

SCOPES OF FEDERAL TRADE COMMISSION ORDERS

IN PRICE DISCRIMINATION CASES

By

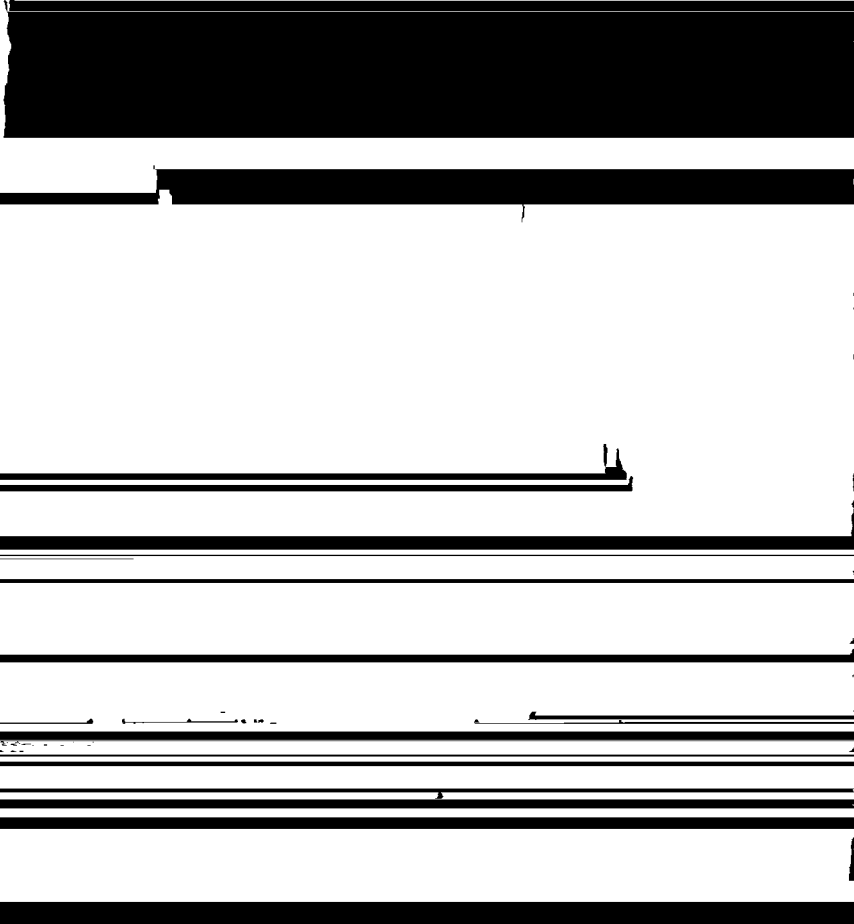
I embrace the opportunity to discuss one of the Federal Trade Commission's most difficult problems before this informed group. I am honored to share the platform with Edgar Barton, to whose keen mind and persuasive presence I am no stranger. In fact, we have recently exchanged ideas on this very subject before a different forum—the

about such cases as: *Hershey Chocolate*,¹ *Jacob Siegel*,² *Morton Salt*,³ *Ruberoid*,⁴ *National Lead*⁵ and *Niehoff* cases.⁶

I look upon the *Hershey Chocolate* case as standing for the proposition that an order should not be limited to proscribing the specific acts by which the violation was manifested but that, to be of any value, it must also forbid the unlawful method employed. In this particular case the court approved an order inhibiting unfair practices in connection with several different confectionery items even though the complaint was limited to one item.

The *Jacob Siegel* case stands for the proposition that the Commission, as an expert body, has wide latitude in fashioning its orders and the courts will not interfere except where the remedy selected has no reasonable relationship to the unlawful practices found to exist.

In the *Morton Salt* case the Supreme Court disapproved a Commission price discrimination order containing provisos permitting certain price differentials "if they do not tend to lessen, injure or destroy competition." I look upon this case as standing for the proposition that the Commission must shift to the courts the job of determining



The *National Lead* case is perhaps most important from the point of view of conspiracy orders, but it again reaffirms the *Siegel* doctrine that the Commission's judgment in fashioning orders is not to be interfered with unless it is arbitrary or clearly wrong.

The *Nichoff* case, which is of very recent vintage, held that it is for the Commission to decide whether its order against one member of an industry ought to be held in abeyance until the Commission has also proceeded against other members of the industry. This case focuses attention upon the possibility that in some types of situations the Commission might find it advisable to set the effective dates of orders so as to avoid putting any particular member of an industry at a competitive disadvantage.

Starting from those general principles, the Commission must fashion orders that are responsive to a wide variety of situations.

Price discriminations, of course, all involve different prices charged

ventionally classified according to the economic interest that suffers by reason of the discrimination. If a competitor of the seller is in

I fully appreciate that Justice Jackson dissenting in the *Rohrbaugh*

spondent discharges the burden of proving that the discrimination

In any event, Commission orders in the secondary line cases are, at least in one sense, inherently limited in area. This is so because

tomers. Therefore, the area of effectiveness with respect to any pair of competitive customers would be that area in which they compete.




Still another difficult problem that we must consider is that of fairness among the competitors in industries in which all of the

each such situation and sometimes strike a balance between the conflicting interests of the consuming public and competitors in the industry. This will not always be an easy task, but it is a necessary one.




Primary line cases are less diverse and less numerous than secondary line cases, but they present an even tougher problem of order drafting. Here we are not concerned with the adverse effects of a price discrimination upon buyers, but rather upon competitors of the seller.

The typical primary line case involves a large seller who injures his

to monopoly and outside the protection of the provisos to Section 2(a) of the Clayton Act. The Commission's task is to fashion an order that will terminate this method of competition without imposing



One type of order prohibits selling to any purchaser at prices lower



competition with any other seller. Another type prohibits selling to any purchaser at a price which is lower than the price charged any other purchaser engaged in the same line of commerce, where such

~~that draftive orders in price discrimination cases is not an essential~~

In concluding my remarks, let me repeat again that it is always the aim of the Federal Trade Commission to fashion an order that will effectively stamp out the illegal practice and, at the same time, be fair to all parties concerned. I am frank to admit that we have