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Neil C. Head

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VALIDITY UNDER THE ROBINSON-PATMAN ACT OF A UNIFORM DELIVERED PRICE OF ONE SELLER

By Neil C. Head*

The Federal Trade Commission attacks on the so-called basing-point method of price quotations have been highlighted by the recent Supreme Court decisions in *Corn Products Refining Co. v. F. T. C.*, and *F. T. C. v. A. E. Staley Manufacturing Co.*, and the Circuit Court of Appeals decision in *Aetna Portland Cement Co. v. F. T. C.*

What is not generally realized, however, is that the attack on the basing-point method is only part of a general campaign by the Commission against the pricing methods in general use in American industry. This campaign has progressed so far that the Commission is now attacking the use by a single seller of a uniform delivered price to all customers, wherever located,—one price across the country.

Of the many commercial advantages of a one-price policy, two in particular, the power to name the price in national advertising and thus identify the product with a moderate price, and the avoidance of accounting costs which in some cases may exceed the transportation costs, have caused this method to be very generally adopted by manufacturers, particularly in consumer goods industries. These manufacturers, the public, and even many lawyers, may be surprised to find that such a one-price policy is regarded by the Federal Trade Commission as “discrimination” within the meaning of the Robinson-Patman Act.

This article is devoted to examining the validity under that Act, of such a one-price policy. It is the author’s conviction, shared it is believed by most lawyers, that the Commission’s position is legally unsound.

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*Member of the Bars of Illinois, Massachusetts and New York. Member, Cahill, Gordon, Zachry & Reindel, New York, N.Y.

1 (1945) 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320.


3 (C. C. A. 7, 1946), 157 F. (2d) 533; cert. granted March 10, 1947 For convenience, this case will be called “the Cement case.”


At the outset, to avoid confusion, it is advisable to define the different pricing methods in common use.

I. Pricing Methods in Common Use

1. F.o.b mill
   The seller quotes a uniform price f.o.b. mill; the buyer pays the full freight from the mill to destination. This method results in uniform mill nets on all sales. The cost to the buyers at destination varies.

   This is the only method of pricing which the Commission says is not open to attack under the Robinson-Patman Act.

   The other common pricing methods, all of which are under attack by the Commission, are as follows

2. Uniform delivered price
   The seller quotes the same price at all destinations to all buyers. The seller pays the full freight. This method results in varying mill nets but the same delivered price at all destinations. This is the method with which we are here concerned.

3. Freight equalization
   The seller quotes a delivered price made up of a base price plus the freight to destination, except where this delivered price would be greater than that quoted by a competitor nearer the destination, and thus with a lower freight rate. In such cases, the seller absorbs enough of the freight from his mill to give a delivered price no greater than that of the nearer competitor. He thus equalizes his freight on that of the nearer competitor to meet the competitor's lower price. This method results in uniform mill nets, except on sales where the seller, to meet the lower price of a competitor, absorbs part of the freight. The price to the buyers at destination varies. This is the method attacked in the Cement case.

4. Zone delivered prices
   The seller divides the country into two or more geographical zones, and quotes a uniform delivered price to all buyers within each zone. The delivered price varies between the different zones. The seller pays the full freight. This results in varying mill nets, and in uniform delivered prices within each zone but varying delivered prices between zones.

   The term "mill net," as used here, means that part of the sales price realized by the seller after deduction of delivery costs.
5. **F.o.b. a basing point other than point of shipment**

The seller quotes a price which includes freight from a point other than the point of shipment. To the extent that the freight from this point exceeds the actual freight from the point of shipment, the seller collects what is called "phantom freight", to the extent that the freight from the basing point is less than actual freight, the seller absorbs the difference. This results in varying delivered costs and in varying mill nets. This method was condemned in the *Corn Products* case.

The form of price quotation does not determine, and may not even indicate on its face, which of the above methods is actually being used. A seller may quote "f.o.b. mill," to put the risk of loss in transit on the buyer; yet by "allowing full freight to destination," actually be quoting what is defined above as a "uniform delivered price." Similarly, what is in form a "delivered price" quotation may be used in an "f.o.b. mill" pricing method, if the seller is quoting to each customer varying "delivered prices," each made up of a uniform f.o.b. mill price plus actual freight to destination.

**II. DEVELOPMENT OF THE CAMPAIGN AGAINST DELIVERED PRICES**

The term "uniform delivered price" is sometimes used to designate the use of the same delivered price by several sellers at a single point. We, on the other hand, are using it to describe the price policy of a single seller. These two uses of the term "uniform" must be carefully differentiated, particularly since both may exist in the same situation and the same term be used to describe each. While outside the scope of this article, it may be helpful to sketch briefly the development of the Commission's attack on the use by several sellers of the same delivered price.


While the Commission has no jurisdiction to enforce the Sherman Act as such, a combination or agreement in restraint of trade, illegal under the Sherman Act, may also be an unfair method of competition under Section 5 of the Federal Trade Commission Act, and the courts have upheld cease and desist orders by the Commission under that Section against price fixing agreements. *F. T. C. v. Beech-Nut Co., (1922) 257 U. S. 441, 453; 42 S. Ct. 150, 66 L. Ed. 307; Fashion Originators Guild of America v. F. T. C., (1941) 312 U. S. 457, 61 S. Ct. 703, 85 L. Ed. 949; F. T. C. v. Pacific States Paper Trade Assn., (1927) 273 U. S. 52, 47 S. Ct. 253, 71 L. Ed. 594.*
The Commission views with suspicion any uniformity of delivered prices of several sellers, and has regarded such uniformity as strong evidence of the existence of conspiracy or agreement, illegal as an unfair method of competition under Section 5 of the Federal Trade Commission Act. The courts have gone far in supporting the Commission's findings and orders based on such inferences.

The sellers maintained that uniformity of price at a given destination was the result of competition, not of agreement, pointing out that the only price in which the buyer is interested is the price at his plant. That is where price competition actually occurs and that is where price competition must be met, if it is to be met at all.

The Commission itself has admitted that

"** uniformity of price in a given market is equally consistent with a condition of free competition or with a condition of monopoly"

Mr Wooden, Associate General Counsel of the Commission, referred to this difficulty of proof in his testimony before the T N. E. C. on January 30, 1940. He recommended legislation outlawing the basing point system, saying

"As the situation is now, with the outcome of any basing-point case depending upon the interpretation of the law and the facts under theories of conspiracy and concerted action which, I think, are necessary to make the law applicable, it requires an enormous expenditure of time and effort and labor in establishing that condition in an adversary proceeding for each particular industry and what the facts are in that industry regarding the basing-point system. I would say that no more vitally needed legislation within the scope of this committee can be suggested than that of directly prohibiting the basing-point system by congressional mandate."

In an apparent attempt to eliminate the necessity of proof of agreement in enforcement proceedings, the Commission, in one

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8For example, in Milk and Ice Cream Can Inst. v. F T C., (C. A. 7, 1946), 152 F (2d) 478, the court said.

"To illustrate, a customer located in St. Paul could purchase cans at the same delivered price irrespective of whether the purchase was made from a member located in Chicago or St. Paul. Just how such an unnatural situation could be brought about by members of an industry without a plan or agreement is difficult, if not impossible, to visualize." (p. 481)

This statement completely overlooks the elementary fact that the seller located in Chicago could make no sales in St. Paul if his price delivered there was higher than the price of the St. Paul manufacturer.

9Matter of Cement Institute, 37 F T C. 87, 251 (Findings, Par. 22c), reported on appeal as Aetna Portland Cement Co. v. F T C., (C.C.A. 7, 1946) 157 F (2d) 533, cert. granted March 10, 1947.

10Hearings before the Temporary National Economic Committee, Part 27 p. 14329.
cease and desist order, forbade "common course of action" which would on its face have prevented individual action by a seller which happened to be the same as that of a competitor. However, on appeal, the order was modified to forbid only "planned common course of action." Thus the Commission still had to prove agreement.11

In the Cement case, the Commission made another effort to get away from having to prove agreement by contending that the use by a number of sellers of the same price formula was inherently collusive and illegal, even in the absence of agreement. The court summed up this argument of the Commission as follows:

"The Commission states 'It should be understood that it makes no difference in the results whether particular base prices are set by each base mill with or without direct collaboration and direct collusion with other base mills or with their own competitors.' This is a contention born of necessity for, as heretofore shown, there is no finding of agreement or collusion between respondents as to base prices. The Commission continues 'It is the method of pricing by formula that produces the identity of delivered price quotations.' This is a significant statement and apparently means that it is immaterial whether the identity of delivered price quotations resulted from the conspiracy charged or from independent action."12

III. THE ATTACK ON THE DELIVERED PRICE OF A SINGLE SELLER

In the meantime, the Commission turned to the Robinson-Patman Act to implement its campaign against uniform delivered prices by a number of sellers. If the Commission could establish that the use by a single seller of a delivered price was a discrimination under that Act, there would no longer be any necessity of proof of agreement among sellers. The Commission therefore contended that to avoid discrimination under the Robinson-Patman Act all sales must in effect be made at one price f.o.b. mill, with all delivery costs charged to the buyer.

While in theory the Commission would concede that it is not unlawful for the seller to charge a buyer a delivered price which includes, fully and exactly, the cost of delivery to that buyer, no more and no less, nevertheless it does unequivocally take the position that to avoid discrimination the selling should be upon a basis that results in the same net realization at the mill on all sales—re-

11Salt Producers Assn. v. F T. C. (C.C.A. 7; 1943) 134 F (2d) 354.
12Page 562 of 157 F. (2d).
gardless of point of delivery. Of course, this is in substance the same thing as selling at one price f.o.b. mill.18

This is a startling and far-reaching interpretation of the Robinson-Patman Act. Each mill, to the extent of its capacity, would be given a monopoly in the area in which it had a freight advantage, and no other mill could invade its territory. The country would eventually be split into little Balkan industrial states.14

The Circuit Court of Appeals, in the Cement case, summed up the Commission’s objective as follows

“The Commission states ‘Under any kind of pricing method every mill has a substantial and naturally inherent advantage when quoting on nearby business in real competition with more distant mills. By the same token every mill has a substantial and naturally inherent disadvantage when quoting on distant business in competition with mills located nearer to the customer.’ This appears to be a logical statement but the question immediately arises as to how the Commission proposes to give effect to this ‘naturally inherent advantage’ and this ‘naturally inherent disadvantage.’ As we have already shown, it proposes to make supreme the advantage of a mill selling in the territory where it has a freight advantage, and to make its disadvantage so great when selling in a competitor’s territory as to practically preclude it from entering that market. In fact, the advantage and disadvantage would no longer be natural but artificial, effected by the requirement that each mill sell on an f.o.b. mill price.”15

IV Basis for the Commission’s Position

The Robinson-Patman Act,16 unlike the Sherman Act, is directed at the practices of a single seller acting alone, not in

18Mr. Wooden, in an address before the New York State Bar Association on January 22, 1947, said.

“Not infrequently it has been charged that the Commission is obsessed with the idea that any and all delivered prices are evil, per se, and that the only cure for that evil is uniform f.o.b. mill prices. There is no warrant for such a charge. There is nothing in the statute and nothing in the Commission’s orders to cease and desist that will support it. There is nothing in either that precludes delivered prices which make due allowance for differences in cost of delivery and which do not injure or prevent competition. The delivered prices of a single seller which make such due allowance do produce a uniform net price f.o.b. his mill, but that is not to require f.o.b. mill pricing.” (Robinson-Patman Act Symposium, 1947 Ed., (C.C.H.) p. 39.)

14Mr. Wooden, in answer to a question as to how a manufacturer can do business in a market in which freight-wise he is not the controlling factor, said.

“The only answer I would make to that is that they are not at liberty under the law, as I see it, to go into distant markets and take less for their commodity than they get at home, if the result be adverse to the interests of competition.” (Robinson-Patman Act Symposium, 1947 Ed., (C.C.H.) p. 45.)

15Page 563 of 157 F (2d).

16The pertinent parts are as follows
concert with any other person. It forbids discrimination in price between different purchasers, where the effect may be substantially to lessen competition or tend to create a monopoly. The Act provides, however, that it shall not prevent differentials in price "which make only due allowance for differences in the cost of manufacture, sale, or delivery," and the seller may show that his lower price was made in good faith to meet an equally low price of a competitor.

A delivered price which is the same to all buyers would not seem to involve any discrimination of any kind. Where there is no discrimination, no question should arise of the effect on competition, or of differentials because of differences in costs, or of meeting an equally low price of a competitor.

However, the Federal Trade Commission takes the position that a uniform delivered price does constitute a discrimination within the meaning of the Act, since the net realized at the mill is greater on some sales than on others.17

The Commission presents two arguments to sustain its position.

1. That when the Act prohibits discrimination in price, the word "price" means the mill net; that is, the net realized after deducting delivery costs.

"Sec. 2 (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality. *** where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, * * *: 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. * * *"

"Sec. 2 (b) * * * 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."

17 Apparently the F. T. C. believes that such a pricing system of an individual seller also constitutes an unfair method of competition in violation of Section 5 of the F. T. C. Act. See the complaint (issued in 1941) in Matter of Rigid Steel Conduit Assn. et al, 38 F. T. C. 534. Although there was no charge of violation of the Robinson-Patman Act, the order forbids:

"Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination." (p. 595).

where the effect may be to produce the same delivered price as those of other respondents. This means that a seller could not absorb freight to sell in a territory where his competitor had a freight advantage if he quotes the same delivered price as that of his competitor. This case is now pending on appeal to the Seventh Circuit Court of Appeals.
Thus in Count II of its complaint against the Cement Institute, the Commission charged that

"Delivered prices made under the formula set forth in Paragraph Five (b) hereof are not the actual prices received by producing respondents. This is for the reason that such delivered prices include not only the price of the cement but the price of its transportation. In order to derive the true price received, the price actually paid to the carrier for transportation of the cement to the buyer must be deducted from the delivered price. * * *"  

In the Rigid Steel Conduit case, one finding spoke of the "mill net or real price."  

2. That since the Act provides that its prohibition of discrimination shall not prevent differentials "which make only due allowance for the differences in the cost of manufacture, sale or delivery," the seller must make allowance for the exact cost of delivery, neither more nor less.

This was Mr. Wooden's argument when he said

"There can be no discrimination when due allowance (for differences in cost of delivery) is made. There is always discrimination when due allowance is not made."  

The complaint in the Chain Institute case, in charging that a uniform delivered price of a single seller violates the Robinson-Patman Act, says

"The discriminations by each said respondent result, in part, because of its failure to 'make only due allowance for differences in the cost of manufacture, sale or delivery' and are discriminatory to such an extent that the net prices paid by cus-

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19 Page 117 of 37 F. T.C.
21 This theory of the Commission antedates the Robinson-Patman Act. Mr. Freer, member of the Federal Trade Commission, testified before the Senate Committee on Interstate Commerce on March 23, 1936, as follows

'The question of discrimination can only be gaged by the treatment the seller accords to buyers in terms of what he has left after paying any sums actually defrayed by him for transportation. If, after subtracting from each delivered price the sum actually defrayed by the seller for freight, the net results are not identical, there is price discrimination. The price of the commodity is one thing, and the price of the transportation thereof is another.

'Such discrimination is inherent in delivered price systems.' (Senate document, "To Prevent Uniform Delivered Prices." Hearings before the Committee on Interstate Commerce on Senate Bill 4055, 74th Cong., 2d Sess., p. 312.)
customers located at or near its factory door in many instances amount to much more than the net prices realized by such respondent on chain and chain products of like grade and quantity sold to its customers located hundreds of miles away.\textsuperscript{23}

The Commission's complaint against the lead industry\textsuperscript{24} charges that a uniform delivered price (within a zone) violates the Robinson-Patman Act through failure to make allowance for differences in cost of delivery.

The position of the Commission has continued unchanged. The complaints issued February 14, 1947 against two clay sewer pipe trade associations and their members\textsuperscript{25} charge.

"* * * The discriminations by each said respondent thus effected are systematic and result in part because of its failure to 'make only due allowance for differing methods or quantities in which such commodities are to such purchasers sold or delivered'.**'

V. PROPER INTERPRETATION OF THE ACT

In the absence of any court decisions directly passing on the validity of a uniform delivered price, guidance must be sought in the wording of the Act, its congressional history, and in court decisions under the Robinson-Patman Act on other pricing methods.

1. \textit{Wording of the Act}

The Act prohibits "discrimination in price between different purchasers of commodities." The immediate question is what Congress meant by "price."

The purchaser's interest in a price is the cost to him at the place he will use the commodity. His ability to compete, which the

\textsuperscript{23}Docket No. 4878—filed 1942, amended 1945 (Count II, Par. 6).

\textsuperscript{24}Matter of National Lead Co. et al, Docket No. 5253, filed November 25, 1944. Count II of the complaint charged that a zone delivered price system constituted two violations: first, the uniform price delivered within a zone; and second, the differences in price between zones, as follows:

"PARAGRAPH EIGHT In using its aforesaid 'ZONE DELIVERED PRICING METHOD AND PRACTICE,' each of the respondents, * * * so quotes prices in its offers to sell that when it sells white lead * * * the delivered cost on a specified quantity of white lead as paid by any one of its customers located at or near the factory door of such respondent, amounts to as much as the delivered cost on the same quantity of white lead as paid to such respondent by any one of other customers located hundreds of miles away in the same 'ZONE,' although substantial differences are involved in the costs of delivery to such nearby customer and the more distantly located ones."

"PARAGRAPH NINE: Systematic discriminations in net prices against nearby customers and in favor of their more distantly located customers are inherent in the use of the aforesaid 'ZONE DELIVERED PRICING METHOD AND PRACTICE' * * *"
Act seeks to preserve, depends on the cost to him at that point. While the Act does not compel a seller to quote a delivered price, where the seller chooses to quote a delivered price to the purchaser, that would seem to be the price in which discrimination is forbidden. It is difficult to spell out from the text a requirement that the freight paid by the seller be deducted to ascertain the price in which discrimination is forbidden.

The Commission's further argument that the seller must make due allowance for cost of transportation seems to disregard the wording of the proviso that the Act shall not prevent "differentials which make only due allowances for differences in the cost of manufacture, sale or delivery * * *" This proviso presupposes differentials in price which are due to inclusion of cost of delivery. But if the word "price" means "mill net," the proviso is meaningless, since a mill net never includes transportation cost. The apparent intent of Congress was that the Act should not prevent making due allowance. The Act does not say that the seller must make due allowance. The word "only" in the phrase "only due allowance" connotes a maximum, its use is inconsistent with interpreting the proviso as a requirement.

The argument of the Commission involves a further difficulty. If this proviso is interpreted to require the seller to make due, that is, exact allowance for differences in the cost of transportation, it would necessarily follow that the seller must, in every sale, make due, that is, exact allowance for differences not only in cost of delivery but also in cost of manufacture and sale. Even the Commission has not advanced this interpretation.

2. Congressional History

The congressional history of the Robinson-Patman Act indicates clearly that Congress did not intend "price" to mean "mill net." The Act, as reported to the House on March 31, 1935 by the Committee on the Judiciary, contained the following provision:

"5. That the word 'price' as used in this section 2, shall be construed to mean the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor."

It was stricken from the Bill by an amendment offered by the chairman of the House Judiciary Committee.26

The Supreme Court, in the *Corn Products* case, in referring to this proposed section 5, said

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2680 Cong. Rec. 8223, 8224.
"The practical effect of this provision would have been to require that the price of all commodities sold in interstate commerce be computed on an f.o.b. factory basis, in order to avoid the prohibited price discriminations in selling price. It would have prohibited any system of uniform delivered prices, as well as any basing point system of delivered prices. These effects were recognized in the Committee's report, see H. Rep. No. 2287, 74th Cong., 2d Sess., p. 14, and in the debates upon the Robinson-Patman Bill. Cf. 80 Cong. Rec. 8118, 8223-8224. Indeed, the provision would have prohibited such a multiple basing point system as that in Cement Manufacturers Assn. v. United States, supra, as well as the present system.

Such a drastic change in existing pricing systems as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary. 80 Cong. Rec. 8102, 8140, 8224. We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se. On the contrary we think that it left the legality of such systems to be determined accordingly as they might be within the reach of Sec. 2(a), as enacted, and its more restricted prohibitions of discriminations in delivered prices." 27

The Commission is now asking the courts to require sellers to use the f.o.b. mill pricing method. This is exactly what Congress refused to do. The court in the Cement case said

"If this pricing system (freight equalization) which Congress has over the years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the courts, it will mark the high tide in judicial usurpation." 28

3. Court Decisions

No court has directly passed upon the legality of the uniform delivered price under the Robinson-Patman Act.

In 1945, the Supreme Court in two cases 29 ruled upon pricing f.o.b. a basing point other than the point of shipment.

Corn Products had two plants, one in Chicago and one in Kansas City. Sales were made at delivered prices computed by adding to a base price at Chicago the freight from Chicago to destination, regardless of whether shipment was made from Chicago or Kansas City. The result was that on shipments from Kansas City to any point where the freight was less than from

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Chicago to that point, the delivered price included more than the actual freight. This was called "phantom freight" and was held by the Supreme Court to be a discrimination in violation of the Robinson-Patman Act. The decision in the Corn Products case was summarized by the Court in the Staley case as follows:

"In the Corn Products Refining Company case, we hold that this price system of respondents' competitor in part involves unlawful price discriminations, to the extent that freight differentials enter into the computation of price, as a result of the selection as a basing point of a place distant from the point of production and shipment."

The Staley Company, a competitor of Corn Products, had its plant at Decatur, Illinois. To meet Corn Products' competition, Staley quoted delivered prices computed by adding to a base price at Chicago the freight from Chicago to destination. The result was that buyers in Decatur, next to the plant, paid more than buyers in Chicago by the amount of the freight from Chicago to Decatur. Thus the Court held involved phantom freight which constituted a discrimination in violation of the Robinson-Patman Act. The Court rejected the defense that the price discriminations were made in good faith to meet competition as permitted by the Act, saying:

"Respondents have never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing policy which, in their case, resulted in systematic discriminations, by charging their customers upon shipments from Decatur, the Chicago base price plus their competitors' actual costs of delivery from Chicago."

The Court, by dictum, upheld a uniform delivered price, as follows:

"But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitors' price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price."

In 1946 the Circuit Court of Appeals for the Seventh Circuit, in the Cement case, vacated a Commission order condemning the freight equalization method used in the cement industry. Cement is sold at a delivered price made up of a base price, plus actual freight or the freight from a nearer competitor's mill. This is the freight equalization method which, it will be recalled, results in a

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uniform mill net in the territory in which freight from seller's mill is less than or equal to the freight from competitors' mills, but a lower and varying mill net on all shipments outside this territory. In both territories, the delivered price varies.

The Commission charged this violated the Robinson-Patman Act, and found—

"The multiple basing-point delivered-price system used by the corporate respondents in the sale of cement is a discriminatory method of pricing. This is true whether the systematic variations in price are viewed before or after consideration is given to the cost of delivery by common carrier."

"* * * that in the circumstances of this case the systematic discriminations in mill nets by each respondent seller among its various customers which necessarily result from the use of the multiple basing-point delivered-price system are discriminations in price that are unlawful under subsection (a) of Section 2 of the Clayton Act as amended, * * *"34

The Commission, in its brief, argued

"If there ever were any doubt that a seller's systematic variation in his mill net prices reflecting a systematic effort to avoid making due allowance in his delivered prices for differences in his actual cost of delivery, constitutes a discrimination in price among his respective customers, that doubt should have been laid to rest by the decisions of the Supreme Court in Corn Products Refining Co. v Federal Trade Commission and Federal Trade Commission v. A. E. Staley Mfg. Co. decided April 23, 1945 (324 U. S. 726, 746). In both cases the price discrimination held to be a violation of Section 2(a) consisted of a variation in mill net prices which comprehended a range inclusive of both 'phantom freight' and so-called freight absorption. In both cases the variation in mill net prices reflected with mathematical precision the failure to make due allowance for differences in cost of delivery. It was and is the only conceivable test and measure of the existence of discrimination in delivered prices."

The court disagreed with the Commission's interpretation of the Supreme Court's decisions in these two cases, saying:

"The Commission in its brief * * * makes the bold statement that the illegality of the variation in mill net prices has been laid to rest by the decisions of the Supreme Court in the Corn Products and Staley cases. We do not so understand. We do understand from those decisions that when a product is sold from a base other than the point of actual shipment and phantom freight thereby collected, a discrimination in violation of the Clayton Act results. Certainly the court in those decisions did not hold that freight absorption

32Par. 23(a).
34Par. 25.
36Pages 197, 198.
was discriminatory, in fact, that question was expressly left open. In the Corn Products case, the court stated (page 735) 'We have no occasion to decide whether a basing point system such as that in the Cement case is permissible under the Clayton Act, in view of the provisions of Sec. 2(b), permitting reductions in price in order to meet a competitor's equally low price.'

The court, with one judge dissenting, vacated the Commission's order, holding that the Commission had made no finding of conspiracy and that in the absence of such a finding, the freight equalization system used by the cement industry was not illegal.

A reversal by the Supreme Court of the holding of the Circuit Court of Appeals in the Cement case would not be conclusive as to the validity of the uniform delivered price by a single seller. In the Cement case, as was shown above, the delivered price to the buyer varies at different destinations, according to the freight rate from the nearest mill. A decision by the Supreme Court that such variation constitutes a discrimination, not justified as made in good faith to meet the equally low price of a competitor, would not be a holding that a uniform delivered price constituted a discrimination.

**SUMMARY AND CONCLUSION**

1. The context of the Act gives no indication that the word "price" means "mill net." On the contrary, it must in some cases mean the delivered price, otherwise the provision permitting differentials which make only due allowances for differences in cost of delivery, is meaningless, since delivery costs can never be part of a mill net.

2. Congress refused to define price as meaning the mill net, and this refusal was recognized by the Supreme Court in the Corn Products case.

3. The Commission's interpretation of the Act as requiring the seller to make exact allowance for differences in cost of transportation (although apparently not of manufacture or sale) requires disregard of the plain meaning of the words used.

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37 The Commission's Petition for Writs of Certiorari filed in the Supreme Court January 20, 1947, in the assignment of error, maintains that the Commission did make findings of combination. However, the Petition also states that the Supreme Court should settle the question, "whether systematic absorption of freight, just as systematic collection of phantom freight, may constitute an illegal price discrimination."
4. The Supreme Court, by dictum in the *Staley* case, said that a uniform delivered price involves no discrimination in price.

5. The Circuit Court of Appeals for the Seventh Circuit, in the *Cement* case, rejected the Commission's contention that the Robinson-Patman Act requires the seller to net the same f.o.b. mill on all sales.

The conclusion that the Commission's position is legally untenable seems inescapable.