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Beatrice Foods: Meeting Competition and Buyer Liability

Albert I. Borowitz

AN EXPERIENCED antitrust practitioner[1] has observed that the traditional allocation of Robinson-Patman responsibility between seller and buyer appears to have been influenced by the treatment of kidnapping under the Imperial Chinese Codes. It seems that kidnapping was rampant in China until an ingenious legislator solved the problem by making the payment of ransom a capital offense.

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For years, the administration of the Robinson-Patman Act[2] has followed a similar pattern. Although the legislation was principally directed against the anticompetitive effect of pressure by large buyers,[3] the seller has more often felt the bite of the statutory prohibitions than the buyer. Two primary factors in this anomalous enforcement pattern have been the Federal Trade Commission's (FTC) restrictive interpretation of the seller's meeting competition defense[4] and the courts'

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1 Stanley Freedman of Dayton, Ohio.

2 15 U.S.C. §§13, 13a-c, 21a (1964). The Robinson-Patman Act, enacted in 1936, amended the original Clayton Act, ch. 323, 38 Stat. 730 (1914).

3 *See* H.R. REP. NO. 2287, 74th Cong., 2d Sess. 3 (1936). These big-volume direct buyers, mainly chain stores, did not, for instance,

> employ the traditional middleman . . . . [They instead] bought directly from the manufacturer. The chain store would, nonetheless, demand the standard brokerage commission in the form of price reduction, and, because the manufacturer would otherwise pay it when dealing with wholesalers, it would be given . . . by the manufacturer in order to placate a large-volume buyer. This "price reduction" would be passed on to the consumer as a lower retail price or used in advertising the retailer's goods. The independent retailer, forced to use the old brokerage route, could not obtain such savings and meet either the lower price or the increased advertising. E. KINTNER, A ROBINSON-PATMAN PRIMER 8-9 (1970).

4 Robinson-Patman Act § 2(b), 15 U.S.C. § 13(b) (1964). Section 2(b) provides in part: "That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ." In 1957, John W. Gwynne, at that time chairman of the Federal Trade Commission, testified before a Senate committee that the following were "reasonably well-established" standards concerning the meeting competition defense:

adoption of stringent standards of proof in imposing liability on buyers for knowing inducement or receipt of prohibited discriminations.[5] Although it may be premature to attribute great precedential effect to *Beatrice Foods Co.*,[6] in view of the diversity of conclusions reached by the Commissioners and of the pending appeal of the Commission's decision to the Sixth Circuit,[7] the case may mark an important milestone in redressing the imbalance between seller and buyer liability for negotiated price cuts.

The *Beatrice* rulings on meeting competition and buyer liability did not, like Minerva, spring fully born and armed from the brow of Jove, though many harried lawyers involved in pricing problems may be willing to attribute a modicum of divine inspiration to at least some aspects of the decision. It is well known that the Federal Trade Commission was long hostile to the meeting competition defense.[8] After the Supreme Court held in *Standard Oil Co. v. FTC*[9]

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(1) The defense covers only situations where the prima facie proof of a discrimination as defined in 2(a) has already been met....
(2) The defense is an affirmative one and the burden of establishing it is upon the person claiming it....
(3) The defense is good only where the reduction in price is to meet the lower price of a competitor. It cannot be used to justify a price below that of a competitor. The defense does not permit predatory price reductions to destroy an individual competitor or the competition in a limited area....
(4) The defense is good only in meeting individual competitive situations. It cannot be used to justify discriminatory pricing systems based on some vague theory of meeting competition generally....
(5) The defense can be used only in defensive situations, that is, to retain a customer and not to gain a new one. While there is an area of disagreement surrounding this premise, I believe that careful examination of the statutory intent plus adjudication will bear this out....
(6) The competitor's price which the respondent was meeting must be a lawful price — or at least the seller as a reasonable and prudent man must believe it to be lawful. Here there is a real area of disagreement with cases pointing two directions....
(7) The defense is good only when the lower price is given in good faith to attain the limited objective prescribed by law. The defense does not permit predatory price reductions to destroy an individual competitor or the competition in a limited area.... *Cited in* C. EDWARDS, THE PRICE DISCRIMINATION LAW 550-51 (1959).

[5] Robinson-Patman Act § 2(f), 15 U.S.C. § 13(f) (1964). Section 2(f) provides that "[i]t 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."

See Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953). For a comprehensive list of the standards that must be met to prove a violation of section 2(f), see E. KINTNER, *supra* note 3, at 252.

[6] [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045 (FTC 1969).

[7] Kroger Co. v. FTC, *appeal docketed*, No. 20233, 6th Cir., Feb. 19, 1970.

[8] *See* note 4 *supra*.

[9] 340 U.S. 231 (1951). Subsequently, the Supreme Court affirmed a ruling of the Court of Appeals for the Seventh Circuit, which had held that the meeting competi-

that, contrary to the Commission's contention, the meeting competition defense is an absolute defense to a charge of price discrimination, the Commission began to convert the statutory concept of good faith into a number of inflexible prerequisites to the establishment of the defense. The Commission held, for example, that the defense can be used to retain customers but not to win new ones;[10] that a seller can claim the defense to meet individual pricing situations but not to match an overall pricing system;[11] that a seller can meet a competitive offer with great precision but cannot legally "beat" it;[12] that a seller must prove that he had no reason to believe that the competitive prices being met were illegal.[13] These substantive limitations on the defense were accompanied by exacting evidentiary standards with respect to verifying the existence and terms of competitive offers.[14] Finally, after the courts of appeals had continually rejected the Commission's restrictive glosses on the defense, the Commission itself found the meeting competition defense to have been successfully established in *Continental Baking Co.*[15] and *Ponca Wholesale Mercantile Co.*[16]

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tion defense had been successfully established by Standard Oil, contrary to the FTC's finding. FTC v. Standard Oil Co., 355 U.S. 396 (1958).

10 Sunshine Biscuits, Inc., 59 F.T.C. 674, 677, *order set aside*, 306 F.2d 48 (7th Cir. 1962).

11 Bigelow-Sanford Co., 64 F.T.C. 704 (1964), *rev'd sub nom.* Callaway Mills Co. v. FTC, 362 F.2d 435 (5th Cir. 1966).

12 Forster Mfg. Co., 62 F.T.C. 852 (1963), *order set aside*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

13 *See, e.g.*, Standard Motor Products, Inc., 54 F.T.C. 832 (1957), *aff'd*, 265 F.2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826 (1959).

14 *See, e.g.*, Forster Mfg. Co., 62 F.T.C. 852 (1963), *order set aside*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

15 [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,720 (FTC 1964). Indicative of the Commission's departure in *Continental Baking* from its previously inflexible approach to the meeting competition defense is its statement that the concept of good faith is "flexible and pragmatic, not technical or doctrinaire. . . . [It] is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of the competitive necessity." *Id.* at 21,647. FTC v. A.E. Staley Mgf. Co., 324 U.S. 746 (1945), is the fountainhead of the broad interpretation of the meaning of good faith. *See also* Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956); Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955).

16 [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,814 (FTC 1964). The following year, Beatrice Foods Co. itself was successful in establishing the meeting competition defense. Beatrice Foods Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 17,311 (FTC 1965) (sales to Miller's Supermarkets).

Many of the recent Commission decisions rejecting the defense, as well as appellate decisions affirming such rejections, appear to be based more on insufficiency of factual proof than on doctrinal limitations on the scope of the defense. *See* Viviano Macaroni Co. v. FTC, 411 F.2d 255 (3d Cir. 1969); Surprise Brassiere Co. v. FTC, 406 F.2d 711 (5th Cir. 1969); Knoll Associates, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,668 (FTC 1966), *rev'd on other grounds*, 397 F.2d 530 (7th Cir. 1968); Tri Valley

While the FTC has thus been relaxing the requirements of the meeting competition defense, there has been an expansion in the area of buyer liability. The buyer liability provisions[17] seemed to have become almost a dead letter after the Supreme Court's 1953 decision in *Automatic Canteen Co. v. FTC.*[18] This case imposed on the FTC the burden of introducing evidence that the buyer had reason, from trade experience or otherwise, to know that the price discrimination was not legally justified by cost savings or other statutory defenses.[19]

But in the 1960's the buyer liability provisions came to life again. Buyer liability was imposed in a series of group-buying cases in the automotive parts industry, where retailers were found to have banded together to claim a wholesaler's discount when they should have known that competitive retailers whose operations were conducted on a similar scale and in a similar manner were not receiving such discounts.[20] More significantly, buyer liability was imposed in a number of cases involving head-to-head negotiations between buyer and seller.[21] These cases involved discrimination in promotional

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Packing Ass'n, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,657 (FTC 1966), *modified and aff'd sub nom.* Tri Valley Growers v. FTC, 411 F.2d 985 (9th Cir. 1969), *cert. denied,* 396 U.S. 929 (1969), *order modified,* [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,044 (FTC 1969); National Dairy Products Corp., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,656 (FTC 1966), *aff'd,* 395 F.2d 517 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968); Exquisite Form Brassiere Inc., 64 F.T.C. 271 (1964), *aff'd,* 360 F.2d 492 (D.C. Cir. 1965).

17 Robinson-Patman Act § 2(f), 15 U.S.C. § 13(f) (1964).

18 346 U.S. 61 (1953).

19 In placing this burden on the FTC, the Court reasoned:

> Added to the considerable burden that a seller himself may have in demonstrating costs is the fact that the data not only are not in the buyer's hands but are ordinarily obtainable even by the seller only after detailed investigation of the business. A subpoena of the seller's records is not likely to be adequate .... Insistence on proof of costs by the buyer might thus have other implications; it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies, and it might also expose the seller's cost secrets to the prejudice of arm's-length bargaining in the future. Finally, not one but, as here, approximately 80 different sellers' costs may be in issue. *Id.* at 69.

20 *See* Alhambra Motor Parts v. FTC, 309 F.2d 213 (9th Cir. 1962); Mid-South Distributors v. FTC, 287 F.2d 512 (5th Cir. 1961); American Motor Specialties Co. v. FTC, 278 F.2d 225 (2d Cir.), *cert. denied,* 364 U.S. 884 (1960); National Parts Warehouse, 63 F.T.C. 1692 (1964), *aff'd sub nom.* General Auto Supplies, Inc. v. FTC, 346 F.2d 311 (7th Cir.), *cert. dismissed,* 382 U.S. 923 (1965). These cases were reconciled with *Automatic Canteen* as falling within its examples of situations from which the FTC could establish buyer knowledge.

21 *See* R.H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964); Giant Food, Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962); American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962). *See also* Colonial Stores, Inc. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,248 (FTC

allowances or services to which cost savings is no defense; therefore, proof of the buyer's guilty knowledge turned on the simpler issue of the nonavailability of similar benefits to other buyers. In *Fred Meyer, Inc. v. FTC*,[22] which involved price discrimination as well as discrimination in promotional payments, the buyer's knowledge of the absence of cost justification was inferred from both the exclusiveness of the reductions and the depth of the price cuts.

This, then, was the immediate legal background of the *Beatrice* case — the beginning of a trend of expanded liability for price pressure by buyers, accompanied by greater flexibility in examining the good faith of sellers attempting to meet their competitors' offers. The principal price reductions considered in *Beatrice* resulted from the initiative of the buyer, Kroger, which, after handling brand name dairy products of a number of suppliers in its Charleston Division, desired to change over to a program providing for its obtaining such products from a single supplier on a private label basis. Kroger also desired so-called "stripped service" in which the dairy would deliver to Kroger's store platforms but would have no responsibility for inventory maintenance or other in-store services. There was no possibility of several suppliers sharing the business; the Commission characterized the bidding as "winner-take-all."[23]

Kroger solicited bids for a private label program from four suppliers: Broughton, Valley Bell, Fairmont, and Borden. Originally, Beatrice was not approached by Kroger because Kroger's representative, Mr. Casserly, did not like the containers Beatrice was using; however, when Beatrice learned that Kroger was seeking private label milk, it assured Mr. Casserly that it could supply a satisfactory container and joined in the bidding. The course of the negotiations became one of the best documented bidding sessions of recent years.

Commissioner Jones, in her opinion for the majority, was clearly impressed with the difficulties which Beatrice faced in determining the terms of the competitive offers. First, Commissioner Jones found that Mr. Casserly had untruthfully told Beatrice at the very outset that Broughton had offered a discount of approximately 20 percent. On that ground, Mr. Casserly rejected Beatrice's initial offer of 71 cents per gallon of milk. Beatrice then reduced its offer

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May 7, 1970); Furr's, Inc., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 17,352 (FTC 1965).

22 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

23 Beatrice Foods Co., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045, at 21,287 (FTC 1969).

to 68 cents to approximate a discount of 20 percent off list. This bid was rejected by Mr. Casserly with the comment that the Fairmont bid was better and that prices in one of the principal market areas were deteriorating. When the Beatrice offer was subsequently reduced to 66 cents, the winning bid, Beatrice was told the bid was "competitive;" but in fact Kroger considered it to be the best. Commissioner Jones summarized her view of Mr. Casserly's negotiating performance by stating that "he failed to convey any correct information about the price levels being quoted by others."[24]

The second difficulty which Beatrice faced in the bidding was that the various offers of the dairies were not comparable. They covered a variety of products and extended over an indeterminate period of time. The bases of the offers were different. One of the Fairmont offers (about which Beatrice had only approximate information) consisted of a series of discounts from list prices and a television advertising program. Other offers, including the successful Beatrice offer, were based on formulas utilizing raw milk costs and other fixed cost factors, but the formulas were by no means the same. The Beatrice formula produced a uniform price and was based on average raw milk prices in the previous year under a single Federal Milk Marketing Order. The Fairmont formula proposal, which produced different area prices, was based on forecast milk prices under three Federal Milk Marketing Orders plus unregulated costs in one area.

A majority of the Commission found that under these difficult bidding circumstances Beatrice had established the good faith meeting competition defense. The majority positions on meeting competition which appear to hold the most significance for future Robinson-Patman policy are the following:

1) The majority appeared to discard the technical approach to the meeting competition defense in favor of an emphasis on a flexible, case-by-case standard of good faith. Commissioner Jones observed: "The heart of the good faith defense is the subjective attitude of the seller and his reasonable belief that his price offer is no lower than is required under the circumstances."[25] By stressing the "subjective" nature of the statutory standard, the opinion goes beyond the position taken by Commissioner Elman in *Continental*

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[24] *Id.* at 21,312. In the interest of fairness to the parties in this case, which is on appeal at the time of this writing, it should be noted that the factual basis for the Commission's conclusions about Mr. Casserly's untruthfulness in the negotiations is very much in dispute.

[25] *Id.* at 21,307.

Baking Co.,[26] where he reserved the question whether an objective or subjective standard of good faith was imposed.[27] It is hoped that this return to the generalized statutory standard, whether or not a subjective standard, will continue and will be accompanied by the gradual demise of the rigid rules which have become encrusted upon the statutory language.[28]

2) Commissioner Jones acknowledged that the Beatrice bid "beat" the opposition in that it was considered the best bid by Kroger. This fact did not defeat Beatrice's defense, however, since the record clearly showed that Beatrice did everything in its power, through investigations and testing of rumors, to find the right price level.

3) The majority was content to pass on the sufficiency of Beatrice's investigation as a whole to establish its good faith, without laying down any rigid evidentiary requirements for proof of knowledge of competitive terms. Such rigid requirements have sometimes been the rule in Commission proceedings.[29] There is no room in the delicate regulation of a competitive system for best evidence rules. Certainly the best evidence of a competitor's terms is confirmation from the competitor himself. But the exchange between competing sellers of price information about past transactions was held violative of section 1 of the Sherman Act[30] in *United States v. Container Corp.*[31] In *Di-Wal, Inc. v. Fibreboard Corp.*,[32] however, a district court, sitting as the trier of facts, recently blessed price information exchanges between competitors on the ground that they had been made to assist competitors in complying with the good faith requirements of the Robinson-Patman Act. Reliance on *Di-Wal*, risky to say the least, will be unnecessary if the flexible evidentiary approach taken by *Beatrice* continues.

4) The majority appeared to authorize a response to an overall competitive situation rather than requiring a close imitation of terms. This attitude is illustrated by Commissioner Jones' apparent

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26 [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,720 (FTC 1964).

27 *Id.* at 21,647.

28 *See* text accompanying notes 10-13 *supra*.

29 *See, e.g.*, Standard Motor Products, Inc., 54 F.T.C. 814 (1957), *aff'd*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959).

30 Sherman Anti-Trust Act, 15 U.S.C. § 1 (1964).

31 393 U.S. 333 (1969). The Court found that the exchange of price information tended to stabilize prices. This was held to be a form of price-fixing, a per se violation of the Sherman Act. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

32 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,155 (N.D. Cal. April 17, 1970).

approval of Beatrice's comparing its price cut with a whole bundle of benefits offered by Fairmont. This Fairmont bundle included a cooperative advertising program, which under a more technical statutory analysis might have required a response through the grant of promotional services or allowances. It would be risky, however, to expect this flexible treatment of competitive response outside of a factual setting such as that in the *Beatrice* bidding situation, in which comparison of the competitors' pricing programs was very difficult. For example, where an industry regularly prices on the basis of list prices less established discounts and products are comparable, it would be dangerous to assume that *Beatrice* authorizes the meeting of an advertising allowance by a price cut.

5) Beatrice was found not answerable for the untruthfulness of Mr. Casserly since the record revealed no reason to disbelieve him. Moreover, Beatrice was absolved from responsibility for responding to buyer pressure. Commissioner Jones wrote:

> If businessmen are not to be prohibited entirely from bargaining in such a situation, the burden of not exceeding Robinson-Patman bounds should, at some point, fall on the buyer who plays the cards so close to his vest as to persuade the seller to come down just a little more, and not on the seller who has tried by every proper means to feel out the opposition.[33]

Turning to the issue of buyer liability, the majority reversed the hearing examiner and found that Kroger had violated section 2(f)[34] by knowing inducement and receipt of a price discrimination. In finding the buyer liable, the majority rejected the argument that since section 2(f) applies only to inducement or receipt of a *prohibited* discrimination, it cannot be violated when the discrimination is justified by the seller under the meeting competition defense. Commissioner Jones did not address herself to this problem arising from the statutory language. She acknowledged that "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."[35] She added, however, that "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)."[36] This is not the first time that Robinson-Patman language has undergone

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[33] [1967-1970 Transfer Binder] TRADE REG. REP. at 21,308.

[34] *See* note 5 *supra.*

[35] [1967-1970 Transfer Binder] TRADE REG. REP. at 21, 312.

[36] *Id.*

surgery or repair in the interest of policy,[37] and this may be one of the less blameworthy occasions.

According to the majority's reasoning, the seller's meeting competition defense would have defeated a section 2(f) claim based on mere "receipt" of a noninduced discrimination, but it afforded no bar to a buyer liability claim based on "inducement." The issue of what constitutes wrongful inducement thus became a crucial point in the majority's analysis. Commissioner Jones began her discussion of the inducement by noting that there was no need to establish coercion of the seller. The element of inducement was satisfied by a showing that the buyer had used its buying power in such a way as to raise the likelihood of injury to its competitors. Commissioner Jones found that Kroger wrongfully induced discrimination by bargaining too hard. The Commissioner stated: "At some point . . . if the buyer continues to push, he must become liable if Robinson-Patman bounds are exceeded."[38]

In detailing the charges of hard bargaining, Commissioner Jones referred to the false information given by Mr. Casserly to Beatrice about the terms of competitive offers and also to his failure to convey any correct information about them.[39] In his dissent, Commissioner Elman complained that this portion of the decision would turn the Robinson-Patman Act into a truth-in-bargaining statute requiring affirmative disclosure.[40] Commissioner Jones' opinion, however, is susceptible of limiting interpretations which render Commissioner Elman's charge unjustified. First, Commissioner Jones links her conclusion that Mr. Casserly's untruthfulness was impermissible with a reference to Kroger's "very powerful bargaining position,"[41] perhaps leaving room for a smaller purchaser to be a better poker player. Moreover, it is by no means clear that Commissioner Jones favors the imposition of an affirmative duty to disclose where the buyer has not, by his own misstatements, contributed to the seller's confusion.

Having found that Kroger had satisfied the inducement element of section 2(f) and disqualified itself from any benefit from the

[37] *See, e.g.*, Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962), where the court rejected the Commission's reliance on section 2's "frequent 'misfits in words and phrases'" and turned instead to statutory policy.

[38] [1967-1970 Transfer Binder] TRADE REG. REP. at 21,312.

[39] *Id.*

[40] *Id.* at 21,316.

[41] *Id.* at 21,312.

seller's successful meeting competition defense, the majority had to deal with the remaining element of buyer liability — proof of the buyer's knowledge that the challenged price was not cost-justified. The majority found that Kroger had reason to know the Beatrice offer was not cost-justified, pointing out that the evidence complied with *Automatic Canteen's*[42] reference to trade experience as a source of proof of buyer knowledge.[43] Commissioner Jones pointed to Mr. Casserly's thorough knowledge of the dairy industry, and more particularly to his experience with private label arrangements and his investigations of conditions in the Charleston Division area involved in the Beatrice negotiations. The Commissioner further noted that one of the dairies expressly premised its withdrawal from the bidding on the lack of cost justification for further cuts. The hearing examiner had reached the opposite conclusion on the issue of buyer knowledge, finding that Kroger did not have knowledge of the dairies' costs and could have believed that substantial savings would arise from the stripped service program.[44]

All in all, it appears that the *Beatrice* opinion takes a giant step beyond *Fred Meyer*[45] on the issue of buyer knowledge, and, if sustained on appeal, will permit a great expansion in the use of trade experience in establishing buyer liability within the doctrinal limits of *Automatic Canteen*. Although the majority's strong emphasis on the legal responsibility of large buyers for excessive pressure in negotiations is welcome, the Commission's conclusion on the issue of Kroger's knowledge of the absence of cost justification seems to be based largely upon supposition and is far from satisfying. In fact, it is difficult to escape the feeling that, in its treatment of the distinct issues of inducement and knowledge, the Commission was carrying water on both shoulders and hoping to compensate for a relatively weak position on buyer knowledge by its strong criticism of Kroger's bargaining techniques. It is certainly not difficult to imagine that in a subsequent case in which the seller involved has no meeting competition defense and the issue of buyer liability turns on knowing receipt rather than inducement, evidence on the issue of buyer knowledge which was no more persuasive than that in *Beatrice* would be insufficient.

Sellers who sell pursuant to bids will take particular encourage-

[42] Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

[43] *See* note 19 *supra* & accompanying text.

[44] [1967-1970 Transfer Binder] TRADE REG. REP. at 21,288, 21,312-13.

[45] Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

ment from the fact that the *Beatrice* decision means that price cuts in bidding situations may, in appropriate circumstances, be justified under the meeting competition defense. But the bidding in *Beatrice* involved a great deal of negotiation and interchange of information and views between the buyer and bidders. It is not clear what significance the decision will have for bidding situations where the bids are closed and the buyer is closed-mouthed. It is to be hoped that the generalized standard of good faith in *Beatrice* will permit the seller to fix his bid on the basis of reasonable investigation of his competitors' or potential competitors' bids in other recent bidding situations, even though his information may be incomplete and he, like Beatrice, actually beats the other bidders. As far as the close-mouthed buyer is concerned, as long as he has not induced any of the bidders to cut their prices, he should, under Commissioner Jones' view, receive the benefit of the meeting competition defense claimed by the winning bidder.

In conclusion, it should be noted that Caspar W. Weinberger, former Chairman of the FTC, has stated that a reappraisal of Robinson-Patman policy is underway at the Commission; however, pending such a reappraisal, Robinson-Patman enforcement will remain vigorous. He has expressed the view that the greatest return from Robinson-Patman enforcement "will probably be obtained by concentrating on inducement of anticompetitive discrimination."[46] Regardless of how the precise issues involved in *Beatrice* may be resolved on appeal, one can respectfully voice the hope that Commission enforcement under Chairman Kirkpatrick will carry forward the more evenhanded treatment of seller and buyer responsibilities which is evidenced in the *Beatrice* decision.

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[46] ANTITRUST & TRADE REG. REP., No. 451, at A-21 (March 3, 1970).