and be prepared to justify them by actual savings, cancelling those which cannot be justified as of June 19."
>
> "2. Cancel, as of June 19, all arrangements for paying brokerage to buyers."
>
> "3. Cancel or suspend all questionable advertising and service payment arrangements pending a further study of the law to learn what is legally permissible." (3)

On the other extreme were a group of companies who continued to do business as usual, making no changes in their specific practices until they received official word from the F T C and the courts.

The middle stand was taken by the majority of firms in the food industry. Although this group continued to operate as before, all deals were carefully scrutinized; those which could be justified as fair and not discriminatory were continued while borderline cases were adjusted to

(1) "Light in Patman Law Darkness", Business Week, No. 360, July 25, 1936, pp. 14-15.
(2) Thorp & George, "Check List of Possible Effects of the Robinson-Patman Act", Dun & Bradstreet Monthly Review, Vol. 44, No. 2101, August, 1936, pp. 2-17.
(3) "Patman Excitement Calming", Facts in Food Distribution, American Institute of Food Distribution, Inc., July 25, 1936, p. 2.

conform to the provisions of the Act. Many in this group believed that the Act would not be as revolutionary as was predicted but that it merely gave industry the opportunity of making a new start along sounder, fairer and more constructive lines. (1)

In the brokerage field many different approaches were taken. The voluntaries and cooperatives asserted that they performed specific services for sellers, such as assured cooperation of retail outlets and successful promotion and sale of products, and they were entitled to brokerage payments. The Atlantic Commission Company and the Wesco Food Company, affiliates of A. & P. and Kroger respectively, devised plans whereby the brokerage which they formerly had received would not appear on the invoice as brokerage but would be reflected in the net price. Other arrangements were made with manufacturers whereby all brokerage that would have been paid but for the Act would be paid at a later date once the brokerage section of the Act was clarified or if the Act was declared unconstitutional.

The experience of being left high and dry by the abrupt cancellation of advertising allowances caused distributors to use advertising space, that was formerly contractually devoted to national brands, to promote the most profitable items they carried, chief among which were their private brands. The following statement by an Eastern distributor in mid-August of 1936 shows the success of this move:

> "We have stopped advertising the brands of manufacturers who no longer pay us allowances under the Robinson-Patman Act. We are doing just as much advertising but are putting our efforts more into canned and glass goods and private label merchandise, all of which are profitable items.

(1) Executive Service in Food Distribution, American Institute of Food Distribution, July 1, 1936, p. 7.

> Formerly, we were anxious to advertise these but did not have the space because of the large number of staples which we had to advertise each week under contract. We are quite pleased now because we are noticing an increase in business on these more profitable items and believe that the extra profit which we, ourselves, are getting should more than counteract any advertising money which we might lose." (1)

Manufacturers belittled the ultimate success of distributors' increased use of private brands. Since development of consumer acceptance of little known brands is a long term proposition, manufacturers were confidant that they would be able to foresee the menace of private brand competition and could take appropriate steps to combat it. A cut in price to compete with private brands would, in their opinion, suffice to level any such threat. (2)

By September of 1936, the leaders in the food industry, A. & P., Safeway, Standard Brands and Hershey Chocolate Company, taking their cue from the results of a conference on the Robinson-Patman Act held between members of the food industry and representatives of the F T C on August 16, 1936, started the trend toward resumption of promotional programs and the rest of the trade followed suit. The big fellows, who were watched by their smaller competitors as closely as a goldfish in a bowl, set the pattern and the food industry then swung towards business as usual. (3)

The Great Atlantic & Pacific Tea Company decided it could legally resume its demands for advertising allowances and quantity discounts. The contracts sent out by A. & P. to its suppliers called for A. & P. "to render

(1) Executive Service in Food Distribution, American Institute of Food Distribution, August 22, 1936, p. 8.
(2) Ibid., September 12, 1936, p. 5.
(3) This conference is discussed in detail in Chapter III.

certain special advertising and special distribution" services in return for an advertising allowance of 6%. (1) The quantity discount contracts sought 5% off list price and obligated A. & P

> "to buy from the manufacturer a large quantity of merchandise and, in view of the purchase in large quantity, present and prospective, the manufacturer agrees to allow the following discount....." (2)

Both types of contracts carried this significant paragraph:

> "The manufacturer avows his willingness to make the same agreement as is here made with any other purchaser similarly situated and on proportionally equal terms." (3)

Hence A. & P. supposedly protected itself by passing the buck along to the seller who guaranteed that the discount and advertising allowances granted were not violations of the Robinson-Patman Act.

4. Initial Results

By the end of 1936, opinion of the Act had crystallized and certain effects were apparent. Separate contracts for promotional allowances were adopted and allowances were granted on a more justifiable basis. Those manufacturers who were getting value received from their promotional payments were eager to reestablish these payments while those whose allowances were nothing but discounts to favorite customers were pleased over having the Act serve as excuse for their elimination.

The trend toward private brands which existed before the Robinson-Patman Act probably was accelerated by the Act as distributors reexamined their advertising and began featuring fewer and more profitable items.

(1) "Forcing Price Law Issue", Business Week, No. 366, September 5, 1936, p.13.
(2) Ibid., p. 13
(3) Ibid., p. 14

Although food prices rose in the latter half of 1936, little or no effect could be attributed to the Act. General increase in business activity and the summer drought of 1936 were the major factors.

Chains and other large buyers sought to hold any advantages they had received prior to the passage of the Law to the degree they were justifiable. Sellers used the law to put their deals in order and to get out from under carelessly drawn promotional programs.

A survey conducted by the Associated Grocery Manufacturers of America among 500 manufacturers, wholesalers and retailers to discover the immediate effects of the Robinson-Patman Act showed the following:

> "Nineteen per cent of manufacturers paid brokerage direct prior to the Act; none do now. Thirty-seven per cent paid brokerage through group buyer's headquarters; 16% continue to do."
>
> "When the Law was first enacted, virtually all manufacturers suspended advertising allowances. Thirty-five per cent continue the suspension, apparently in the expectation of making some restitution later; 18% have definitely discontinued; 40% have restored them with significant changes."
>
> "Fifty per cent of manufacturers and 57% of distributors favor advertising allowances regardless of the Law, though 70% of manufacturers and 67% of distributors record themselves as favoring such allowances when paid for services rendered as required by the Robinson-Patman Law."
>
> "Sixty-seven per cent of the manufacturers have made no change in their quantity discount schedules, despite all the agitation. With regard to cumulative discounts for purchases over a specified period, 23.4% of manufacturers used them prior to June 19 and 9.4% use them now--almost 35% of the distributors still want them."
>
> "More than 70% of the entire trade approve the intent of the Law as they interpret it and this with significant reservations and qualifications. Only 40% admit any benefits from the Act, though 15% have hopes of still receiving some." (1)

(1) George, "Business Adjusts Itself to Robinson-Patman Act", Dun and Bradstreet Monthly Review, Vol.45, No.2108, March 1937, pp. 11-15.

CHAPTER III

Administration

A. Clarification of the Act

Congress laid down certain rules and principles when it passed the Robinson-Patman Act, but the application of these rules to practical business methods was the job of the Federal Trade Commission. It was to the Commission, the administrative and enforcement agency, that business looked for clarification and interpretation of the Act. However, the F T C itself was finding difficulty in interpreting the Act. As an administrative agency, it could not lay down hard and fast rules about enforcement since each case arising under the Act would have to be judged on its own peculiar circumstances and would be subject to court review.

Nevertheless, on August 16, 1936, a contingent of food manufacturers, processors and distributors met with members of the legal staff of the F T C in an effort to clear up some of the fears and misunderstandings that had arisen in the food industry because of the Act. Expressions and opinions were not the official verdict of the government agency, but rather indications of what the F T C was likely to think about when it took up the application of the law.

The food group was led by Gilbert H. Montague, general counsel of the National Food & Grocery Conference Committee and Paul Willis, President of the Associated Grocery Manufacturers of America. Other organizations represented were the National Voluntary Groups Institute, the National Association of Retail Grocers, the National Federation of Wholesale Grocers, Food & Chain Stores of America and the National Retailer

Owned Wholesale Groceries.

The following points were made at the conference:

1. The Act would be enforced with a genuine rule of reason and each case would be considered on the basis of the individual facts presented. It was recognized by the conference that there could not be an exact standard of costs established which could be applied as a yardstick to every deal consummated in the industry since no two accountants were able to study the same set of books and arrive at exactly the same figure of costs for selling the same article.

2. Standard dictionary definitions of terms would suffice, it was decided, and the F T C would not look for hidden meanings in the Act but would be guided by the intent of Congress. For example, a customer could only be the customer of one man; if a retailer bought Maxwell House Coffee from his wholesaler, he could not be said to be a customer of General Foods.

3. The Robinson-Patman Act would not be regarded as a legislative franchise to remodel business--the Commission would not look for trouble and would not use the Act in a campaign to remodel business.

4. It was agreed that not all price discriminations would be unlawful, but all companies, especially those selling to large distributors, would have to be able to justify their discounts on a strict accounting basis in terms of savings in the cost of manufacture, sale or distribution. In all questions concerning the validity of quantity discounts, it was stated that the Commission would insist that a contract with a big customer should carry its full share of the seller's whole overhead. The accepted practice of allowing cash discounts would not be interfered with provided that such

cash discounts be in line with the costs of extending credit.

5. The food men were told the practice of splitting brokerages and rebating brokerages would be definitely forbidden by the Act. However, nothing would prevent a manufacturer from giving a big customer virtually the full brokerage as a discount if this price reduction could be justified by the manufacturer's saving in handling such business direct. The bill, it was stated, did not contain any provision prohibiting buyers from owning stock in a brokerage house; it merely said that if a so-called brokerage company was controlled by the buyer, it would be unlawful for the seller to compensate the brokerage company. The Law, the F T C men pointed out, proposed no interference with the ownership of stock but it did prohibit price discriminations whether given or obtained directly or by subterfuge.

6. The F T C would not look upon wholesalers and retailers as competitors, and, therefore, manufacturers would not be required to deal with both on the same price basis.

7. There would be considerable latitude in interpreting the phrase "proportionally equal terms". A recognition would be made of the fact that some customers would be able to render services that others could not, so that factors of quality of service as well as quantity of allowance would enter into the picture. Flat advertising and promotional allowances, such as those made to chain stores, would no longer be safe, it was decided, for all advertising made through a retailer by a manufacturer would have to be placed on a true cost basis in accordance with the Act.

8. The Commission would not interpret the phrase "available" (Section (d) of the Robinson-Patman Act) to mean that the manufacturer

or processor would need to notify all customers of the fact that he had advertising allowances at his disposal; rather, the phrase would be taken to mean "obtainable" so there would be room in the interpretation of the law to consider the relative merits of claims presented by various customers.

9. Contracts for future delivery would not be invalidated by the Act, the conferees agreed, but all clauses in the agreement which could be interpreted as causing discrimination would be subject to governmental surveillance.

10. It was agreed that in establishing prices on private branded goods supplied to a distributor, manufacturers and processors would be allowed to deduct the cost of advertising their own brands, and justify this discount as a saving in the cost of manufacture, sale or distribution.

11. Free deals, the use of demonstrators and push-money would be subject to the requirement that all allowances and services be made available to all buyers on proportionally equal terms, the conferees decided. (1)

As a result of this conference, the fears of the food industry were somewhat allayed and it began to be felt that the trade would not fare as badly as was thought. It was agreed that answers to questions would have to be gathered over a long period of time from the F T C complaints and court cases and that many parts of the Act would still require clarification. However, the food industry began to breathe more easily and realized that the Robinson-Patman Act would not prove to be a harsh interference with normal business procedure.

(1) "Price Law Looks Less Drastic", Business Week, No. 364, August 22, 1936. pp. 13-15.

B. Duties and Functions of the Federal Trade Commission

The Federal Trade Commission, an administrative body exercising quasi-judicial functions was charged by Congress with the enforcement of the Robinson-Patman Act. The Commission was organized on March 16, 1915 under the Federal Trade Commission Act of 1914. It is composed of five commissioners appointed by the President subject to Senate confirmation. The term of office is seven years and the chairmanship rotates annually so that each commissioner serves as chairman at least once during his term of office. Not more than three of its membership may belong to the same political party.

Up to 1936, the prestige of the F T C was at a low ebb since appointments were invariably political doles and the Commission never received any real support from the administration in power. Its staff was consistently robbed of its more capable men for other more important assignments. Most business men regarded the Commission as another meddling government bureaucratic body. (1)

The duties of the F T C are twofold--enforcement of the laws it administers and general investigations of economic conditions in interstate and foreign commerce undertaken upon presidential order, congressional resolution or upon its own initiative. Laws which the Commission enforces are the Federal Trade Commission Act of 1914 and its amendments, Sections 2, 3, 7 and 8 of the Clayton Act of 1914, the Export Trade Act (Webb-Pomerene Law) of 1918, the Robinson-Patman Act of 1936, the Wool Products Labeling Act of 1939 and the Lanham Trade Mark Act of 1946.

(1) "How F T C Got That Way", Business Week, No. 370, October 3, 1936, pp.17-18.

Sections 6 (a) and (b) of the Federal Trade Commission Act of 1914 clearly define the Commission's powers as follows:

> "(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, excepting banks and common carriers .....and its relation to other corporations and to individuals, associations and partnerships."
>
> "(b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers.....to file with the Commission in such form as the Commission may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management and relation to other corporations, partnerships and individuals of the respective corporations filing such reports or answers in writing....."

When a complaint, supported by evidence of price discrimination and meeting the essential jurisdictional elements of the Robinson-Patman Act, is received by the F T C, it is docketed. An investigation is then initiated by a staff attorney appointed by the Commission's Chief Examiner to determine the facts in the case. A record of the case is drawn up with recommendations as to what action should be taken and is submitted to the Chief Examiner who reviews the case and recommends to the Commission that, (1) the case be closed without further action because of lack of evidence to support the charges or that the complained of practice was not a violation of the Act, (2) the case be closed upon the signing by the respondent of a stipulation of the facts and an agreement to cease and desist from the unlawful practices as charged, or (3) a formal complaint be issued.

Any company wishing to plead guilty to the complaint may be given the opportunity, at the discretion of the Commission, by signing a stipulation in which the respondent not only promises and agrees to cease and disist from the discriminatory practices but also agrees that the admitted facts may be used against him if thereafter the F T C has reason to believe that he is violating the agreement to cease and desist. Generally a stipulation is used when the violation occurs through ignorance or misunderstanding of the law and when the practice will cease once called to the attention of the offender. This method of case disposition becomes part of the public records of the Commission, but all proceedings prior to publication are confidential as is the identity of the complainant.

If, however, a company decides to contest the charge or if the Commission issues a complaint, a public hearing is conducted before a Trial Examiner appointed by the Commission. At this hearing the F T C may use data taken from the respondent company's own private files to prove the charge. Thus, all of the details of a business may become public property. At the conclusion of the hearing, the Commission either dismisses the complaint or issues a cease and desist order which can only be appealed to a United States Court of Appeals. (1)

The possibility of an F T C case disclosing the details of a company's operations and methods has been one of the most influential factors forcing voluntary compliance with the Act. Furthermore, the danger of losing the good-will of customers through disclosure that all were not treated with equal favor has been a deterrent in aiding companies

(1) See any Annual Report of the Federal Trade Commission for a detailed account of its procedure and organization.

to turn down all deals which they would not be willing to explain in detail to all customers and competitors. (1) Again the possibility of triple damage action and financial loss has initiated self-regulation. Finally, the criminal provision of the Act, enforceable by the Department of Justice, makes a violator of the Act liable to a fine of $5,000, imprisonment for one year, or both.

The Commission's policy has been to develop only those cases which will lead to a clarification of the Act involved and which will settle controversial points arising out of the wording of the Act.

The F T C has found that investigations of alleged violations of the Robinson-Patman Act have been more expensive and time-consuming than those made under any other acts administered by the Commission. The technical nature of the Act, the detail required to determine its application and the elaborate cost accounting studies needed to prove price differentials account for this high ratio of time and money. Nevertheless, the Commission has endeavored in view of limited funds and personnel, to confine investigations to matters of substantial importance and to eliminate time and money expenditures investigating cases where preliminary inquiry discloses them to possess little practical importance.

(1) Robinson-Patman Guide Book, American Institute of Food Distribution, 1940, p. 5.

CHAPTER IV

I. Enforcement

A. Brokerage

No other provision of the Robinson-Patman Act has received as much attention or has been as thoroughly tested by judicial review as Section 2 (c), the brokerage provision of the law. Underlying the provision, as administered by the F T C, is the concept of the true merchandise broker. He is defined as an independent intermediary who either furnishes bona fide services to the seller in finding market outlets or represents the buyer in seeking sources of supply and that he retains the fee paid for such services. (1) His primary function is to bring about a purchase and sale for which he is compensated in the form of a brokerage fee received from one party only; thus his fiduciary obligation runs to the principal in whose behalf he acts. Further interpretation by the F T C, sustained by the courts, precludes the buyer or his agent from claiming rendition of services to the seller in connection with his own purchases. (2)

The first enforcement action taken by the Commission was on January 13, 1937, when separate complaints against the Biddle Purchasing Company and the Great Atlantic & Pacific Tea Company were issued. Each case was reviewed by the courts and each became the prototype of one of the two basic groups of later F T C proceedings--those in which an intermediary acted between buyer and seller and those in which the seller dealt

(1) Article III, Section 1, Constitution of the National Food Brokers Association.
(2) Oppenheim, "Administration of the Brokerage Provision of the Robinson-Patman Act", George Washington Law Review, Vol. 8, No. 3, January-February, 1940, p. 512.

directly with the buyer.

The Biddle Purchasing Company operated a combined marketing information and purchasing service for 2400 wholesale food dealers who subscribed to the service, paying $25.00 to $50.00 per month under written contracts. Dealers forwarded orders to the company's buying staff who, in turn placed orders with sellers. Goods were delivered and billed direct to each dealer and brokerage fees were paid direct to the Biddle Company which, in turn, credited this brokerage to each dealer. About 86% of the buyers paid more in subscription fees than was due them in brokerage credits.

The purchasing company claimed it was a true intermediary which could accept compensation from both buyer and seller since both knew of the company's method of operation. The company further claimed that it rendered services to sellers by saving them the expense of dealing with each buyer separately. The Commission concluded that, irrespective of the buyers' and sellers' knowledge, Biddle was the agent of the buyers, acted solely for the buyers and, as such, could not receive fees from sellers. The F T C pointed out that those services which the purchasing company claimed it furnished sellers were incidental to its main function and constituted a necessary part of Biddle's services to its subscribers. The Second Circuit Court of Appeals sustained the Commission's ruling and found that since Biddle passed its brokerage back to its subscribers, it was compensated solely by buyers and therefore, was the agent of buyers and subject to their control. Since the United States Supreme Court refused to grant a writ of Certiorari in this case, the decision stands as

final on this type of brokerage payment. (1)

Before the Circuit Court of Appeals, Biddle urged that Section 2 (c) of the Act was unconstitutional unless the provisions of Section 2 (a) with respect to limitation of competition or tendency to create a monopoly applied also. This argument was rejected by the court which affirmed the contitutionality of the subsection, holding that Section 2 (c) was wholly independent of Section 2 (a) and that consideration of any effect upon competition was immaterial. Congress, the court stated, intended to prohibit the transmission of brokerage from seller to buyer as an unfair trade practice and thus there was no necessity of proving specific injury to competition as would have to be done in every case under Section 2 (a) of the Act. The court, by implication, upheld the entire Act as constitutional, for, if it was held that prohibition of price discrimination via the medium of brokerage payments is constitutional, it inevitably follows that prohibition of direct price discrimination is certainly valid. (2)

The F T C has consistently held the view, which has been sustained without exception by the courts, that an intermediary acting for, or controlled by a buyer, could never render services to a seller.

Cooperative associations were not exempt from the prohibitions of the brokerage section of the Act for the court found in the Quality Bakers Case that neither collective ownership by a large group of buyers, where no buyer could be said to be in control, nor the failure to

(1) Biddle Purchasing Co., et al vs. F T C (CCA-2, 1938) 96 Fed. (2d) 687, affirming Docket 3032--January 13, 1937, cert. denied 305 U. S. 634.
(2) Research Institute of America, Inc., Business Control Coordinator, Vol. 1, 1944, pp. 10, 393.

distribute all brokerage received changed the application of Section 2 (c). (1) In the Webb-Crawford Case the admitted rendering of normal brokerage services by a partnership was held illegal because the partners owned a buying company and served as its officers. (2) In the Modern Marketing Case the courts decided that a contract arrangement licensing the rights to sell a particular brand of food products and the distribution of the license fees to the buyers was a violation of the brokerage section of the Act. (3)

Any connection between brokers and buyers has been closely scrutinized by the F T C in its interpretation of the phrase "except for services rendered". The Commission has maintained, with sustaining opinions by the courts in every instance, that this phrase does not permit payment of brokerage by sellers' agents to buyers' agents or buyers' controlled intermediaries whether the control arises by contract, by stock ownership, by common officers or interlocking directorships, or by any other means, whereby the buyer has the ultimate legal power to control the distribution of the brokerage. Any arrangement wherein brokerage is transmitted by an intermediary to the buyers is deemed a violation of the brokerage section of the Act.

The second basic group of cases arising under Section 2 (c), those in which the seller dealt directly with the buyer, has been largely

(1) Quality Bakers of America, et al v. F T C (CCA-1, 1940), 114 Fed. (2d) 393, affirming Docket 3218--Agust 26, 1937.
(2) Webb-Crawford Co., et al v. F T C (CCA-5, 1940), 109 Fed. (2d) 268, affirming Docket 3214--August 26, 1937.
(3) Modern Marketing Service Inc., et al v. F T C (CCA-7, 1945), 149 Fed. (2d) 970, affirming Docket 3783--May 6, 1939.

concerned with the granting of a net price, allowance or discount in lieu of brokerage.

In its case against the Great Atlantic & Pacific Tea Company, the F T C charged A. & P. with making purchases at net prices and with receiving discounts and allowances which reflected brokerage that would have been paid by sellers to brokers. (1) The Atlantic & Pacific contended that the cost differential provisions of Section 2 (a) must be read with Section 2 (c); and, since the net price reflected a saving in cost to the seller equivalent to the brokerage which he would otherwise have to pay, this saving could be passed along to the direct buyer. The court confirmed the Commission's view that Section 2 (c) was complete and independent and dealt specifically with a particular trade practice deemed by Congress as an unfair method of competition. It was held that brokerage could not be passed on to buyers as a saving in cost whether it be paid directly or in the form of a net price or allowance.

In 1941-42 the Commission issued a number of complaints against wholesalers who served as brokers in selling to small distributors and as wholesalers in selling to retailers. In such transactions, it was the practice to allow the buying broker a commission on his direct purchases as well as on his regular brokerage operations. The Southgate Brokerage Company made all its purchases direct from sellers, keeping 60% for its own account and selling the rest to small distributors. (2) In prohibiting the payment of brokerage on purchases Southgate made for its

(1) Great Atlantic & Pacific Tea Co. v. F T C (CCA-3, 1939) 106 Fed. (2d) 667, affirming Docket 3031--January 3, 1937, cert. denied 308 U. S. 625.
(2) Southgate Brokerage Co., Inc. v. F T C, (CCA-2, 1945), 105 Fed. (2d) 607, affirming Docket 4821--August 5, 1942.

own account, the F T C and the courts maintained that lack of discriminatory effect among buyers was irrelevant due to the independence of subsection (c) and that, on no account, could a buyer render service to a seller or be paid by a seller.

The most recent case attracting nation-wide attention, involving practices expressly prohibited by subsection (c), was the Sherman Anti-Trust Act suit against the A. & P. (1) The court found that the Company wrung price concessions from manufacturers and packers while the Atlantic Commission Company, a wholly owned subsidiary of A. & P., acted as selling agent for the manufacturers involved, that the Atlantic Commission Company sponsored cooperative associations of producers and growers dominated by A. & P. personnel, and that the commission company acted as a buyers' broker, a sellers' broker and a direct buyer for A. & P., all at the same time. By reason of these and other practices the court found the company guilty of violating the Sherman Act.

After twelve years of enforcement, the F T C's interpretation of Section 2(c) is clear. The phrase, "except for services rendered", indicates that if there be compensation to an agent, it must be for bona fide brokerage. A seller or buyer may compensate a broker for services rendered but an agent cannot serve two masters.

It may be taken as settled that the brokerage of the Act unconditionally prohibits:

1. The payment or allowance of brokerage to buyers on their purchases either directly to them or through their agents.

(1) U. S. v. New York Great Atlantic & Pacific Tea Co., et al, (D. Ct. E. Ill., 1946), 67 Fed. Supp. 626.

2. The payment of brokerage to intermediaries who act for buyers and are controlled, however indirectly, by buyers even though some type of service is rendered to sellers.

3. The application of the "services rendered" phrase to buyers, their agents or controlled intermediaries and in no way does it allow a condition where brokerage may be paid in any form to them.

4. The reflection of brokerage by a seller, who ordinarily uses brokers, to a direct buyer in the form of a net price, an allowance or discount.

5. The payment of brokerage to a buying broker on those purchases made for his own account.

6. The application of the cost differential and competitive effect provision of Section 2 (a) of the Act to Section 2 (c).

7. The application of the cooperative association exemption proviso of Section 4 to Section 2 (c).

This conception of the brokerage provision of the Robinson-Patman Act has immeasurably strengthened the position of the independent food broker. It has forced the buying broker to decide whether he wants to be exclusively a broker or a buyer. It has brought about the dissolution of many long established marketing information and buying service companies. It has also forced many manufacturers and processors of food to use brokers exclusively or to sell direct so that they can justify price differentials on the basis of cost. All price concessions granted via the medium of brokerage payments that prevailed in the food industry prior to the enactment of the law were declared illegal and thus placed the independent wholesaler and retailer on firmer, more equitable competitive ground.

B. Price Discrimination

In the enforcement of the prohibitions of price discrimination outlined by the Robinson-Patman Act, the Federal Trade Commission has been concerned with price differentials that were contained in quantity discount scales, cumulative or volume discount concessions and erroneous functional discount classifications and differences disguised by private brands and package sizes. In every case that price discrimination occurred between two or more customers of a given seller, the Commission had to show that the commodities involved were of like grade and quantity and that there was competitive injury as a result of the practice employed. Respondents could justify differentials based on differences in manufacturing or distribution costs, changing market conditions or competition. Despite these conditions, the F T C issued 158 complaints as of January, 1949.

The first three discrimination complaints instituted by the F T C not only showed that cost justification and the meeting of an equally low price of competitors would receive favorable consideration, but also indicated that, in interpreting the requirement of injury to a competitor, the Commission would allow considerable latitude in the framing of business price policies.(1)

However, many complaints have disclosed illegal discriminatory practices and the Commission has issued cease and desist orders affecting many industries. In the Hollywood Hat Company Case, the F T C found that

(1) "The Effect of the Robinson-Patman Act on the Work of the F T C: The Control of Price Discrimination", Harvard Law Review, Vol. 54, No. 4, February, 1941, pp. 674-5.

the company sold hats to its largest customers at prices from $3.00 to $6.00 a dozen lower than it sold to its "ordinary" customers; both types of customers were competitors. (1) The company was ordered to cease and desist from this practice when the differentials could not be accounted for by differences in the cost of manufacture, sale or delivery. Discrimination was charged against Standard Brands because of unjustified differentials in its quantity discount sale of bakers' yeast. (2) The company contested the Commission's cease and desist order claiming that differences in price were justified by cost savings but the F T C reaffirmed its order and pointed out that Standard Brands' cost defense was inadequate to justify price dissimilarities. This case brought to the fore the accounting problems introduced by the Law and its emphasis on distribution cost accounting.

Price discrimination by manufacturers in favor of large buyers was repeatedly exposed by the Commission. A manufacturer of mayonnaise and food extracts was ordered to cease granting to certain chain stores and to wholesalers associated under a common name preferential discounts not given to other customers and not justified by savings in costs. (3) A candy manufacturer was ordered to cease making sales to large chain purchasers at prices different from those charged other customers, the differences not being in accord with differences in cost of manufacturing, selling or delivery. (4) Price discrimination in quantity discount scales was also found to exist in the sales of a packaged bakery products manufac-

(1) Hollywood Hat Co., Inc., Docket 3020--December 23, 1936.
(2) Standard Brands Co., Docket 2986--November 21, 1936.
(3) C. F. Sauer Co., Docket 3646--November 11, 1938.
(4) Life Savers Corp., Docket 4057--August 8, 1941.

turer in favor of large buyers. (1)

The so-called cumulative discount is one in which a customer is given an allowance on the basis of his total purchases made during a specific period of time, or is granted a percentage rebate of his purchases in the event of purchasing a certain volume in a given period irrespective of the number of orders given during the period. (2) The mere fact that a buyer has purchased a large quantity of goods in numerous small transactions, the F T C stated, does not prove a saving to the seller which can be legally passed to buyers by way of lower prices. In the Anheuser-Busch case the company was charged with discrimination by selling bakers' yeast to its customers on the basis of total consumption irrespective of the number of individual deliveries made. By this method of granting discounts an independent, located in the same area as one plant of a large chain bakery, might have received the same quantity of yeast as the branch plant but was obliged to pay more for the yeast. (3)

In the Brill Company case, the company allowed certain chain stores rebates amounting to approximately 2¼% of the chains' annual purchases of the product. (4) The F T C pointed out that most food chains operated on a marginal profit of 1½ to 2% and a rebate of 2¼% actually represented in many cases the difference between profit and loss. Moreover, in sales to chains, the seller regarded each warehouse as an individual customer, both as to sales effort and shipment of merchandise, so there

(1) National Biscuit Co., Docket 5013--July 20, 1943.
(2) Ostlund, "The Robinson-Patman Act and Quantity Discounts", The Accounting Review, Vol. 14, No. 4, Part I, December, 1939, p. 403
(3) Anheuser-Busch Co., Docket 2987--November 21, 1947.
(4) H. C. Brill Co., Docket 3299--January 20, 1938.

could not be any cost justification for the practice. Rebates, bonuses and discounts dependent upon quantities purchased in specific size shipments within specific periods of time were considered unlawful discrimination in the Curtiss Candy Company case. (1) The use of so-called "split business" discount by salt companies was ordered to cease when it was found that discounts were based on total requirements of a customer and not on the actual quantity purchased from any one source. (2)

Discounts resulting in competitive injury that arose from erroneous functional or trade classification of buyers was another manifestation of unlawful discrimination. The Robinson-Patman Act makes it necessary for a seller to be aware of to whom his customers resell in order that the functional discounts he grants do not result in injury to competition. In the case involving four manufacturers of fertilizer the F T C found that there were few jobbers in the industry that sold exclusively to dealers and that distributors, called jobbers, sold both to users and to dealers. (3) An F T C order required manufacturers to cease and desist from selling combination dealer-jobbers at jobbers' prices, except as to that portion which was resold to dealers, and to charge dealers' prices for that portion sold at retail. In a series of cases involving five cigarette companies and later, a candy company, the F T C ordered the respondents to cease and desist granting a discount to vending machine operators while refusing similar discounts to competing

(1) Curtiss Candy Co., Docket 4673--January 21, 1942.
(2) International Salt Co., et al, Docket 4307--September 9, 1940.
(3) Agricultural Laboratories, Inc., Hansen Inoculator Co., Urbana Laboratories, Inc., and Nitrogen Co., Inc., Docket 3263, 3264, 3265, and 3266 respectively--November 13, 1937.

retail distributors. (1)

Complaints charging discrimination because of sales made to buyers at prices not in accord with sound discount schedules have also been issued by the F T C. A packer of fruits and vegetables was ordered to discontinue price discrimination via the medium of three different price lists. (2) The lists, based on true cost savings, established prices which varied with quantities purchased. But it was found that the packing company sold to some purchasers at prices set by one list when the purchaser did not buy in sufficient quantities to qualify for that particular list.

When buyers are unwarrantably charged different prices for identical goods with no attempt to disguise the differential, a simple case of illegal discrimination can be demonstrated. But the F T C has brought to light a few rather ingenious methods of obscuring price dissimilarities. One of these devices is the sale of goods of the same grade and quality under different brand names at varying prices. (3) Another method was disclosed when a company, selling corn syrup, instituted several types and sizes of containers, the use of which so affected the cost of manufacturing candy, that competition was substantially lessened. (4)

In all the complaints investigated, the Federal Trade Commission has declared that a price dissimilarity is not valid or invalid in itself.

(1) P. Lorillard Co., Brown & Williamson Tobacco Corp., R. J. Reynolds Tobacco Co., and Larus & Brother, Inc., Docket 3912, 3913, 3914 and 3915, respectively--November 5, 1939.
Philip Morris & Co., Ltd., Docket 3919--November 7, 1939.
Walter H. Johnson Candy Co., Docket 4677--January 22, 1942
(2) Curtice Bros. Co., Docket 3381--April 23, 1938
(3) Continental Baking Co., Docket 4149--May 31, 1940.
(4) American Maize-Products Co., Docket 3805--June 1, 1939.

In order for a discrimination to be unlawful, it must be shown that, because of an unwarranted price advantage given to one customer, another customer was placed at a competitive disadvantage. If, however, there was cost justification for the practice or if the price difference was made in accord with those circumstances provided by the Robinson-Patman Act, the differential was deemed legal. Each case heard by the Commission has been judged on its own peculiar merits after a thorough investigation of all the circumstances involved.

The Act threw a spotlight on distribution cost accounting, a branch of accounting that was the least developed and probably the most difficult.

> "Few, even of the large and important companies, have yet worked out and installed cost accounting systems which, for purposes of defense under the Robinson-Patman Act, are sound and adequate in their conception and at the same time suitable and practicable for the everyday use of the individual business concern." (1)

Distribution cost accounting is a field where there is, as yet, no established and indisputable technique or procedure as compared with the field of production cost accounting. Inquiries made by the F T C in 1940 and 1941 disclosed a striking lack of proper distribution data in industry throughout the country, as shown by the following statement:

> "It became evident early in the Commission's inquiry into distribution cost accounting that there is a dearth of good case material. This situation is the result of the fact that until recently little attention has been given to this branch of accounting. The methods that are in use are undergoing change. This evolution is due, in part,..... to a greater social control, as expressed in recent

(1) Federal Trade Commission, Annual Report, June, 1938, p. 10.

legislation, to comply with which additional information is necessary" (1)

The Commission has rejected as unsound a number of cost reports advanced in defense of alleged price discriminations for the reason that costs had not been properly developed. It has insisted that cost allocations must be based on actual experience and on a reasonable, sound and adequate basis. Consequently, the Robinson-Patman Act has made business men in the food distribution industry, and in all other industries as well, look into the price labyrinth and develop better cost accounting methods to find out what they are doing, if for no other reason than to be able to justify any deal. The Act has brought home with decided emphasis to business the realization that distribution costs are important so as to be able to select those commodities, quantities, markets and channels of distribution which will result in the largest net profit possible.

This report will not touch upon the multiple basing point system since the Supreme Court's decision in the Cement Case has created an air of confusion. Congress has told the F T C to maintain a "hands off" policy pending a Congressional inquiry and necessary legislation. Suffice it to say, that the Cement decision showed that the cement companies violated Section 2 (b) of the Act by receiving more from some customers than from others. Apparently this decision outlaws phantom freight, any type of basing point system--single or multiple--and zone delivered prices (lead industry case now up before the Supreme Court). A seller may shrink his mill net to meet the freight advantage of a competitor. But this is

(1) Federal Trade Commission, Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling, House Document No. 287, 77th Congress, June 23, 1941, p. 12.

applicable only to an individual competitive situation and apparently, cannot be construed as legal if used as a regular pricing system by a whole industry or an individual. Irrespective of future Congressional action, this particular decision does not possess as many ramifications upon the food industry as it does upon the heavy, basic industries of the nation.

C. Allowances and Services

Still another favored medium for the granting of unlawful discriminations was the practice of large buyers to demand, and their sellers to grant, special allowances in payment for purported advertising and sales-promotional services which the customers agreed to render the seller. These allowances and services became unjust when they were not rendered as agreed and paid for, or when, if rendered, the payment was grossly in excess of the received value, or when an allowance or service granted one customer gave him an unwarranted competitive advantage over another customer who was not permitted to enter into a similar sales-promotional agreement. The Act attacked these evils by prohibiting the granting of such allowances and services except when made available to or accorded all competing customers on "proportionally equal terms". The latter phrase was designed to preserve equal opportunity in the channels of distribution by protecting the small dealer. This proviso made it illegal to limit allowances and services to a few customers on the ground that they alone could furnish the desired services and to refuse them to competing customers who were able to furnish services of the same relative value but in less quantity. The Act also condemned a promotional

agreement unless it was a true, reasonable and earned payment for a bona fide service. (1)

The first case to be settled by the F T C involved payments of royalties by manufacturers of golf balls and their association to the Professional Golfers Association for the privilege of using the letters "P G A" on golf balls. (2) The Golfers Association used the royalties for advertising, promoting and creating consumer preference for golf balls so marked and distributed by P G A retailers. The Commission held that such payments constituted discrimination against those retailers who did not sell that particular brand and as a result, placed these retailers in an unfavorable competitive position. In another case, a canning company was charged with allowing certain grocery companies varying amounts per case for advertising the canner's cranberry sauce under private brand names and refusing any payments to other grocers selling the respondent's sauce under different private brand names. (3) In the Grabosky Brothers Case the company was ordered to cease and desist allowing discounts to chain stores under an agreement whereby the retail units of the chains provided sales promotional display services for the company. (4) Other customers who were in competition with the chains were not accorded similar agreements on proportionally equal terms.

The Federal Trade Commission has pointed out that a manufacturer or distributor can equally proportionallize the payments for sales promo-

(1) Dunn, "Section 2 (d) and (e)", Robinson-Patman Act Symposium, Commerce Clearing House Inc., January 23, 1946, pp. 55-73.
(2) Golf Ball Manufacturers Association et al, Docket 3161--June 30, 1937.
(3) Cranberry Canners, Inc., Docket 4637--November 14, 1941.
(4) Grabosky Brothers, Inc., Docket 4740--March 26, 1942.

tional services between competing customers in either of two ways; first, by making the same payment for a similar service to every customer willing to render the service, and second, through uniformly measuring this payment by a reasonable standard of the relative marketing value of that service to him in each instance. One such standard could be the volume of sales of his product to buyers--payments as a percentage of sales. (1)

A complaint involving the use of advertising payments as a subterfuge for price concessions was issued against the Miami Wholesale Drug Corporation. (2) The company and six individuals, operating under the name of the "Miami Magazine", induced sellers to contract for advertisements to be inserted in the magazine with the understanding that the advertising charges would be credited to purchases made at the drug company. Since the magazine was operated as a subterfuge and had no substantial advertising value, this method of obtaining price concessions was ordered to cease.

Complaints involving the granting of free goods and other gratuities by sellers have been investigated by the F T C. In the Republic Yeast Corporation case, the Commission ordered the company to cease delivering large quantities of yeast as additions to orders of favored customers at no charge resulting in a 5% lower cost to the buyers so favored. (3) An order for the National Grain Yeast Corporation to cease and desist from offering gratuities, consisting of liquor, tobacco, meals, money, entertainment and other personal gifts, to employees of

(1) Dunn, op. cit. p. 71.
(2) Miami Wholesale Drug Corp., et al, Docket 3377--April 11, 1938.
(3) Republic Yeast Corp., Docket 4367--October 30, 1940

baking companies was issued. (1) In the Continental Baking Co. case, the F T C ordered the company to cease inserting, in the wrappers of bread, coupons redeemable in merchandise or cash for the face value by the company to buyers. (2)

The application of the phrase, "proportionally equal terms", came to light in the F T C investigation of the use of demonstrators by distributors of toilet goods and cosmetics. (3) In the Elizabeth Arden case, the Second Circuit Court of Appeals upheld the Commission's findings that the demonstration allowance was in reality a discount, which was actually based on volume of net annual purchases, and that every store, regardless of its prestige, location, volume, and equipment was entitled to receive the same percentage discount or, as an alternative, be supplied with the services of a demonstrator for a period commensurate with the value of the allowance to which it was entitled. (4)

The Robinson-Patman Act does not prohibit the various sales-promotional devices as such but it does set down certain conditions which must be met if the particular type of allowance or service employed is not to be deemed a discrimination in violation of the Act. These conditions prohibit sellers from making available any sales-promotion services unless they are true, reasonable and earned payments for services actually rendered, and unless they have been made available to all buyers competing in the distribution of such products on proportionally equal terms.

(1) National Grain Yeast Corp., Docket 3903--September 29, 1939.
(2) Continental Baking Co., Docket 4149--May 31, 1940
(3) Carter, "Validity of the Demonstrator Practice Under Section 2 (d) and (e), Robinson-Patman Act Symposium, Commerce Clearing House, Inc., January 23, 1946, p. 93.
(4) Elizabeth Arden, Inc. v. F T C (CCA-2, 1946) 156 Fed. (2d) 132, affirming Docket 3133-May 15, 1937, cert. denied 67 SC 1189.

CHAPTER V

I. Industry Opinions

During September, 1948, questionnaires were mailed to 750 organizations in the food industry to obtain the opinion of those actively engaged in the field regarding the Robinson-Patman Act and its effect on the food industry. Although only a 26.4% response was received--considered by many to represent an average return--the respondents clearly indicated the attitude of the food industry toward the Act.

Stratified random sampling was undertaken since this method tied in with the use of mail questionnaires and the date available concerning one portion of the universe, viz., food retailers. The 1939 Census of Business was used to establish the ratio of food retailers in each state to the national total. This ratio, applied to the 500 Questionnaires allotted to food retailers, then gave the number of questionnaires to be sent to retailers in each state. Using these resultant figures as a base, one-fifth and one-tenth as many questionnaires were allotted to wholesalers and brokers respectively in each state. Questionnaires to be forwarded to food manufacturers were based on the importance of food manufacturing in each state limited in number only by the total number of brokers selected. With the addition of a few important food trade associations, the total sample numbered 750. Within the numerical limitations for each stage of the food distribution system in each state, names and addresses were selected at random from the Thomas Wholesale and Kindred Trade Register, 44th Annual, 1940, and the Thomas Register of American Manufacturers, 37th Edition, 1946.

The questionnaire was designed not only to elicit industry opinions on the effects each important section of the Robinson-Patman Act had on the food industry, but also to prove or disprove the early fears and ill omens predicted for the industry. Only seven multiple choice type questions were included and it was possible for more than one answer to be given to many questions. In addition, space was provided for respondents to better express opinions not covered by the few questions. The many comments made in this section by respondents proved most enlightening--comments that could not possibly be elicited by any type of formal questioning via mail.

QUESTIONNAIRE

EFFECTS OF THE ROBINSON-PATMAN ACT ON THE FOOD INDUSTRY

Please indicate by a check, the answer you personally believe to be correct.

1. Did the Robinson-Patman Act

_____ Eliminate price discrimination abuses?
_____ Drive price discrimination abuses under cover?
_____ Concern itself with non-existent price abuses?
_____ Introduce new price abuses not covered by the Act? If so, please describe briefly_____
_____
_____
_____

2. Concerning brokerage allowances, did the Robinson-Patman Act

_____ Eliminate unfair allowances?
_____ Curtail the use of unfair allowances?
_____ Have no effect on the use of unfair allowances?
_____ Give rise to new methods of securing unfair brokerage? If so, please describe briefly_____
_____
_____
_____

3. Concerning quantity discounts, did the Robinson-Patman Act

_____ Tighten functional discounts?
_____ Reduce quantity discount spreads?
_____ Simplify manufacturers' and wholesalers' price structures?
_____ Simplify customer classification
_____ Have no effect on them?

4. Concerning promotional allowances, did the Robinson-Patman Act

_____ Place them on a true cost basis?
_____ Cause strict accountability for performance of advertising services?
_____ Place them on "proportionally equal terms" to all customers?
_____ Curtail their use?
_____ Have no effect on them?

5. In stimulating the use of private brands, was the Robinson-Patman Act

_____ A major influence?
_____ A minor influence?
_____ Of no influence whatsoever?

6. What effect do you think the Robinson-Patman Act has had on the food industry?

_____ No effect.
_____ Bad effect. If so, please describe briefly_____
_____
_____
_____
_____
_____ Beneficial effect. If so please describe briefly_____
_____
_____
_____
_____

7. Do you think that the Robinson-Patman Act should be changed?

_____ No.
_____ Yes. If so, in what way?_____
_____
_____
_____
_____

8. What favorable or unfavorable comments do you wish to make concerning the entire Robinson-Patman Act, any of its sections or any of its effects on the food industry? Any comment will be greatly

appreciated!

Name
Firm
Position

Over 30% of the questionnaires mailed were returned but, since many did not answer the questions and only made some general remarks, the returns used for analysis constituted a 26.4% return. Almost three-fourths (72.7%) of the trade associations responded, whereas only a fourth of the retailers and manufacturers (24.5% and 24.0%, respectively) returned questionnaires. Geographically, the Pacific Coast states had the greatest proportion of respondents (49% of the questionnaires mailed were returned) whereas the Mountain States had the poorest return (8.7%). Both the New England and Middle Atlantic Regions showed returns above the national average, 47.5% and 29.1% respectively.

Table 3

Mail Questionnaire Response by Business Function

Business Function	Mailed	Returned No.	Returned %
Associations	11	8	72.7%
Manufacturers	50	11	24.0
Brokers	60	20	33.3
Wholesalers	114	33	28.9
Retailers	515	126	24.5
	750	198	
Total Average			26.4%

Table 4

Mail Questionnaire Response by Regions (1)

Region	Mailed	Returned No.	Returned %
Pacific	53	26	49.0
New England	57	27	47.4
Middle Atlantic	182	53	29.1
West South Central	65	17	26.2
East North Central	136	29	21.3
South Atlantic	97	20	20.6
East South Central	53	10	18.9
West North Central	66	8	12.1
Mountain	23	2	8.7
Total	750	198	26.4%

Approximately two-thirds (66.1%) of the responding firms felt that the Robinson-Patman Act was a good law and had benefited the food industry. Retailers were not quite as convinced that it was a beneficial law as were other members of the industry, while all associations stated that it was a good law. Little more than a third suggested that the law be changed with retailers again being predominant in this group. A frequent retailer-suggested amendment was to "remove manufacturers from the field--force a company to stay in one field", while most retailer-sponsored changes suggested "taking out Sections 2 (c), (d), (e) and (f)". Wholesalers, who voiced dissatisfaction with the present law, suggested that the law "should be changed to prohibit big fellows from selling merchandise below cost to eliminate the small fellows" and should also "prohibit manufacturers from allowing special discounts and allowances on extremely large purchases that only big fellows can take advantage of".

Little more than half of the industry (56.3%) felt that the

(1) Regional breakdown of the U. S. based on identical divisions used by Bureau of the Census.

Act eliminated price discrimination abuses. Evidently, discriminatory practices were still in effect either by being driven under cover (22.5% felt so) or by the rise of new abuses not covered by the Act.

Table No. 5

EFFECT OF ROBINSON-PATMAN ACT ON FOOD INDUSTRY--INDUSTRY OPINION

	No. of Respondents	No Effect	Bad Effect	Beneficial Effect	Total
Retailers	58	18.4	29.9	51.7	100.0%
Wholesalers	25	4.0	24.0	72.0	100.0
Brokers	13	7.7	15.4	76.9	100.0
Manufacturers	11	0	9.9	90.1	100.0
Associations	8	0	0	100.0	100.0
Average		11.3%	22.6%	66.1%	100.0%

Apparently the Act was successful in eliminating or curtailing unfair brokerage allowances since three out of four felt either one to be the case. Retailers, who would know less about and are least affected by brokerage, were more emphatic than other members of the industry in stating that the Act stopped or curtailed brokerage abuses. Many respondents were quick to spot new methods of unfair brokerage developed under the Act; most of these pointed to the methods used by the A. & P. as uncovered in the recent Sherman Act case. (1) Other devices were "selling direct to large buyers at cheaper prices, eliminating brokers", "receipt of additional fees in lieu of specialty work, expense accounts or advertising", and according to a manufacturer "selling direct by many in the canning industry--using no brokers".

(1) See Chapter IV, p. 43 above.

Table No. 6

EFFECT OF THE ROBINSON-PATMAN ACT ON UNFAIR BROKERAGE ALLOWANCES

	Retailers	Wholesalers	Brokers	Manufacturers	Associations	Average
Eliminate	20.0%	25.7%	27.3%	40.1%	40.0%	25.2%
Curtail	54.1	51.4	50.0	33.3	40.0	50.4
No Effect	7.0	2.9	0	13.3	20.0	6.4
New Methods of securing unfair allowances	18.9	20.0	22.7	13.3	0	18.0
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

When it came to quantity discounts, practically all respondents felt that the Act made some marked effect upon tightening functional discounts, reducing quantity spreads and simplifying price structures and customer classification at manufacturer and wholesaler level. Although each group in the food industry seemed to place emphasis on a different effect, nowhere else in the questionnaire was there such unanimous opinion as to the effects of the Act.

Table No. 7

EFFECTS OF THE ROBINSON-PATMAN ACT ON QUANTITY DISCOUNTS

	Retailers	Wholesalers	Brokers	Manufacturers	Associations	Average
Reduce quantity spreads	73.2%	51.5%	70.0%	72.7%	50.0%	66.8%
Simplify mfgrs' and wholesalers' price structures	51.1	70.0	75.0	54.5	100.0	61.0
Simplify customer classification	52.5	48.5	55.0	36.3	25.0	49.4
Tighten functional discounts	30.2	63.6	65.0	72.7	75.0	47.4
No effect	18.3	17.1	10.0	36.3	37.5	18.8

Totals - do not add to 100% as most respondents answered more than one question.

Although the Act has apparently made manufacturers cognizant of their promotional costs and the value received for such, a large number of manufacturers (27.3%) still felt that the Act had no effect on promotional allowances. In fact, three out of ten respondents felt the same way. While the Act was intended to prevent abuses by causing strict accountability for performance of services and placing them on proportionally equal terms--the majority of the industry felt that such was accomplished--and not to decrease the amount of legal promotional services offered, over a third of the respondents felt that the Act curtailed promotional allowances. Apparently the outlawing of illegal allowances and the awakening of manufacturers as to value received for services rendered, assuredly reduced these allowances.

Table No. 8

EFFECTS OF THE ROBINSON-PATMAN ACT ON PROMOTIONAL ALLOWANCES

	Retailers	Wholesalers	Brokers	Manufacturers	Associations	Average
Strict accountability for performance	66.2%	56.3%	75.0%	45.5%	25.0%	61.5%
Placed on proportionally equal terms	45.5	68.8	55.0	54.5	25.0	51.0
Placed on a true cost basis	22.1	37.5	55.0	18.2	50.0	31.1
Curtailed use	40.4	18.8	30.0	36.3	50.0	34.5
No effect	26.0	25.0	50.0	27.3	37.5	30.0

Totals - add to over 100% as most respondents checked more than one item.

The argument that the Robinson-Patman Act, by seriously affecting price and promotional allowances, would give great impetus to the promotion of private brands at the expense of national brands was

not only disproved by leading authorities in the past, but also by the respondents to the questionnaire now under discussion. Less than a fifth of the respondents felt that the Act was a major influence in stimulating private branded merchandise while the remaining respondents were equally divided as to whether the act exerted a minor or no influence on private brands.

Table No. 9

EFFECT OF ROBINSON-PATMAN ACT ON STIMULATING THE USE OF PRIVATE BRANDS

	No. of Respondents	Major Influence	Minor Influence	No Influence	Total
Retailers	74	12.2%	52.7%	35.1%	100.0%
Wholesalers	26	34.6	46.2	19.2	100.0
Brokers	17	29.4	29.4	41.2	100.0
Manufacturers	10	10.0	0	90.0	100.0
Associations	8	0	25.0	75.0	100.0
	135				
Average		17.8%	43.0%	39.2%	100.0%

The last portion of the questionnaire was left blank for whatever comments respondents thought applicable. Most of the comments were extremely partial toward the Act, thereby offering further proof of the beneficial aspects of the Robinson-Patman Law.

Retailers wrote that the Act "had a good moral effect--eliminated flagrant abuses and favoritism", "has eliminated unfair trade practices and placed competition on a more equitable basis", "has no doubt stopped some of the worst special discounts and allowances" and finally, "a step in the right direction.....you must have rules to play by". A few felt that "laws like the Robinson-Patman Act kill initiative; it is not a bad idea for manufacturers to have freedom in offering advantages to people that cooperate with them, but if the ones who cooperate are

penalized and the non-cooperative ones benefit to the same extent, then the system breaks down". Others felt that "smaller stores that fail usually fall by the roadside because of insufficient financing, lack of knowledge of the business, lack of attention to duties and responsibilities, etc., and not because they have to pay 75¢ a dozen whereas their competitor got it for 72¢ a dozen".

Very few manufacturers, brokers and wholesalers made adverse criticism of the law in the section set aside for comments. Of the few adverse criticisms voiced by manufacturers, the following statement seemed to echo the classical economists:

> "the law is detrimental because larger chains and cooperatives sell food cheaper, thereby benefitting 140,000,000 people while the law protects 5,000 jobbers! The best for most people!"

Many manufacturers felt that the Act "stopped a lot of chiseling, rebates and brokerage payments to buyers", "helped equalize the picture" and "cut out the advantages that the big buyers held unfairly".

Comments by brokers on the effects of the Act showed that it "stabilized the industry by curtailing a definite trend toward monopoly in production and distribution", benefited the consumer "by forced competition in quality and price" and by the elimination of "extra handling charges and fees added to final costs", and finally, gave "the little fellow a chance to exist and eliminated kick-back money in large volume to big buyers".

Wholesalers declared that the law "helped in a way for smaller wholesalers or individual merchants to buy merchandise on a more equal basis compared to purchases made by big fellows", "opened independents' eyes to allowances available" and "gave manufacturers better control of

sales of merchandise".

An excellent observation, a tribute to the Act and to the Commission, which appears to sum up, in general, the opinion of the entire food industry was voiced by a canner who stated that,

> "The Robinson-Patman Act, in our opinion, is an excellent piece of legislation and was long overdue at the time it was enacted to correct grave trade abuses. Its general purpose was to eliminate the securing of unfair price advantages by larger distribution units. In general, these discriminatory lower prices were secured, not because of savings in costs of doing business with the mass distributors, but because of the tremendous purchasing power they had, used as a club to secure discriminatory treatment."

> "Over a period of years, the F T C has slowly, but steadily, proceeded to enforce the provisions of the Act. It appears to us to be doing a good job in gradually overtaking and putting a stop to trade abuses in many lines of business endeavor."

CHAPTER VI

Summary and Conclusions

The essence of the Robinson-Patman Act is the prohibition of all price discriminations in any form--allowances, services, discounts, rebates, etc.,--that are not based on cost differences in the manufacture, sale or delivery of commodities or that are not available on proportionally equal terms to all buyers.

Before determining whether the competitive position of the smaller food distributors is firmer as a result of the abolition of the discriminatory practices that existed prior to the Act, it would be well to ask what part these special discounts and allowances played in the consistent ability of chains and other mass distributors to undersell independent wholesalers and retailers. The Final Report on the Chain Store Investigation, submitted by the F T C to Congress in December, 1934, and used as factual ammunition by the advocates of the Act, showed, that of the 1.73% by which independent's cost of merchandise exceeded that of chains, only 0.45% could be traced to special concessions. (1) Since only 16.4% of the independent's higher selling price was the result of greater cost--83.6% caused by higher gross margin--the chains would still continue to undersell the independent even if the entire difference in merchandise cost were eliminated. (2)

As a result of the Act, the Federal Trade Commission has demonstrated the illegality of many of the practices that prevailed in

(1) Phillips, "The Robinson-Patman Anti-Price Discrimination Law and the Chain Store", Harvard Business Review, Vol. XV, No. 1, Autumn, 1936, p.63.
(2) Ibid., p. 64

the food distribution system prior to June 19, 1939. Sellers, because of large-order pressure, are no longer able to load their unabsorbed costs onto less powerful and smaller customers. Special concessions cannot be granted arbitrarily to certain customers and not to others. All buyers, whether large or small, must be treated alike, and all must bear their proportional share of the cost of the seller's operations. Unfair brokerage allowances, fees and rebates are outlawed as unfair methods of competition. Advantages resulting in large distributors being able to draw more trade must be made available to small distributors on proportionally equal terms. The small buyer can insist that he be treated fairly; he can demand that the game be played impartially; he can legally force a seller to discontinue any deals which discriminate against him and injure competition. In that unjustifiable concessions are outlawed, independents do stand on firmer and stronger competitive grounds.

The Act has had many effects on the food distribution system. It has forced men to delve into the price labyrinth to find out what they were doing. Accounting methods had to be surveyed to determine distribution costs in order to judge whether differentials were warranted by cost and whether various price and promotion policies were sound. This scrutiny not only eliminated many discriminatory practices, but also produced greater efficiency.

This housekeeping by manufacturers and distributors has reduced swollen quantity discount schedules to a point where discount spreads are in line with economies secured from sales in quantity lots. It has brought about the discontinuance of those cumulative discount

rebates not based on costs and has eliminated unwarranted concessions based on total volume purchased in a given period of time to the benefit of the particular companies involved. The selection and classification of customers according to the trade functions performed is no longer a careless act, but is an operation executed with greater prudence and caution to insure price differentials being lawful. The law allowed many sellers an opportunity to revamp price and sales promotional policies which were undesirable though not necessarily in violation of the Act. Advertising allowances and services are not indiscriminately granted but are made with an eye on the "proportionally equal terms" phrase of the Act. The furnishing of free deals, gratuities, demonstators, etc., has been limited. The practice of using separate contracts for promotional and advertising services has been adopted, and manufacturers now insist upon strict accountability for the performance of such services. The payment of brokerage commissions in any form or by any means to buyers or to buying-brokers on that share of goods bought for their own account has been outlawed. The provision of the law which makes the buyer equally liable with the seller for knowingly inducing or receiving unlawful concessions has been effective in eliminating discriminatory abuses. Purchasers must be certain before completing any deal that the same arrangements are available to all other buyers on proportionally equal terms. Hence, a seller is better able to protect himself from the demands for sacrificial price cuts coming from the most voracious buyers. In addition, the fear that a firm's complete business activities may be aired at public hearings on a Federal Trade Commission complaint has been an effective device in deterring discriminatory

practices. The law, therefore, has had beneficial effects on the food distribution system, not only because it has produced fairer competition, but also because it has emphasized greater knowledge of costs and prices and has made necessary a broader prospective of the whole distribution system on the part of each member of the system.

The Act has certainly not been the panacea some claimed it would be and it has not equalized the chains and the independents. The small buyer can neither receive the same quantity discount on purchases nor advertise as extensively as larger competitors; and the prohibition of unfair discriminations cannot conceivably place the small distributor on an equal plane with the mass distributor. If all buying advantages held by the mass food distributors were wiped out, they could still undersell the independents because of savings obtained through integration, specialization, and greater efficiency. The law does not aim to level the advantages resulting from efficiency; it merely seeks to prevent the enterprise thus favored from exploiting its advantages to the point of injuring or destroying competition. A premium is still placed on efficiency and that firm which is the most progressive and most efficient can still maintain its position in our competitive society. The small wholesaler and retailer must bend every effort to be as efficient as possible and must exploit to the best of his ability his own peculiar advantages such as personal contact with customers, service, credit extension, progressive merchandising of perishables by retailers, flexibility of operation, etc.

Apparently the Act had little or no effect upon the growth of private branded merchandise. The desire of distributors to have

control over their market, the greater profits involved, the rise and fall of private brands in the downward and upward trend of prices respectively, consumer preference, scarcity of materials during the war, etc., have all affected the growth of private brands. There are far too many factors involved to point to one and say that it is the major factor.

Likewise, there is no evidence that the Act stimulated vertical integration. Such a decision is based on a variety of reasons and to point to one influence, which could well be offset by another, would be foolhardy.

Undoubtedly, there are still many discriminatory practices prevailing in the food distribution system today since it is impossible for the F T C to supervise the operations of every company. Offenders are still being apprehended and unfair competitive practices are being abolished one by one. The Act has led to a volume of work which occupies an important part of the docket of the F T C and which requires lengthy and expensive investigations. This has resulted in the Commission acquiring influence and respect among businessmen. As an administrative body it has produced better work than most and has received needed stimuli by many Court findings in its favor.

As it stands, the Robinson-Patman Act is a good law from the point of view of both consumer welfare and business progress. Nevertheless, one section of the Act should be altered either by administrative and court interpretation or by legislative edict. Section 2 (c), the brokerage provision, should be read or amended in order that the requirement of Section 2 (a), with respect to injury of competition, may apply.

The enforcement of any law which is enacted to preserve competition should be tempered by vigilance of its influence on public welfare. If a practice is not affecting competition and, in view of the practical circumstances involved, will not do so, there is no reason to punish anyone or order said practice to be discontinued. One of the basic tenets of our society is that an individual be guaranteed complete freedom of action without intervention of any kind by any power or individual providing that such action does not interfere with the rights and privileges of his neighbor. In the Biddle case, for example, the brokerage activities of this long, established company should not have been outlawed unless injury to competition was definitely established. Again in the Southgate complaint, the brokerage paid to this buying-broker should have been prohibited only if the practice clearly injured competition. If the brokerage has no harmful effect on competition in any way, it should not be outlawed merely because similar brokerage practices involving different parties did injure competition. Section 2 (c) does definitely outlaw those detrimental manifestations of brokerage payments, but it should not ban those in which brokerage payments do not cause any damage to the competitive system and to the public welfare. The Federal Trade Commission and the courts should consider each case under Section 2 (c) upon its own individual facts.

In conclusion, let it be said that little difficulty would be encountered if every buyer and every seller were to approach the Act with a realistic effort to comply with the intent of the law. But as long as some firms attempt to gain unwarranted advantages of any kind, laws such as the Robinson-Patman Act will continue to appear and investigations by government agencies will remain to plague business.

APPENDIX

THE ROBINSON-PATMAN ACT

PUBLIC --- No. 692 --- 74th CONGRESS

H. R. 8442

AN ACT

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 15, sec. 13) is amended to read as follows:

"SEC. 2. (a) That it shall be unlawful for a person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such 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, and 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; PROVIDED, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of

manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: 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; AND PROVIDED FURTHER, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: AND PROVIDED FURTHER, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively

shown, the Commission is authorized to issue an order terminating the discrimination: PROVIDED, HOWEVER, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(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 services 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.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

SEC. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: PROVIDED, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of

October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

SEC. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a

competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings of surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Approved, June 19, 1946.

PUBLIC -- No. 550 -- 75th CONGRESS

(Chapter 283 --- 3d Session)

(H. R. 8148)

AN ACT

To amend Public Law Numbered 692, Seventy-fourth Congress, second session.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit.

Approved, May 26, 1938.

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