

HARD BARGAINING UNDER § 2(f) OF THE ROBINSON-PATMAN ACT

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While § 2(f)¹ of the Robinson-Patman Act prohibiting the inducement or receipt of a proscribed discrimination in price, has been a part of the Act since its passage in 1936, its enforcement by the Federal Trade Commission has been sparing² and its invocation by private parties infrequent.³ From an administrative point of view, however, there are indications that a change in enforcement policy may be forthcoming. Outlining Federal Trade Commission policy in a 1970 appearance before the Committee on Small Business, Caspar Weinberger, then Federal Trade Commission Chairman, stated: "We think that the greatest return will probably be obtained by concentrating on inducement of anticompetitive discrimination."⁴

Thus, while users spurred by pressures to control costs (the current wage-price freeze notwithstanding) may discover that aggressive bargaining may yield better prices from producers anxious to improve on disappointing sales of the last two years, it may also bring about heretofore unexperienced § 2(f) problems. Case law has produced little in the way of guidelines. This article therefore is intended to offer insight and counsel to enable purchasers to remain in the channel of sanctioned aggressive bargaining and avoid courses of conduct which will invite § 2(f) litigation.

Authoritative interpretation of § 2(f) was first undertaken by the Supreme Court in 1953 in *Automatic Canteen Co. of America v. FTC*.⁵ The issue which the Supreme Court considered to be before it was procedural in nature and in the Court's words was "simply the burden of coming forward with evidence under § 2(f) of the Act."⁶ However, as a "neces-

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¹ 15 U.S.C. § 13(f) (1964). This section provides:

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

² In 35 years, the Federal Trade Commission has filed less than 50 complaints.

³ *Texas Gulf Sulphur Co. v. J. R. Simplot, Inc.*, 1969 Trade Cas. ¶ 72,975 at 87,816 (9th Cir. 1969); *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *American Cooperative Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907 (7th Cir. 1946); *Metropolitan Dry Cleaning Machinery Co., Inc. v. Mashtex Machinery Corp.*, 1969 Trade Cas. ¶ 72,686 at 86,438 (E.D.N.Y. 1969); *Big Value Stamp Co. v. Sperry and Hutchison Co.*, 1967 Trade Cas. ¶ 71,978 at 83,459 (S.D. Ohio 1967); *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230, 237 (D.N.J. 1956).

⁴ *Hearings on Small Business and the Robinson-Patman Act Before The Special Subcommittee on Small Business and the Robinson-Patman Act of the House Select Committee on Small Business*, 91st Cong., 2d Sess. Vol. 2 at 831 (1970); see also *The Federal Trade Commission of the 1970's*, 39 A.B.A. ANTITRUST L.J. 411, 422 (1970); *Beatrice Foods Co.* [1967-70 Transfer Binder] TRADE REG. RBP. ¶ 19,945 at 21,286 (1969); *In re Great Atlantic & Pacific Tea Co., Inc.*, FTC Doc. No. 8866, Oct. 18, 1971.

⁵ 346 U.S. 61 (1953).

⁶ *Id.* at 65.

sary preliminary" to deciding the "precise issue"⁷ the Court undertook to analyze the substantive prohibition of § 2(f) against the knowing receipt of illegal discrimination in price.

In the proceedings before the Commission, the Commission staff demonstrated that Automatic Canteen had secured prices as much as one-third below those obtained by its rivals. Based on this showing, the Commission held that the buyer knowingly received a favorable concession which was sufficiently sizeable to cause "injurious" market effects and therefore a prima facie § 2(f) violation was established which the buyer was then obligated to disprove as either being "non injurious, or otherwise justified."⁸ The Court rejected this construction, which would have required the buyer to prove the legality of the price obtained, holding that the obligation of going forward with the evidence should be measured under a more flexible standard of "fairness" and convenience.⁹ Measured by this standard, the burden of going forward with evidence relating to costs was regarded by the Court as the obligation of the party plaintiff and the burden of going forward with evidence that the seller's price was made to meet the equally low price of a competitor as the obligation of the buyer. Commenting on the Court's reasoning, the *Report of the Attorney General's National Committee to Study the Antitrust Laws* stated:

But the Court realized that a buyer charged with accepting a favorable differential could not ordinarily be expected to possess information of the seller's cost data adequate to negating possible illegality through a "cost justification" of the seller's price. Rather, the Court coined a rule of "convenience" and fairness by which the production of evidence as to cost savings, wherever appropriate as an element in the buyer's illegality, became the task of the Commission which was obviously better equipped than the buyer for investigating his supplier's book of account.¹⁰

With respect to costs the Court in *Automatic Canteen* outlined in some detail situations in which the buyer should reasonably be aware that the seller's price is below that which can be justified:¹¹

⁷ *Id.* at 74.

⁸ 46 FTC 861, 896 (1950).

⁹ *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 81 (1953).

¹⁰ THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, pt. IV, at 194-95 (1955).

¹¹ 15 U.S.C. § 13(a) (1964). This section provides:

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 either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for

Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified. But trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified. The Commission need only show, to establish its *prima facie* case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. The showing of knowledge, of course, will depend to some extent on the size of the discrepancy between cost differential and price differential, so that the two questions are not isolated. A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient.¹²

The circumstances from which culpable knowledge may be inferred were expanded in a series of cases involving group buying arrangements in the automotive parts industry. In *American Motor Specialties Co. v. FTC*,¹³ the system of volume discounts granted to groups of distributors who pooled the individual purchases of their members was alleged to permit group members to receive discriminatory prices to the competitive disadvantage of nonmembers. The Second Circuit discussed the buyer's position in these terms:

Petitioners of course knew that they, as individual firms, were receiving goods in the same quantities and were served by sellers in the same manner as their competitors, and hence organized themselves into a buying group in order to obtain lower prices than their unorganized competitors. Hence, by the very fact of having combined into a group and having obtained thereby a favorable price differential, they each, under Automatic Canteen, were charged with notice that this price differential they each enjoyed could not be justified. And this knowledge of each of the seventeen individual firms is imputable to the organization of which they were all members. Thus, irrespective of whether the buying . . . constituted an improper *inducement* under Section 2(f), we hold that the Commission introduced sufficient evidence to fulfill the requirements of Automatic Canteen when it showed that petitioners knowingly *received* preferential price treatment of such a nature as to violate Section 2.¹⁴

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.

¹² 346 U.S. at 79-80.

¹³ 278 F.2d 225 (2d Cir. 1960).

¹⁴ *Id.* at 228-29.

Similarly in *Mid-South Distributors v. FTC*,¹⁵ the following factors were held sufficient to establish a presumption of the buyer's knowledge of the seller's nonjustification:

The outstanding factor is that as to a specific purchase order the particular Member-Jobber knew two things. First, the price he was obtaining through the Co-op was substantially lower than his group (b) competitors were required to pay. Second, for all practical purposes, the order and shipment were handled exactly the same. It is true that the Member-Jobber forwarded the order to the Supplier on a Co-op order form which ostensibly reflected a purchase of the goods for the Co-op. But this order form showed that shipment was to be made to the specified Member-Jobber. The buyer knew that this procedure represented no real savings in cost to the seller. Invoices were, of course, sent by the Supplier to the Co-op which was presumably liable therefor. But the Member-Jobber as buyer knew that the volume discount was extended, not because of increased credit reliability acquired by the presence of the Co-op as a sort of guarantor, but solely because of the increased volume of total purchases. The buyer could not reasonably have entertained any idea that he was getting preferred treatment over his competitor because credit costs were less. Moreover, there was no proof that this is why Suppliers were selling at more favorable terms.¹⁶

Under its balance of convenience standard, though, the Court in *Automatic Canteen* considered proof of knowledge that the seller's offer was made to meet a competing offer more particularly within the province of the buyer.¹⁷ In a footnote to its opinion the Court stated:

¹⁵ 287 F.2d 512 (5th Cir. 1961).

¹⁶ *Id.* at 518. The Ninth Circuit's opinion in *Alhambra Motor Parts v. FTC*, 309 F.2d 213 (9th Cir. 1962), however, indicates that cooperative buying would be upheld in respect to a cooperative which conducted a cost saving warehouse and redistribution service (1) if the co-op buying group were deemed a separate entity which as opposed to being a mere device to facilitate member jobber qualification for volume discounts as no price discrimination would exist in that case between the warehousing co-op and the independent warehouse distributors which both performed distribution functions and received the same redistribution discount, or; (2) if, in any event the economies of the warehousing operation were sufficient to dispel any culpable knowledge on the part of the member jobbers that the price discounts could not be justified. See also *American Metal Products Co.*, [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 15,684 at 20,514 (FTC 1962), dismissed by FTC as moot (June 8, 1962) (no competitive injury to buyer's competitors in view of apparent cost justification and lack of evidence that favored buyer used discounts to sell at lower price). *But cf.* *National Parts Warehouse*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,700 at 21,607 (FTC 1963) (injury to competitors of buying group's jobber members postulated from member's price advantage over unaffiliated jobbers, although not reflected in their resale prices).

¹⁷ 15 U.S.C. § 13(b) (1964). This section provides:

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller from rebutting the prima facie case thus made by showing that his lower price on 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.

Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller.¹⁸

Until recently, this aspect of the *Automatic Canteen* opinion has received little treatment. The Commission has acknowledged the Court's procedural allocation, accepting the burden of presenting evidence as to the absence of cost justification and the presence of probable competitive injury, but has declared that it regards the burden with respect to the issues of "meeting competition" and "changing conditions" to be upon the buyer.¹⁹ The Fifth Circuit, however, while upholding the Commission's cease and desist order under § 2(f) against two buying cooperatives in its *Mid-South Distributors* opinion indicated that it regarded the burden to be on the Commission with respect to § 2(b) justification as well.²⁰ The Court in *Mid-South Distributors* also commented briefly upon appellants' substantive contention that they were without actual knowledge that the official prices were below those necessary to meet competition:

Even less need be said of the § 2(b) seller justification to meet competition. The Co-ops were not formed to give Suppliers an opportunity to meet competition with other Suppliers. The Co-ops were formed to get from Suppliers who were already committed to the volume rebate practices the benefit of that competitive method for individual jobbers through the pooling of orders. What was sought was not a benefit for one Supplier because individual jobbers could get a like advantage from another Supplier. What was sought was a benefit which the individual jobbers at their volume level could get from no one.²¹

The Commission's opinion in *Beatrice Foods Co.*,²² though, has produced a decision which already has begun to fulfill Frederick Rowe's prediction that it will "almost certainly spawn further controversy and litigation."²³ In that proceeding a majority of the Commission dismissed the § 2(a) charges against Beatrice for price discrimination in favor of Kroger and A & P. The prices quoted to A & P were found to have been both short lived and justifiable under § 2(b), and in the one instance where a concession of prolonged and substantial duration was made, the interstate commerce jurisdictional requirement had not been met. While the price concessions granted to Kroger were found to have substantial competitive

¹⁸ 346 U.S. at 79.

¹⁹ National Parts Warehouse, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,700 at 21,607 (FTC 1963).

²⁰ 287 F.2d at 517.

²¹ *Id.* at 519.

²² 1967 Trade Cas. ¶ 72,124 at 84,051 (9th Cir. 1967).

²³ Rowe, *New Developments Under the Robinson-Patman Act*, 26 BUS. LAW. 971, 973 (1971).

impact, the "meeting competition" defense was held to be available to Beatrice, notwithstanding the fact that the offered prices were actually below those paid by Kroger's competition. Beatrice's good faith effort to determine the competitive prices was held to be sufficient to bring it within the § 2(b) justification.

The absolution of Beatrice, however, did not exonerate Kroger. Kroger conveyed false information as to competitive offers, and their deception was held to have induced a discrimination in violation of § 2(f). Under these circumstances, Kroger could not avail itself of the § 2(b) defense accorded to Beatrice. In the words of Commissioner Jones:

Here, Kroger was in a very powerful bargaining position because of its size and importance to the dairies in the Charleston Division. This being so, Mr. Casserly went beyond the bounds of permissible bargaining when he falsely gave the impression that the original Broughton offer amounted to a 20 per cent discount; when he told the Beatrice representatives that their 71 cent offer was too high on that specific ground; when he first rejected their 68 cent offer and then indicated that their 66 cent offer was 'competitive' without having made any comparison of the bids; and when *he failed* to convey any *correct* information about the price levels being quoted by others. It is by reason of this conduct that Kroger took on the risk of liability under the Robinson-Patman Act.

. . . .

Kroger asserts that this means it cannot be liable if Beatrice is found to have acted in good faith. We disagree. There may be instances in which a buyer is insulated from liability by the seller's good faith but Automatic Canteen does not hold that the buyer is always entitled to avail himself of such a defense, nor does it compel such a result in the present situation. Undoubtedly a buyer can accept an offer made to meet competition which in fact does beat a competing offer if the buyer has done nothing to initiate the price break in the first place, but to hold that a buyer can escape liability merely by inducing and accepting a second discriminatory offer which meets an offer *previously induced by the buyer* would make a mockery of Section 2(f).²⁴

The Sixth Circuit, in an opinion authored by former Supreme Court Justice Clark sitting by designation, affirmed in a decision handed down this spring:

Kroger seizes upon this circumstance contending that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of section 2(f) without there being one under section 2(a). While ordinarily this may be true—a matter we need not and do not pass upon — it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given "false price information" to Beatrice as to Broughton's competing bid which induced Beatrice in perfect good faith to meet Broughton's equally low price.²⁵

²⁴ Beatrice Foods Co., [1967-70 Transfer Binder] TRADE REG. REP. ¶ 19,045 at 21,312 (1969).

²⁵ Kroger Company v. FTC, 438 F.2d 1372, 1374 (6th Cir.), *cert. denied*, 40 U.S.L.W. 3166 (U.S. Oct. 12, 1971).

The Commission has sought to follow up its victory in *Beatrice* in a two-pronged attack upon a private label milk agreement between the A & P and Borden companies.²⁶ In tendering its bid to supply A & P stores in the Chicago area with private label milk and other dairy products, Borden had informed A & P that its offer was being made to meet competition in the form of an existing offer or offers then in A & P's possession. In its complaint the Commission alleges that A & P violated both § 5 of the Federal Trade Commission Act and § 2(f) of the Robinson-Patman Act in accepting Borden's offer without informing Borden that its offer was substantially below those of other competitive bidders. Introduction of private label milk at the prevailing retail prices which had been secured at as much as 11 cents per gallon less than vendor labeled milk was further alleged to constitute illegal price stabilization in violation of § 5, on the grounds that the cost savings were not passed along to the consuming public; failure of Borden to pass on at the wholesale level similar price reductions to A & P's competitors in the Chicago area was similarly attacked as an unfair competitive practice. Thus comparing the complaint to the decision in the *Kroger* case it appears that the Commission by an approach parallel to that of its sister agency, the Securities and Exchange Commission, is seeking not only to proscribe misrepresentation but non-disclosure as well.

"Trade experience," another consideration pertinent to establishing the buyer's knowledge, was also recently discussed by the Ninth Circuit in *Texas Gulf-Sulphur Co. v. J. R. Simplot*.²⁷ In its action for contract rescission, Texas Gulf alleged that Simplot had unlawfully induced the sulphur supply contract in violation of § 2(f). In refusing to grant rescission, the Court noted the absence of the following factors:

. . . (a) that Simplot did not request or suggest, nor did Texas Gulf state or suggest that Texas Gulf should or would *not* give similar or as favorable a transaction to any other customer or prospective customer . . . (b) that there was no express or implied agreement that Texas Gulf would *not* extend to any of its customers any of the terms negotiated between Texas Gulf and Simplot or that anyone else would receive any less favorable transactions . . . (c) that Simplot merely attempted to obtain the best deal it could consistent with market conditions, and did not directly or indirectly attempt to obtain any advantage over any of its fertilizer competitors, or any more favorable deal than its competitors, or did not attempt to obtain, induce or receive any discrimination violative of the Robinson-Patman Act . . . (d) that Simplot had no reasons to believe that Texas Gulf would give less favorable terms to any other customer or would discriminate against any customer . . . (e) that there was no reason why Texas Gulf could not have granted the same terms and conditions to other customers and that Texas Gulf was under no restraint with respect thereto . . . (f)

²⁶ In re The Great Atlantic & Pacific Tea Co., Inc., FTC Doc. No. 8866, Oct. 18, 1971.
²⁷ 1969 Trade Cas. J 72,975 at 87,816 (9th Cir. 1969).

that the transactions in issue, including those with the alleged disfavored customers were isolated and nonrecurring transactions, each negotiated in the light of the particular needs of the parties and in response to market conditions existing at the time each was negotiated and executed.²⁸

Many of the factors focused upon in the *Texas Gulf* case are similar to those found in the so-called "buyer cases" arising under § 5 of the Federal Trade Commission Act. These cases, beginning with *Grand Union Co. v. FTC*,²⁹ have held that buyer-induced discrimination in allowances and services which are not within the reach of § 2(f) are nonetheless "unfair methods of competition" under the Federal Trade Commission Act.³⁰

The *Kroger* decision in which the Court refused to regard a violation by the seller as a condition precedent to finding buyer liability under § 2(f), and the *Grand Union* rationale of extending § 5 of the Federal Trade Commission Act to plug legislative "oversights"³¹ are of considerable doctrinal significance. It is submitted, however, that their real impact lies in enabling the prosecution of a violation, as distinguished from the proscription of additional business conduct. In *Grand Union*, there was no question that § 2(d) had been violated. The Court of Appeals for the Second Circuit stated: "The practice itself is clearly proscribed by § 2(d); the novelty is solely in the application of § 5 to a buyer's knowing receipt of unlawful payments."³²

In *Kroger*, the Court's denial of absolution to the buyer was expressly predicated upon the fact that the conveyance of false information relating to competitive bids induced the discrimination—not a startling conclusion, in the sense that the seller, too, cannot invoke the § 2(b) defense unless he meets a "good faith" standard. Moreover, as previously indicated, while there are important considerations compelling more vigorous enforcement of § 2(f),³³ there are equally compelling reasons supporting a policy which does not unduly restrict commercial bargaining. A consistent line of Court opinions and commentary evidence a clear desire to avoid the result of "burning down the house to cook the pig." In rejecting the Commission's position in *Automatic Canteen*, the Court stated:

Such a reading must be rejected in view of the effect it might have on

²⁸ *Id.* at 87,284.

²⁹ 300 F.2d 92 (2d Cir. 1962).

³⁰ *Giant Foods, Inc. v. FTC*, 307 F.2d 184 (D.C. Cir. 1962); *American News v. FTC*, 300 F.2d 104 (2d Cir. 1962). See also ANTITRUST DEVELOPMENTS 1955-68: A SUPPLEMENT TO REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS pt. IV, at 153, (1955); in *Fred Meyer Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966) buyer induced discriminations in allowances and services were held to be within reach of § 2(f). Certiorari was denied on this issue. 386 U.S. 907 (1967).

³¹ See *Rowe, New Developments Under the Robinson-Patman Act*, 26 BUS. LAW. 971, 974 (1971).

³² 300 F.2d at 98.

³³ See note 4 *supra*.

that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated.³⁴

Similarly the *Report of the Attorney General's Committee* maintained:

Especially significant was the Court's recognition of the imperative necessity for preserving the legal freedom of buyers to engage in aggressive bargaining over price as basic to effectively competitive distribution. In markets characterized by sellers enjoying a significant degree of control over price, the exertion of offsetting force by some large and aggressive buyers bargaining for concessions can contribute materially to lower prices for all. Not only is one reduction likely to spread; but each entering wedge enhances the negotiating position of other traders who can insist on equal concessions from the supplier with the ancient gambit of buying elsewhere unless he accedes. And unless competition on the buyers' level is wholly defunct, the ultimate consumer stands to benefit by lower prices. Legalistic impediments to this normal bargaining process, we think, might well deprive the public of gains that under effective competition it has a right to expect.³⁵

Kroger, too, drew this distinction:

Moreover, we find no support for the charge that the Commission's holding places the buyer at his peril whenever he engages in price bargaining. The use by the Commission of the "hard bargaining" language as well as the failure of *Kroger* "to convey any correct information about the price levels being quoted by others" is but a warning, not a command. The controlling point here is not the "hard bargaining" nor the "price levels" but the *misrepresentation* of the Broughton bid.³⁶

What then are those factors which invite § 2(f) condemnation and how may a businessman avoid them? Bargaining is in large measure a matter of personal style with some individuals preferring to state to the potential vendor at the outset the terms and conditions which they seek and aggressively bargain for them from that point, while others prefer to offer little communication in anticipation that the seller in an unstructured situation will come in with a lower offer than if a "ball park" is established for him. Whatever the technique, the buyer has in mind both a figure which he desires and a figure at which he will do business; these may be the same or different, depending on the circumstances. The important point is that neither must be palpably unjustifiable. In terms of costs, the Court in *Automatic Canteen* recognized the elusiveness of cost justification: "Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified."³⁷ The buyer, therefore, will not be required to establish a cost justification necessary to ex-

³⁴ 346 U.S. at 73-74.

³⁵ THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS pt. IV, at 196 (1955).

³⁶ *Kroger Co. v. FTC*, 438 F.2d 1372-78 (6th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3166 (U.S. Oct. 12, 1971).

³⁷ 346 U.S. at 79.

cuse a seller relying on the cost justification defense in a court or administrative proceeding. By the same token, however, *Automatic Canteen* makes it equally clear that exoneration will be accorded only where the methods by which the buyer is served or the quantities in which he purchases are sufficiently different from those of his competitors as to warrant the difference in price. *Kroger* further indicates that the buyer will be held to a high standard of knowledge in respect to prevailing competitive costs. To this end the buyer might well be advised to document the cost savings produced by and accruing to him, both as an internal check and as a means of corroboration.³⁸ The buyer should also avoid the enticement of certain trade devices such as cumulative volume discounts which do not produce cost savings and of "loss leaders" offered by sellers to establish a bridgehead at a new account.³⁹

If the price to be met is that of the seller's competitor, the buyer may wish to disclose written evidence of such price. *Kroger* does not compel disclosure, but does hold that if the buyer chooses to disclose, he must disclose fairly. If the Commission is successful in its suit recently filed against A & P and Borden, disclosure may be required at least under the circumstances where the seller expresses its offer in terms of meeting existing offers. Moreover, there is the further impression that the techniques utilized in playing one supplier off against another will be subject to closer scrutiny and that bargaining by means of non-factual persuasion is risky.⁴⁰

Finally, the buyer is prohibited from engaging in any form of anti-competitive behavior which would preclude the seller from offering substantially the same terms to the buyer's competitor.

³⁸ Rowe, *How to Comply with Sections 2(a)-(f)*, Proceedings N.Y. State Bar Ass'n. Section On Antitrust Law, Antitrust Law Symposium 124, 138 (1957).

³⁹ Often offers of this nature are made unsolicited. While no case has been decided involving receipt without solicitation, the wording of § 2(f) would appear to clearly condemn receipt of a concession known to be illegal. Both *Automatic Canteen* and *Grand Union*, decided under § 5 of the Federal Trade Commission Act, indicate such a disjunctive interpretation would be proper in a § 2(f) proceedings. Thus, if a buyer feels that these circumstances might arise with a vendor, he may wish to structure the negotiations by stating a basis upon which he will deal at the outset, thereby securing a price which, while not as low, is still advantageous and moreover not afoul of § 2(f).

⁴⁰ Rowe, *New Developments Under the Robinson-Patman Act*, 26 BUS. LAW. 971, 973 (1971); Report of ABA Commission to Study the Federal Trade Commission 68 (September 15, 1969). Conversely, however, a buyer is not bound to accept seller protestation that a concession would be violative of the Robinson-Patman Act which is not grounded in fact.