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

By WALTER B. WOODEN*

This article is an analysis of and a rejoinder to one which appeared in the Minnesota Law Review of May, 1947, under the above title. The author was Mr. Neil C. Head, member of the New York bar.

The thesis of Mr. Head's article was that a uniform delivered price of one seller is valid under the Robinson-Patman Act, and that the Federal Trade Commission's position thereon is legally unsound in the opinion of most lawyers and the author (p. 599). However, it was also stated that the Federal Trade Commission is engaged in a general campaign "against the pricing methods in general use in American industry."

Thus what purported to be and for the most part was a strictly legal argument by Mr. Head was colored at the outset by a subtle suggestion that the Commission is hostile to the legitimate needs and interests of industry at large and of single sellers. Such a suggestion implies that the Commission is acting without regard to the purposes for which it was created and in disregard of its statutory powers as construed by the courts. The fact is that the Commission can not successfully challenge any pricing method until and unless it satisfies the reviewing Federal courts, and ultimately the Supreme Court, that a given pricing method is within the purview of statutes which forbid it because of its injurious effect on competition. This the Commission must do on a case-by-case basis, giving each challenged party his day in court on that ultimate issue. No general orders can be entered by the Commission. Orders to cease and desist from the use of any pricing method will be sustained by the courts only if the Commission finds that the method has an adverse effect on competition and only if that finding is supported by substantial evidence. Therefore, any statement that a campaign is under way is no more than a statement that the Commission is seeking to eliminate pricing methods which to it appear

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1. (1947) 31 Minn. L. Rev. 599.
2. Further references to Mr. Head's article will be to the appropriate page in 31 Minn. L. Rev.
to be injurious to competition, which is precisely what Congress intended it to do. If it goes wrong in a particular case the courts will provide the necessary relief under the statutory provisions for court review. Presumably the success or failure of the so-called campaign will turn upon the ability of the Commission to satisfy the courts that substantial evidence has been adduced in each case to show injury to competition.

Against this strange silence concerning any relation between the Commission's objective and the basic economic problem of monopolistic pricing methods, Mr. Head puts forward two of "the many commercial advantages of a one-price policy." One of these is "the power to name the price in national advertising and thus identify the product with a moderate price" (p. 599). The idea savors of resale price control of consumer goods based on consumer acceptance of an advertised price and has little if any relation to the situations where the Commission has instituted proceedings against sellers of heavy goods sold to processors or dealers without any nationally advertised price. Mr. Head says this pricing method has been adopted "particularly in consumer goods industries." The second commercial advantage named is "the avoidance of accounting costs which in some cases may exceed the transportation costs." On a priori grounds there is good reason to question the soundness of this statement, especially in view of the further statement that under this method "the seller pays the full freight" (p. 600). In the first place there is a formidable amount of accounting cost before such a delivered price can be built up. This involves an extensive study and an averaging of transportation costs such as will insure against an over-all loss on shipments the costs of which continually fluctuate. And if the seller does actually pay the freight he must break down the delivered price which he has built up into separate accounts with the carriers and the purchasers. That accounting costs may in some cases exceed the transportation costs seems inherently improbable, except for deliveries where no transportation costs are involved as at the factory door. The idea that it costs more for accounting than for transportation seems fantastic for deliveries in the more distant parts of the United States. Or if it does cost more such a pricing method would present a new point of questionable vulnerability.

As a matter of fact, however, payment of freight by the seller is not an essential element in such a delivered price. This Mr. Head recognizes when he says that a *seller may by "allowing full
freight to destination, actually be quoting what is defined above as a uniform delivered price” (p. 601). In any event, whatever commercial advantage there may be to a seller in the advertising of a single price across the country must of course be held subordinate to the interests of the public in preventing injury to competition. No seller need fear attack upon such a price unless substantial evidence can be adduced that it does or probably does injure competition.

THE ALLEGED POSITION OF THE FEDERAL TRADE COMMISSION

In the same context Mr. Head's article states that “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” (p. 599). He includes such a price among those which he later says are “all” under attack (p. 600). These statements are incorrect. In no instance has the Commission instituted a proceeding against a single seller attacking his use of a uniform delivered price to all customers wherever located. And if it were to do so it could not avoid the necessity of showing by substantial evidence that it injures or would probably injure competition.

Apparently the statements last quoted rest upon the cases referred to by Mr. Head in his discussion of “Basis for the Commission's Position” (pp. 604-607). He says (p. 606) that the Chain Institute complaint charges that “a uniform delivered price of a single seller violates the Robinson-Patman Act,” and quotes an allegation from the complaint as to “each said respondent.” There were 17 seller-respondents in that case. In that same paragraph of the complaint from which the above quotation was taken it was also alleged that there were involved in the delivered price system of the several respondents “Matched delivered price quotations or offers as made by all respondents to any given customer, so that such customer in considering or accepting any of such offers is denied the opportunity ordinarily afforded under price competition to bargain with one respondent member as against another.” In Paragraph 9 of that same Count II it is alleged that “each of the said respondents” discriminates “for the purpose and with the effect of enabling all the respondents to exactly match their delivered price offers.” Paragraph 10 of that same Count II alleges

3. Docket No. 4878, as amended, Count II, Par. 6, filed 1942, amended 1945.
that the inherent and necessary effect of the discriminations involved is to eliminate price competition between the various respondent members. So it hardly appears accurate to say, as Mr. Head does, that the Commission was there attacking the practice of a single seller. Moreover, Paragraph 11 of Count I of the same complaint charges the use by each respondent seller of a zone delivered price system pursuant to a combination whose purpose and effect was to suppress price competition among all respondent sellers.

Nor does the National Lead Company case\(^4\) cited by Mr. Head (p. 607) give any support for his claim that the Commission "is now attacking the use by a single seller of a uniform delivered price to all customers, whenever located—one price across the country" (p. 599). Incidentally the price structure in that case did not involve "one price across the country" but a series of 12 zones or areas with a different uniform delivered price in each zone. Mr. Head treats the two as generically different types of structure (p. 600), and there says that he is concerned only with the single zone type. And at the outset he stated that his article "is devoted to examining the validity under that Act, of such a one-price policy" (p. 599). In the National Lead Case there are 6 corporate sellers charged with unlawful price discrimination. Count II alleges that each of them uses the zone delivered price method and practice, that this results in matched delivered prices by all 6 sellers, and that each uses the zones and thereby discriminates in price for the purpose and with the effect of enabling them to match their delivered price quotations (Count II, Pars. 7, 8, 9, 12). Under Count I these 6 seller-respondents were charged with maintaining a price fixing combination of which their uniform zone delivered price structure was alleged to be a part [Par. 7(2)]. So it would appear that this second case relied upon to support the statement that the Commission is attacking a single seller's uniform delivered price does not support it.

Mr. Head cites a third instance of proceedings by the Commission which he says shows that "the position of the Commission has continued unchanged" and which position he had characterized as that of attacking the use by a single seller of a uniform delivered price, "one price across the country." This third instance consists of two complaints against two clay sewer pipe associations and their members.\(^5\) (p. 607). There are 18 corporate respondent-sellers

\(^4\) Docket No. 5253, filed 1944.

\(^5\) Matter of Clay Products Ass'n, Docket No. 5483; Matter of Clay Sewer Pipe Ass'n, Docket No. 5484; both filed 1947.
charged with price discrimination in one of these complaints and 20 in the other. The charges in both cases in that connection are practically identical with those made in the Chain Institute case as already described. Each of these two cases also includes a Count I which alleges a price fixing combination of which uniform delivered price zones are alleged to be a part. Incidentally, neither of these sewer pipe cases involves a single zone with "one price across the country" and which is the only kind of uniform delivered price Mr. Head says "we are here concerned with" (p. 600).

It would appear that no case has been cited which supports the statement 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" (p. 599). The present writer does not believe that any such case can be cited. This does not mean, of course, that the Commission would have no power to institute such a case if the adverse effect on competition could be shown, for as Mr. Head says, the Robinson-Patman Act "is directed at the practices of a single seller acting alone" (p. 604). However, it does not follow that there can not be a combination of sellers to discriminate in price as Mr. Head implies when he says that the Act does not apply to discriminations accomplished "in concert with any other person" (p. 605). There could well be combination or concert of action to violate any law and especially any law which makes injury to competition its standard of illegality.

The fact is that practically all the cases brought by the Commission involving any form of discrimination in delivered prices have been brought against a group of sellers who were each discriminating in order to match their delivered prices and thus eliminate competition among themselves. Only in an exceptional case where a single seller might have a monopolistic position would there be any basis for action against him under the Robinson-Patman Act unless the effect of his discrimination is to injure or prevent competition among his customers. Such effect was the basis of decision by the Supreme Court upholding the Commission against single sellers in the Glucose cases. But those cases did not involve the use of zone delivered prices or of "one price across the country" but were basing point cases the merits of which Mr. Head does not discuss in this connection.

In view of the foregoing it is hardly accurate to say undiscriminatingly as Mr. Head does (p. 599) that "such a one-price

policy is regarded by the Federal Trade Commission as ‘discrimination’ within the meaning of the Robinson-Patman Act.” Such language would readily be taken as meaning that the Commission regards such a policy as unlawfully discriminatory under the Act but no case can be cited to support the statement. The most that could be said in support of the statement is that the present writer and perhaps individual members of the Commission or of its staff have advanced the view that delivered prices which make other than due allowance for differences in cost of delivery result in differences in the net factory price which are discriminatory, but which are not unlawfully discriminatory unless they have the injurious effect on competition specified in the statute. But that is no more than the Supreme Court said in the \textit{Staley} case, that because the delivered prices there had “no relation to the actual cost of delivery, they are systematic discriminations prohibited by Section 2(a) whenever they have the defined effect upon competition.”

**DISCRIMINATION BY UNIFORM DELIVERED PRICES AND BY OTHER FORMS OF DELIVERED PRICES**

It is only a verbal truism which enlightens no one to say that a one-price policy cannot create discriminatory prices under the statute, and naturally anyone might well be surprised that anyone else could think otherwise. The obvious verbal inconsistency reflects only the question-begging assumption that a single delivered price across the country is a one-price policy. The soundness of that assumption depends on the basic concept of the price of a commodity as distinguished from its transportation and on the meaning of the statutory provision regarding the making of “only due allowance” for differences in its cost of delivery. Theoretically it may be discriminatory “to have equality among unequals” as Mr. Justice Frankfurter said in his dissenting opinion in the regional freight rate discrimination case decided May 12, 1947\textsuperscript{8} but Section 2(a) of the Clayton Act of course does not prevent equality at the seller’s option to purchasers among whom discrimination might be warranted. So, Mr. Head’s “one price across the country” cannot be successfully attacked unless upon analysis it is found to be a cover for discriminations in net factory prices which have the injurious effect on competition required by the statute. Only in the event that such injurious effect can be shown would it be neces-

\textsuperscript{7} \textit{Id.} at 750, 751.

sary to determine whether a uniform delivered price can be discriminatory. However, since such injurious effect may appear in later cases, it might be well to re-examine the assumption that the system of "one price across the country" has been correctly labeled.

Under the title "Pricing Methods in Common Use" Mr. Head describes five methods, four of which he says are under attack by the Commission. He includes among the five the "one price across the country" method used by a single seller which, as has been shown above, has not been attacked by the Commission. It is stated that "the only method of pricing which the Commission says is not open to attack under the Robinson-Patman Act" is that where "the seller quotes a uniform price f.o.b. mill" (p. 600). That statement requires a most important qualification; namely, that no delivered price which makes only due allowance for differences in cost of delivery is open to such attack. The inference is clear that the four types of delivered prices that are then said to be under attack fail to make such allowance. And to whatever extent they are under attack the attack cannot succeed unless injury to competition can be shown as well as the existence of price discrimination. Delivered prices that are not discriminatory are as much beyond attack as prices f.o.b. mill that are discriminatory are open to attack. Otherwise one would have to assume that all delivered prices are necessarily discriminatory and that all f.o.b. mill prices are necessarily non-discriminatory.

Mr. Head states that "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. price plus actual freight to destination" (p. 601). He thereby recognizes that there can be delivered prices which are not discriminatory because they make only due allowance for differences in cost of delivery. There is no more warrant for saying that such prices are delivered prices in form but not in substance than for saying the same of delivered prices which do not make such allowance. If the uniform net mill price is the substance of the transaction in the one case, then the varying net mill price is the substance in the other.

Mr. Head describes four classes of delivered pricing, (1) a "uniform delivered price" defined as quoting "the same price at all destinations to all buyers," (2) "freight equalization," (3) "zone delivered prices," and (4) "f.o.b. basing point other than point of shipment." However, he treats these four classes as though
each were the pricing method used by a single seller rather than a method used by all sellers in a given industry (pp. 600, 601). Obviously the use of a given pricing method by which all competitors discriminate in price in order to match their delivered prices stands on quite a different legal footing than its use by a single seller. And every one of the four classes of delivered prices described is susceptible of being used for that purpose, including what Mr. Head calls a "uniform delivered price." For example, "one price across the country" was involved in the pricing of tire chains in the Chain Institute case cited by Mr. Head but it was not the act of a single seller.

Moreover, in addition to the availability of all four classes of delivered prices for the common purpose of matching the delivered prices of all competitors who use them, and in addition to their common element of variation in mill net which Mr. Head recognizes, one may doubt the validity of the separation into four group classifications. Thus one may doubt that there is any difference in principle or substance between "one price across the country" considered as one zone and one price across a large section of the country considered as two or more zones under the title "zone delivered prices." The same doubt arises as to the validity of the differentiation between the "freight equalization" method which involves discrimination only through "freight absorption" and "f.o.b. a basing point other than point of shipment" which involves discrimination through both "freight absorption" and "phantom freight."

Mr. Head is incorrect in stating (p. 600) that it was the "freight equalization" method that was attacked in the Cement case. It was the basing point method involving both "freight absorption" and "phantom freight" that was attacked in the Cement case and it is quite gratifying to note his concurrence in the writer's view that "this method was condemned in the Corn Products case" (p. 601). It was the "freight equalization" method that was attacked in the Milk Can case.

As a matter of fact, the term "freight equalization" could logically be applied to all four classes of delivered prices when used by competitors with differing freights. It is also a more

revealing term, for since actual freights can not be equalized except by action of the carriers it means the equalization of freight advantages and disadvantages through systematic adjustment of their net factory prices by the respective sellers. Such adjustments are the negation of making only due allowance for differences in cost of delivery.

In any event not only the Commission but the courts have condemned three of the four classes of delivered prices described by Mr. Head—"freight equalization" and "zone delivered prices" as price fixing devices constituting unfair methods of competition under the Federal Trade Commission Act, and "f.o.b. a basing point other than point of shipment" as a price fixing device and also as unlawful price discrimination under the Robinson-Patman Act.

Under the sub-head "Development of the Campaign against Delivered Prices," Mr. Head correctly emphasizes the importance of differentiating between use of the term "uniform delivered price" to designate "the same delivered price by several sellers at a single point" and to designate "the price policy of a single seller" (p. 601). As already shown, however, he failed to make that important differentiation when he cited the Chain Institute, National Lead and the Sewer Pipe cases as instances where the Commission had attacked the use of the method by a single seller. It is stated that 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" (p. 602). That is hardly an accurate statement unless there be added to it the element of substantial differences in the costs of delivery from widely scattered sellers. And in all cases where the Commission has proceeded there were other elements which substantially reinforced the inference of agreement arising from the identity of delivered prices.

Mr. Head quotes from the Circuit Court of Appeals opinion in the Milk Can case to the effect that it was "an unnatural situation" for purchasers in St. Paul to be able to buy at the same delivered price from a Chicago seller as from a St. Paul seller, and then

12. Ibid.
comments that this "completely overlooks the elementary fact" that otherwise the Chicago seller could not sell in St. Paul. (Footnote p. 602). But Mr. Head's criticism overlooks the elementary fact that this situation involves an unnatural refusal by both the Chicago and the St. Paul seller, as well as sellers located elsewhere, to give their local buyers any better price than the sellers at distant places would give them. That it is unnatural for local sellers with a natural advantage over sellers at a distance to disdain utilizing such advantage to gain local business was held by the Circuit Court of Appeals in Fort Howard Paper Co. v. Federal Trade Commission. The argument that the Chicago seller must be allowed to sell in St. Paul on an equality with the St. Paul seller is in effect an argument that the handicap of distance should be cancelled for all sellers everywhere.

Referring to the Cement case Mr. Head states that the Commission endeavored "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" (p. 603). That is a collection of contradictions. Of course one does not and can not get away from proving agreement by contending that the formula is collusive and to speak of collusion where there is absence of agreement does not make sense. Whether a given situation is "inherently" collusive is nothing but the familiar concept of the sufficiency of circumstantial evidence, which is ordinarily the only available evidence by which collusion or agreement in such situations can be established. The quotation from the Circuit Court of Appeals presented by Mr. Head in this connection embodies a similar confusion of ideas. After the Court quoted from the Commission's brief to the effect that "it makes no difference in the results whether base prices are the product of collusive agreement and that it is the formula method of pricing "that produces the identity of delivered price quotations," the Court says "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" (p. 603, italics added). Since the conspiracy charged was one to use the formula method and not an agreement on the base prices to be used in that formula the Court's conclusion was manifestly faulty. No such contention was made in the Cement case which the Court says our quoted statement "apparently means." We did contend that the basing

17. (C.C.A. 7th 1946) 156 F.2d 899, 906.
18. 157 F.2d 562.
point formula there used was inherently collusive but that is a far
cry from contending that it was "inmaterial" whether identity of
delivered price quotations resulted from collusion or from indepen-
dent action. The theory of the Cement case as defined by the plead-
ings, findings and order made any such contention unnecessary and
irrelevant.

Under a sub-heading entitled "The Attack on the Delivered
Price of a Single Seller" (p. 603), Mr. Head states that the Com-
mission "turned to the Robinson-Patman Act to implement its
campaign against uniform delivered prices by a number of sellers"
in order to avoid the necessity of proving agreement among sellers.
He says also that the Commission contends that to avoid discrim-
ation under that Act "all sales must in effect be made at one price
f.o.b. mill, with all delivery costs charged to the buyer" (p. 603).
He states that "in theory the Commission would concede" the
legality of a delivered price which "includes, fully and exactly, the
costs of delivery to that buyer, no more and no less." Why this
should be referred to as a theoretical concession is not apparent.
So far as the writer knows, no one has ever suggested otherwise.
Nor is it apparent why the quoted statement should be contrasted
with the statement that "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—regardless of point of delivery." This is followed by the
statement that "of course, this is in substance the same thing as
selling at one price f.o.b. mill" (p. 603, 604).

It is true that in the Staley and Corn Products Refining Com-
pany cases the Commission took the position that the discrimina-
tion there found was embodied in the varying net factory prices after
deduction of the costs of delivery. This interpretation of the
Act was apparently accepted by the Supreme Court in those two
cases. In the Corn Products case the Supreme Court held that
the basing point system there used "results inevitably in systematic
price discriminations, since the prices they receive upon deliveries
from Kansas City bear relation to factors other than actual costs of
production or delivery" (324 U.S. 732), and that the prices on
shipments from Kansas City to various cities "are frequently
discriminatory, since the prices in such cities usually vary accord-
ing to factors, phantom freight and freight absorption, which are
unrelated to any proper element of actual cost," (id. at 739). The
Court set out in its opinion a table showing "this sharply varying
factory net and also the amounts of phantom freight" (id. at 733).
In the *Staley* case failure to make due allowance is even more clearly condemned. The Court said that "price discriminations are necessarily involved where the price basing point is distant from the point of production," that "this is because" of phantom freight or freight absorption, and that "since such freight differentials bear no relation to the actual cost of delivery, they are systematic discriminations prohibited by Section 2(a), whenever they have the defined effect upon competition" (id. at 751). The Court said also that in both cases the system discriminated systematically in favor of some buyers and against others "by reason of respondents' absorption of freight and collection of phantom freight" (id. at 756).

It would be difficult to select language more nearly approximating the proposition that failure to make due allowance for differences in costs of delivery makes delivered prices discriminatory, for that was the only form of discrimination in the basing point system used by the Corn Products and Staley Companies.

Yet Mr. Head characterizes this interpretation as "startling and far reaching" (p. 604). How startling and far reaching such an interpretation may be depends, of course, on the extent that there may be delivered price systems which are discriminatory and which are also injurious to competition. While such interpretation involves a uniform net factory price subject to the statutory exemptions, it is not the same thing as "selling at one price f.o.b. mill," for it leaves open to the seller delivered prices which make due allowance for differences in cost of delivery. The critics of such interpretation are necessarily in the position of demanding and defending either varying net factory prices or delivered prices which do not make due allowance for differences in cost of delivery. There is no logical escape from the conclusion that in either case the demand is for and the defense is of discrimination.

Mr. Head follows his characterization of "startling and far reaching" by asserting that "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" (p. 604). This assertion carries the assumption that freight advantage is the sole determinant of competitive advantage and the other elements of competitive advantage can not or should not be recognized. Obviously any method of pricing that makes freight advantage the sole determinant, and then nullifies that advantage, has automatically nullified all the other competitive elements also. And unless it be defined in terms of a standardized form of freight even freight advantage would not exclude one mill
from another’s home territory, to the extent one mill uses a cheaper form of transportation than another. Any exclusion which might occur would result from freight or other competitive advantage being translated into a lower price than the distant mill would care to meet, instead of cross hauling into each other’s territory at identical delivered prices. The phrase in the assertion under discussion “to the extent of its capacity” is interesting and significant. For it recognizes that there is no economic explanation or justification for distant mills regularly going into the home territory of other mills on a freight absorption basis when the latter are not operating to capacity.

The above quoted assertion was followed immediately by another to the effect that “the country would eventually be split into little Balkan industrial states” (p. 604). A similar assertion was made in a brief filed by Mr. Head’s firm on behalf of the General Electric Company in a case now pending on review of the Commission’s order in the Circuit Court of Appeals for the Seventh Circuit\(^\text{19}\) (Case No. 8644). This neat political figure of speech has only one defect; it is an admission that the industries to which it may be applicable are not composed of the autonomous, independent units which competitive theory assumes them to be but are cartelized industries which should not be disturbed.

Mr. Head proceeds to quote from the Circuit Court of Appeals’ opinion in the Cement case, which he says “summed up the Commission’s objective” as being to give effect to the naturally inherent advantages and disadvantages of mill location by making freight advantages and disadvantages “supreme,” with the result that “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”\(^\text{20}\) (p. 604). As already shown the Commission does not propose any such requirement. Under the pricing system involved in the Cement case, freight advantage and disadvantage was considered by the industry as the sole and therefore the “supreme” competitive factor, and as a factor that must be systematically offset through phantom freight and freight absorption. Nor is it quite clear how what is a natural advantage to begin with is transformed into an artificial one merely because the government intervenes to make the natural advantage effective.

Under the title “Basis for the Commission’s Position” Mr.

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20. 157 F.2d 563.
Head states that "a delivered price which is the same to all buyers would not seem to involve any discrimination of any kind" but that the Commission nevertheless "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" (p. 605). As previously shown, no case involving only a single seller's use of such a price can be cited. Mr. Head also cites in this connection Rigid Steel Conduit Association et al. v. Federal Trade Commission, now on appeal to the Seventh Circuit Court of Appeals. He cites it in support of his statement that "apparently" the Commission "believes that such a pricing system of an individual seller also constitutes an unfair method of competition" under the F. T. C. Act (p. 605). No question of the use of a uniform delivered price is involved in this case nor is the use of any pricing practice by a single seller. It is a basing point case which Mr. Head had previously distinguished from the uniform delivered price (p. 601) and it involves all the producers of conduit, not a single seller, as Mr. Head's own footnote recognizes (p. 605).

It is true that the Commission has regarded mill net as the true price in delivered prices that include delivery by common carrier and has taken the position that discrimination in such prices is ascertainable only by comparison of the mill nets. Otherwise all differences in delivered prices would be prima facie discriminatory. Instead of quoting from the complaint in the Cement case to the above effect it would have been more appropriate to have quoted from the Commission's findings to that effect. However, as already indicated, the Supreme Court in the Staley and Corn Products cases found the discrimination in terms of mill net and that this resulted from failure to make due allowance for differences in cost of delivery. In the Cement case the Commission found that even though the word "price" in the Act were taken to mean delivered price and not mill net, the delivered prices of cement were discriminatory because they did not make the due allowance required by the statute.

**Meaning of "Price" and "Due Allowance"**

Mr. Head takes issue with the concept that "the seller must make allowance for the exact cost of delivery, neither more nor less" (p. 606) and under "Proper Interpretation of the Act" presents his theory of what is price and what is due allowance (p. 607).
Arguing that price means delivered price he states that “the purchaser's interest in a price is the cost to him at the place he will use the commodity” and that “his ability to compete, which the Act seeks to preserve, depends on the cost to him at that point” (pp. 607, 608). The argument attempts to prove too much. Price as used in the Act surely does not mean delivered price only, for if so, discrimination in f.o.b. mill prices would not be prohibited at all. While a purchaser's interest in price may be in what it costs him at the place of use he may not necessarily be interested in its cost delivered by common carrier; he may wish to provide his own transportation to the place of use for reasons of economy, convenience or to get a lower delivered cost than his competitor. What is place of use depends on whether the commodity is to be consumed, processed or resold without processing. The “ability” of purchasers to compete, which Mr. Head says the Act seeks to preserve, has little or no application to consuming purchasers and yet it would hardly be contended that consumers have no protection against discrimination. The ability of processor and dealer purchasers to compete may depend on their ability to reduce their delivered costs by providing their own delivery facilities from the factory to where they want to use it. Moreover, a dealer may want to use the commodity for resale at a place where he has no established place of business. The law permits this as one of the rights of free competitive enterprise, although organized dealers have opposed it and obtained support from organized manufacturers for its inhibition. There is no doubt that delivered price systems lend themselves readily to such an inhibition. A question also arises whether the ability of purchasers to compete is necessarily synonymous with inability of some to purchase more cheaply than others where lower costs of delivery would warrant it, as in “one price across the country.”

One difficulty with this line of argument about the ability of purchasers to compete is that it assumes the statute has no applicability to the preservation of competition among the producers and sellers of a commodity. The terms of the Act very definitely include the preservation of that kind of ability to compete, but that is ignored in the remainder of Mr. Head's argument on this point. He returns to the argument that price means delivered price, stating that if the seller chooses to quote a delivered price, “that would seem to be the price in which discrimination is forbidden,” and that “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” (p. 608). Of course no one would suggest that discrimination in delivered prices is not forbidden, but it is impossible to determine whether such discrimination exists when delivered prices differ, and if so the amount of discrimination, except by a comparison of mill nets. Otherwise every difference in delivered prices would be discriminatory. Mr. Head also argues that the proviso regarding due allowance “is meaningless” if the word price means mill net, “since a mill net never includes transportation cost” (p. 608). This is a non-sequitur because the proviso would hardly be meaningless just because it applies only where delivery is furnished and mill net would include transportation cost if furnished in the seller’s owned vehicle.

Where delivered prices do not differ as in “one price across the country,” the crucial question, as Mr. Head recognizes, is whether the statute requires due allowance for differences in cost of delivery or merely permits it. Quoting the proviso of the Act that it shall not prevent “differentials which make only due allowance for differences in the costs of manufacture, sales or delivery,” he states that “this proviso presupposes differentials in price which are due to inclusion of cost of delivery” and that “the word ‘only’ in the phrase ‘only due allowance’ connotes a maximum; its use is inconsistent with interpreting the proviso as a requirement.” (p.608). The first statement quoted can mean only that differentials which are not due to inclusion of cost of delivery are not the differentials which the proviso “presupposes.” Nevertheless, the argument is that some differentials other than those the proviso “presupposes” are permissible and they are to be considered permissible if they do not exceed a “maximum.” To reach that conclusion the word “only” is treated as meaning the same as “no more than.” Webster’s Dictionary, however, defines the word as “no or nothing more or no other than; for no other purpose; at no other time, in no other wise, etc. than; exclusively; solely; merely.” So the word “only” as used in the proviso excludes every allowance for differences in cost of delivery except those which are “due.” Webster’s defines “due” as “owed or owing as a natural or moral right; becoming, fit, or appropriate; rightful, proper or just.” Thus both the word only and the word due unite in excluding allowances that are not made on account of differences in cost of delivery and in excluding the idea of a maximum.

Moreover, one who entertains the idea of a maximum must
define that maximum, and apparently the only logical definition is that any differential in delivered prices must not exceed the difference in cost of delivery. Mr. Head having conceded that the price differential can not exceed the difference in cost of delivery, let us examine the validity of the idea that the price differential can be less than the difference in delivery cost. Let us assume a case where the difference in cost of delivery is 50 cents per unit of product and where the allowance or price differential is only 25 cents. According to Mr. Head that should be permissible because it is less than the difference in cost of delivery. The result, however, is to increase the price by 25 cents to the purchaser at one location above the price to the purchaser at the other location and to increase the mill net by that amount. The actual freight being less by that amount than the imputed freight, the 25 cents is called phantom freight. So the idea that it is permissible to make allowance for less than the difference in cost of delivery becomes a rationalization of phantom freight, the most implausible and indefensible aspect of delivered prices which do not make due allowance for differences in cost of delivery. On the other hand and by the same token it follows that when Mr. Head concedes that price differentials cannot exceed differences in cost of delivery he has conceded that the proviso cannot justify freight absorption. For example, he concedes that the proviso will not permit the difference in cost of delivery to be 25 cents per unit and the allowance or price differential to be 50 cents. In any event all these permutations attach themselves to and are reflected in the net factory prices, and the higher of two prices, or the maximum, is no more immune than the lower from a charge of discrimination.

Mr. Head pursues this argument by contending that if one interprets the proviso as requiring due or exact allowance for differences in cost of delivery, "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." It will be noted that Mr. Head here adopts the normal meaning of the word "due," only to recoil from its implications. He correctly says that "even the Commission has not advanced this interpretation" (p. 608). However, this conveys the impression that the reason for not advancing it is because it is patently unsound, whereas the sufficient explanation is that the Commission has had no occasion to pass on the issue in any formal way. But let a case be assumed where every ingredient of unlawful discrimination exists unless the seller affirmatively proves due
allowance for differences in cost of manufacture or sale under the proviso, then it would seem that the law has put on him the requirement of making due allowance by requiring him to prove that he has made it.

CONGRESSIONAL HISTORY

Under the title "Congressional History," Mr. Head discusses the striking of the proposed definition of price as mill net from the Robinson-Patman Act while it was being debated in Congress and says the Commission "is now asking the courts to require sellers to use the f.o.b mill pricing method" which is "exactly what Congress refused to do" (pp. 608, 609). The Commission is not asking the courts to do any such thing. It is doing exactly what Mr. Head's own quotation (p. 609) from the Supreme Court's opinion in the Corn Products case shows that Congress intended, namely, that Congress "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." Whatever it was that the Commission required in the Staley and Corn Products cases the Supreme Court upheld it, but it is no more correct to say that the Commission is asking the courts to require use of the f.o.b. mill pricing method in the cases now pending than to say the same of the two former cases. Only delivered prices that are discriminatory can be reached under the Robinson-Patman Act, and discriminatory f.o.b. mill prices also can be reached thereunder.

In this connection Mr. Head quotes from the opinion of the Seventh Circuit Court of Appeals in the Cement case, to the effect that Congress had "over the years steadfastly refused to declare illegal" the pricing system there involved and if it "is now to be outlawed by the courts, it will mark the high tide in judicial usurpation"23 (p. 609). In the first place Congress did not steadfastly refuse to declare the basing point system illegal, and the Supreme Court rejected the contention that Congress intended to legalize it. The Cement case was grounded upon charges and findings of a price fixing conspiracy, a thing which both Congress and the courts have long condemned under both the Sherman Act and the Federal Trade Commission Act. If the court had confined itself to a holding that the Commission did not have substantial evidence to support such findings, it would have been on theoret-

22. 324 U. S. 737.
23. 157 F.2d 573.
cally unassailable ground however one might disagree with its conclusion concerning the evidence.

COURT DECISIONS

Under the title “Court Decisions,” Mr. Head next proceeds to discuss the decisions of the Supreme Court in the Staley and Corn Products cases and the decision of the Seventh Circuit Court of Appeals in the Cement case. For some reason he failed to discuss them in connection with his preceding titles, “The Attack on the Delivered Price of a Single Seller” and “Basis for the Commission’s Position” pp. 603, 604), although the Staley and Corn Products cases were very pertinent to those titles. The three cases referred to are used under “Court Decisions” as support for the thesis that the uniform delivered price is not discriminatory under the Robinson-Patman Act. None of the cases is in point, for no such system was involved; and Mr. Head accurately describes as “dictum” the following sentence in the Staley opinion, which, he says, “upheld a uniform delivered price (p. 610):

“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.”2

However that may be, it is also clear, from its use of the words “by so doing,” that the Court conceived of such a price as one involving only freight absorption and as excluding phantom freight. The fact of the matter is that it is impossible to have a uniform or zone delivered price that meets such a specification. For in all localities where the imputed freight factor is more than the actual freight as in localities at or near the factory, there will be phantom freight. Freight absorption can occur only in the localities where the imputed freight factor is less than the actual freight. Some form of freight average must be used in a uniform or zone delivered price system, and it is almost necessarily an average of freight costs based on previous sales rather than an average of the freight rates. In either case, the buyers who fall below the average must pay more freight than the actual and those who are above the average are permitted to pay less than the actual. This runs counter to the Supreme Court’s declaration that a non-discriminatory system is one which gives to purchasers who have the natural advantage of proximity to a seller’s plant “the price advantages

which they are entitled to expect over purchasers at a distance."^{25}

Curiously enough, Mr. Head here treats the *Staley* and *Corn Products* cases as condemnatory of phantom freight only, while at p. 601 he had concurred in the present writer's judgment that both phantom freight and freight absorption were condemned. Nevertheless he quotes from the Commission's brief in the *Cement* case expressing such judgment and points out that the Seventh Circuit Court of Appeals had disagreed with it (p. 611). By contrast with the omission of freight absorption and the stressing of phantom freight in his discussion of the *Staley* and *Corn Products* cases, Mr. Head here omits phantom freight and stresses freight absorption in his discussion of the *Cement* case. He does this in apparent repetition of his error (p. 600) that the *Cement* case involved freight absorption only, whereas about half the cement mills were non-base mills and systematically charged phantom freight as part of the pricing formula. Presumably the Supreme Court will clarify this disputed point concerning the status of freight absorption under the *Staley* and *Corn Products* cases when it decides the *Cement Case*.^{26} Mr. Head is also in error when he states that the delivered price of cement varied at different destinations "according to the freight rate from the nearest mill" (p. 612). It varied only according to variations in the all-rail freight translated into barrel rates from the governing basing point which was not always the nearest mill and not always a point of production.

One can not wholly agree with Mr. Head's statement that a reversal by the Supreme Court of the Seventh 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." Nor can one altogether disagree with his statement that if freight absorption is condemned by the Supreme Court in the *Cement* case, this "would not be a holding that a uniform delivered price constituted a discrimination" (p. 612). If the Court should more clearly agree with the Commission concerning the status of net factory price as the true price, and that systematic freight absorption has no better legal status than phantom freight, the vulnerability under the Robinson-Patman Act of a uniform delivered price which injures competition would become apparent.^{27}

25. Ibid.


27. Incidentally the case of *Fort Howard Paper Co., et al. v. Federal Trade Commission*, 155 F.2d 899, would have been as relevant, if not more so,
In his "Summary and Conclusion" Mr. Head recognizes that the word price "must in some cases" mean other than delivered price (p. 612). This he had omitted to recognize at p. 608. He repeats the fallacy that delivery costs "can never be part of a mill net." All he means is that delivery cost through common carrier can never be part of the mill net. By recognizing that price may mean either mill net or delivered, Mr. Head must also recognize that either one may be a discriminatory price. If a delivered price is discriminatory it is because it fails to make due allowance for difference in cost of delivery. If a delivered price is discriminatory it must manifest itself in the mill net and if a mill net price is discriminatory it must manifest itself in the delivered price. Discrimination can not be concealed or canceled merely by turning the one form of price quotation into the other.

Mr. Head states (p. 612) that to treat the words "only due allowance" in the proviso of Section 2(a) as requiring "exact allowance for differences in cost of transportation" is to require "disregard of the plain meaning of the word used." But at p. 608 he had himself treated the word "due" as meaning "exact." He also there treated the word "only" as meaning "no more than," for which there is no dictionary warrant. The inference from these various contentions is that the proviso should be applied only to differentials which "make no more than exact allowance" for differences in cost of delivery or of manufacture or sale. And who can say what that would mean?

Mr. Head draws the final conclusion that "the Commission's position is legally untenable seems inescapable" (p. 613). Assuming that the position referred to is the alleged one of attacking the uniform delivered price of a single seller it has been shown that the Commission has not initiated any such attack in a formal case and until it does the question is academic. If and when such a formal case is brought, it will be necessary for the Commission to establish by evidence which the courts will regard as substantial that there is discrimination which has a reasonable probability of preventing or injuring competition. Under the law the Commission can do no more; under the public policy declared by the law it can do no less.

to Mr. Head's analysis of the cases as his use (p. 605, m. 17) of Rigid Steel Conduit Ass'n, et al. v. Federal Trade Commission, supra note 19, which has not been decided.