In the

Supreme Court of the United States

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

PETITIONER,

V.

FEDERAL TRADE COMMISSION,

RESPONDENT.

No. 77-654

Washington, D. C.
December 4, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., Petitioner,	:	
v.	:	Case No. 77-654
FEDERAL TRADE COMMISSION, Respondent.	:	

Washington, D. C.

Monday, December 4, 1978.

The above-entitled matter came on for argument at 1:01 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DENIS McINERNEY, ESQ., 80 Pine Street, New York, New York, 10005; on behalf of the Petitioner

FRANK H. EASTERBROOK, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 77-654, Great Atlantic & Pacific Tea Company v. Federal Trade Commission.

Mr. McInerney, you may proceed whenever you are ready.

ORAL ARGUMENT OF DENIS McINERNEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. McINERNEY: Thank you, sir. Mr. Chief Justice and may it please the Court:

This is a review of the Second Circuit's affirmance of a final order of the Federal Trade Commission. The Commission found that the petitioner, A&P, knowingly induced or received illegal price discriminations in violation of section 2(f) of the Robinson-Patman Act.

A side effect of its order is that it may subject A&P to treble damages and private actions as well.

Now, the issues here are of general application, principally whether a buyer is free to accept the lowest price offered to him on a meeting competition basis; and, secondly, whether, in order to escape liability, it is the buyer's burden to prove his seller's cost justification in such a proceeding.

Now, although the record is some 20,000 pages, the case presents a very common place event. It simply is sale of goods and the negotiations leading to it. The parties were A&P

and its supplier in the Chicago area thirteen years ago, the Borden Company. A&P's local buyer, Elmer Schmidt, went to the Borden Company and asked for a price on private label milk, with Borden eliminating all merchandising and similar expenses, and reducing to a minimum all delivery and other expenses. Borden came back saying that they could under those circumstances reduce A&P's annual bill on some eleven most popular dairy items by $410,000 a year on $5.6 million in purchases.

The Borden salesmen, Messrs. Tarr and Minkler, said to the buyer that Borden had just opened a new dairy at Woodstock, Illinois, which was the largest and most efficient in the world, that they didn't see how anybody could offer any better prices, and they discouraged them from shopping around on the ground that it would be futile.

But like any pruden buyer, A&P went to compare prices. Mr. Schmidt solicited four other dairies, but only one was interested in all of A&P's business in the Chicago area, the Bowman Dairy. The prices quoted by the Bowman Dairy in their offer have been found to be valid, comparable to Borden's.

Now, there has been some debate about that, so if Your Honors should have the slightest doubt about the validity of the Bowman offer, I would respectfully ask you to take a look at the testimony of Mr. Frank Cannon, which appears at page 452a of the appendix. That shows that Bowman made its offer on the basis of making a profit, on the basis of cost

justification, and not on any meeting competition basis. The offer that they made on the same eleven items -- the comparison is restricted to that -- would have saved A&P $737,000 a year on the comparable basis on which the Borden offer would have saved $410,000. Now, I am using the word "saved," but that is obviously a misnomer here, because A&P would not have saved those amounts. Borden or whoever the supplier would be was shifting substantial expenses of stocking the dairy cases and so on to A&P.

Now, A&P's buyer goes back to Borden and says, "You fellows are not even in the ballpark." And the Borden people say, "Well, we may have overlooked $50,000 in merchandising expense that could be saved," and he relies, "$50,000 would not be a drop in the bucket." They testified that that was the only clue they had as to the competing offer.

So they came back several days later and improved their offer, and said they would offer savings that would reduce A&P's annual bill by $820,000 per year, just double their previous $410,000 offer, and Mr. Schmidt says, "Now you're in the ballpark."

QUESTION: Did he say anything else at that point?

MR. McINERNEY: Your Honor, no. I believe, if Your Honor is referring to the so-called "sharpen your pencil" remark or something else, I can take care of that, but I am not quite sure of the purport of your question. The only thing

that I know of that might conceivably be considered relevant -- and I don't think it is -- is that at some stage, it is fuzzy, there may have been a "sharpen your pencil" comment. And as to that, that was not relied on by either of the forums below, either of the authorities. The Federal Trade Commission mentioned it only once, to say that it was not relevant, and it said nothing at all about it on the 2(f) part of the charge. It said it was not relevant to count one. The Court of Appeals didn't mention it at all. In fact, from the time that comment was allegedly made until the final deal was concluded, there was no change in the $820,000 "savings" offered to A&P.

So that is the conversation, and I submit that the figures shown at the top of page two of our reply brief to which I respectfully call your attention demonstrate the total propriety of everything that the A&P buyer said.

The Commission claims that at most the difference between the two offers was $83,000 on $5.6 million in purchases. That would be one or one and a half percent. The more accurate comparison shown at page two of our reply brief compares the actual prices quoted, and they are undisputed, and they show that the difference between the two offers was six-tenths of a mil per quart at best. Now, that is a difference on the unit price comparison of one-third of one percent. But I submit, whether the difference is one and a half percent or one-third of one percent, it was clearly not substantial.

The Borden people, comparing back with their final quotation in writing now, say to Mr. Schmidt, "We are offering this to you on a meeting competition basis. We know of no other way to justify it." And Mr. Schmidt, whose memory wasn't that good about it, says -- well, he said something about meeting or beating competition, but he didn't think it was important. He didn't report it to anyone at A&P because he considered it salesmen's talk.

Instead, in the same conversation he said, "Well, will you give me a letter of availability," meaning that this will be available to your other customers. They didn't refuse to do it. Instead, they gave him a letter that said, "We wish to assure you that our prices are proper under applicable law, and we are prepared to defend these prices." No mention of any particular defense, just that blanket assurance. And on the basis of that letter and Mr. Schmidt's recommendation, A&P's headquarters approved the Borden offer, the final Borden offer.

Now, I respectfully submit that there is nothing at all unusual in this little vignette I've given you. It is something that happens daily. And after 110 days of hearings, we still don't know what the Commission would have had A&P do differently. They say the buyer had no duty to disclose the competitive offer. In fact, they go much further and say that to impose a duty of disclosure would be "contrary to normal business practice and, we think, contrary to the public interest."

Then what is the buyer supposed to do under these circumstances, take the higher offer, tell the low bidder that he ought to increase his price? It is just a puzzlement, to borrow from the King of Siam.

While the Commission has no hesitancy in telling us what A&P cannot do -- they say that in their final offer -- they never tell us what the buyer should have done, and perhaps we will hear it today. We have been waiting a long time.

QUESTION: Mr. McInerney?

MR. McINERNEY: Yes, sir.

QUESTION: Suppose there weren't any antitrust laws and you had a system whereby a general contractor called different subs and was perhaps unethical enough to peddle the bids. Do you think if he had a bid from one sub for $100,000 and went to another one and said, "Look, I will let you have this if you will go under it," that he as a matter of business practice would be likely to switch bids if the other one came in at $99,999?

MR. McINERNEY: I doubt if he would if it was that close.

QUESTION: It would have to be a fairly substantial incentive, wouldn't it?

MR. McINERNEY: I would think so. And here, although the difference between the two bids wasn't very much, A&P had been doing business with Borden over a great many years.

QUESTION: What was it, $83,000?

MR. McINERNEY: $83,000 at the most of $5.6 million in purchases. That is one and a half percent, roughly. And I say that is not the best comparison, because the Court of Appeals said that it had no jurisdiction over the by-product aspect of the case, there was no Robinson-Patman jurisdiction. So if Your Honor would look at the unit prices on page two of our reply brief, you will see that it really is a much smaller difference, six tenths of a mil per quart.

Now, the final order says to A&P that it cannot accept a lower price unless A&P "had no reason to know it was not cost justified or unless A&P can show that said price was granted to it by the supplier to meet a competitor's equally low price."

Now, read against the factual background of this case, that order might be interpreted to prohibit A&P to accept a lower price unless it happened to exactly match another bid mil for mil. And if that seems slightly unrealistic, we think it is and we also think it is consistent with the Commission's opinion, however -- the Court of Appeals put it this way: "The buyer is properly deprived" of the meeting competition defense when he accepts a lower offer, believing that it is the lower offer, unless it happens that they match up, that it matches up with a competing bid.

Now, that is such an unusual circumstance that when that happens, buyers tend to become suspicious.

QUESTION: It would suggest possible collusion, is that what you are saying?

MR. McINERNEY: Yes, sir.

QUESTION: Or it would suggest what Mr. Justice Rehnquist indicated, a disclosure of all the alternative bids?

MR. McINERNEY: It does seem to suggest that, Your Honor, and I submit that it is so unusual that this will be a daily dilemma of buyers if this decision below is allowed to stand, unless they are supposed to go back and insist on paying a higher price.

The court below and the Commission relied, they said on the Kroger case, Kroger v. F.T.C., in 1971. Now, in that case the Kroger buyer actually defrauded Beatrice Dairy by fabricating bids that did not in fact exist, and in the opinion of the Sixth Circuit they stated "the controlling point here is not the hard bargaining nor the price levels, but the misrepresentation" -- and that is the court's emphasis -- "misrepresentation of the competing bid in order to induce a discriminatory price."

Here, Your Honors, we do not have a lying buyer. We have a silent buyer whose silence has been exonerated by the Federal Trade Commission, nothing unfair or deceptive about it. That is their ruling. And as we understand their position, it is simply this, that as a result of that meeting competition reference and the letter of legal assurance and some figures

that were given to the A&P buyer as what the Borden executives themselves characterized as "sales tools" to persuade him because he was getting a "good deal." On the basis of those factors, they say that Mr. Schmidt should have known that the Borden prices would not be made available to others, that they were not cost justified, and that they were not within the meeting competition defense.

Now, Mr. Schmidt is not a lawyer. He is not a college graduate. But I submit that anyone, even who was a Robinson-Patman scholar, trained at the Federal Trade Commission, would not be able to discern or divine all that from those few references, particularly when in this case Borden never denied availability, although it was asked about it, never denied cost justification, although they talked about it, and never mentioned the Robinson-Patman Act. We submit that that too is an unrealistic inference.

QUESTION: When you ask for a letter of availability, that is a Robinson-Patman question, isn't it? I mean that is not something that a normal buyer would ask a normal seller unless he was aware of the implications of the Robinson-Patman Act.

MR. McINERNEY: Your Honor, it is entirely normal at A&P.

QUESTION: Yes, because of the Robinson-Patman Act.

MR. McINERNEY: That's right.

QUESTION: It was in the habit of it.

MR. McINERNEY: There was nothing special about this transaction.

QUESTION: No, but were it not for the Robinson-Patman Act, nobody would understand the question, isn't that correct?

MR. McINERNEY: Yes, Your Honor, you are quite correct.

QUESTION: And under this holding they might pursue the cross-examination a good deal more or would be required to, would they not?

MR. McINERNEY: Well, I don't know how A&P --

QUESTION: Under the holding of the Court of Appeals, I am speaking of.

MR. McINERNEY: That the buyer might be required --

QUESTION: Yes.

MR. McINERNEY: Yes, Your Honor, but we have in this record that Borden and other dairies considered first of all their costs to be trade secret, they would not disclose their costs, and that is very understandable, that they even considered their prices to chain store competitors to be trade secret. So there was hardly any way that a buyer could have done very much more in this circumstance.

Now, the first element of proof in a 2(f) case is proof of a price discrimination. And when we got to that, A&P said all right, there may be some difference between the invoice price that others pay to Borden and what A&P paid, but there was

no net discrimination on net prices because the others received services and allowances that were not accorded to A&P, and the Commission said, well, we will look into that at the cost justification phase of the case. When they got to that phase, they said, "The burden of persuasion as to the issue of whether prices are in fact cost justified rests with the buyer." The Court of Appeals agreed, and they both distinguished between the initial burden of going forward with the evidence and the ultimate burden of persuasion. But the fact is that Commission counsel did not fulfill either burden because they introduced no evidence of Borden's cost conserving A&P, no comparison between that and the cost of serving other customers, no comparison between the difference between those costs and any price differential.

So that the burden, however it is described, that was mentioned in Automatic Canteen, that the seller must show cost justification when the prices and terms of -- pardon me, when the terms of sale differ from buyer to buyer, that burden, however it is described, simply disappeared in this case, like a pea in a shell game. It was gone. There was no proof whatever on that score.

QUESTION: These transactions occurred in about 1965, didn't they?

MR. McGREGOR: Yes.

QUESTION: Is there any factual finding in the record

up to now that Borden's costs were or were not in fact cost justified?

MR. McINERNEY: No, there is not. In fact, the Court of Appeals is quite plain on that. They say that strangely a buyer has been convicted of inducing an illegal price discrimination without any showing that there was no cost justification.

QUESTION: We don't even know what the costs were, do we?

MR. McINERNEY: That's right, Your Honor, we do not. There was no way that under the Commission's view of this case, it really was not necessary because of their what I would consider anomalous interpretation of this Court's ruling in the Automatic Canteen case. What they found was that the buyer was guilty of inducing the seller to give an illegal price without any finding that the seller had in fact given an illegal price, without any finding that there was no cost justification defense and without any finding that there was no meeting competition defense to the seller. So I consider that rather Kafkaesque treatment of the defendant here.

QUESTION: Really, didn't they say that if we can infer that the buyer was suspicious that the price was not cost justified, we can also infer as a fact that the price was not cost justified?

MR. McINERNEY: Well, that is a rationalization, I

think, of the opinion below, yes, Your Honor. But there is no way that this record could support a finding of lack of cost justification, because there was simply no evidence on that. The only evidence with respect to costs was from a Borden internal accountant, a Mr. Malone, and he testified that since he didn't know how that new Woodstock plant was going to operate, how much they would be saved by all of these various reductions in service and so on, there was no way he could tell what Borden's costs of serving A&P under the new arrangement would be.

So the only references that were made to the Malone data, the Commission itself finally said we admit that will not support a finding of lack of cost justification, and the Court of Appeals pointed that out. Now --

QUESTION: Could the purchaser take into account or to what extent, if so, the factor of a national reputation for reliability and quality with a supplier?

MR. McILHENNEY: Yes, I think they would take that into account, Mr. Chief Justice. Here A&P had no reason -- this is perhaps a characterization of the facts, but when you look at the record here -- and the facts are just as bare as I have stated them here -- there was really no reason for A&P to have been suspicious of the Borden bid at all, particularly when it had a Bowman bid admittedly valid that is so close to it that the difference was a mere matter of mils.

QUESTION: But this is a very low margin business, isn't it?

MR. McINERNEY: Yes, it is, Mr. Chief Justice.

QUESTION: The unit margin is inevitably very low on each sale?

MR. McINERNEY: Yes, it is. But when you get down to a hundredth of a cent on two competing bids and then there are other factors that made the Bowman bid more attractive, such as that they were selling the brand label at that price as well, really the difference here is so miniscule that one could easily conclude that the Bowman bid was far better than the Borden bid and that the Borden bid was only accepted because they had been doing business with Borden all that time.

Now, we don't believe that this case presents any conflict between the Robinson-Patman Act and the Sherman Act. If it did, we think that this Court's recent reaffirmation of Automatic Canteen, in Gypsum would indicate that if there were any such conflict it ought to be resolved in favor of the more fundamental policy of preserving competition, rather than the more limited goals of the Robinson-Patman Act.

We say there is no conflict, whether you take the Robinson-Patman Act literally, in which case a 2(f) violation or a buyer violation cannot exist without a seller violation, or whether it is interpreted to fulfill the underlying purposes of section 2(b) which was to permit competitive buying and

competitive selling, as long as the seller is in good faith it makes no difference that he actually beat the competitive price.

For all of those reasons, and because of the fact that if strictures are put on buyers such as would be put on buyers as a result of the decision below, that that will necessarily result in more rigid monolithic pricing, rather than competitive pricing, to the detriment, we submit, of competition and consumers as well. We respectfully submit that the complaint should be dismissed and the decision below reversed.

I would like to save the rest of my time for rebuttal.

QUESTION: May I ask an irrelevant question?

MR. McINERNEY: Yes, Mr. Justice.

QUESTION: A&P is still in business up there now, are they not?

MR. McINERNEY: Yes, sir.

QUESTION: Who is their present supplier?

MR. McINERNEY: Spinney Run and Dean Milk, they both submitted better prices than Borden quite some time ago.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. EASTERBROOK: Mr. Chief Justice, and may it please the court --

QUESTION: Mr. Easterbrook, as a matter of curiosity, where has this case been since 1965?

MR. EASTERBROOK: Almost everywhere but here, Your Honor. The Commission indicated to A&P in 1967 that it was interested in investigating these matters, and the charge was not brought by the Commission until the early 1970's, after a quite lengthy investigation. There was then a substantial period of litigation before an administrative law judge which consumed, as Mr. McInerney said, 110 days of hearings alone. The administrative law judge then wrote an opinion, it was -- there were three separate issues in this case originally.

A&P appealed from the two issues that were adverse to it and the complaint counsel appealed from the decision of the administrative law judge that was adverse to it, and the case was before the Trade Commission for another year. The Trade Commission finally decided it in 1976, upholding only the second count of the complaint. It was then in the Court of Appeals for a little more than a year and it has been actually more than a year since the petition was filed in this Court before we reached oral argument. So there has been some delay at almost every turn in the process. The problem has been that there are a lot of turns in the process.

QUESTION: Were these really 110 full days or 110 occasions when testimony was taken?

MR. EASTERBROOK: These were, I believe, 110 full days of hearings. The transcript of the hearings exceeds 10,000 pages, and there are more than 10,000 pages of exhibits in this

case alone. The record that has been filed in this Court is quite voluminous, and the appendix is 1,200 pages and barely begins to comprehend it.

QUESTION: It is very vast.

QUESTION: Mr. Easterbrook, should we make any effort to break any of these records and keep it a little longer to comprehend?

MR. EASTERBROOK: Mr. Justice Marshall, we think that there is no need for additional delay. Indeed, this case could almost be affirmed on the opinion of the Court of Appeals.

QUESTION: Do you think the opinion of the Court of Appeals was faithful to Automatic Canteen?

MR. EASTERBROOK: I think that the opinion of the Court of Appeals was faithful to Automatic Canteen, although, as I will explain later in the argument, there has been almost a suppressed understanding about the way in which it is necessary to prove the actual lack of cost justification in these cases.

QUESTION: I take it the conjunction "although" means that you think it was faithful "but." Could you explain the "but"?

MR. EASTERBROOK: The "but" in my observation is that, as A&P argues, there has been a considerable division and allocation of burdens that has been made necessary by Automatic Canteen. Section 2(b) of the Robinson-Patman Act provides in rather clear terms that the defendant has the ultimate burden

of persuasion, of discharging a defense.

What came before the Court in Automatic Canteen was who had the burden of introducing evidence, and the Court held that the Commission's complaint counsel initially had the burden of introducing evidence because evidence of the costs of the sale were to a considerable degree in the hands of the seller rather than in the hands of the buyer. And as the Court said at page 74 of the Automatic Canteen opinion, considerations of equity and fairness therefore put the burden on the Commission to come forward with the initial evidence.

What the Commission -- I'm sorry?

QUESTION: No, go ahead.

MR. EASTERBROOK: What the Court was talking about in most places in Automatic Canteen was the Commission's duty to show the buyer's knowledge that there was no cost justification, and there was a reason why it focused on the Commission's duty to show the lack of the buyer's knowledge. That is principally because it is almost impossible to show that a buyer knew something.

QUESTION: But it wasn't talking about it is only a 346 U.S. 8, where it says if methods of quantity differ, the Commission must show that such differences could not give rise to sufficient savings in the cost of manufacturer's sale or delivery. It was talking about a fact, not about a buyer's knowledge of a fact.

MR. EASTERBROOK: Yes, Your Honor, I understand that. And it is our position that the Commission accepted that burden and showed that in this case. But I think the case can be short-stopped before you get to that portion of Automatic Canteen, and I would like to draw the Court's attention to the language immediately preceding what you just quoted. It is a statement on the third line of page 80 that begins "By way of exampler, a buyer who knows that he serves 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 has interpreted that I think quite accurately as saying that its initial burden in many of these cases is to make out both lack of cost justification and the knowledge of that lack by showing something that makes the chance that there is no cost justification vanishingly small, and that is to show that in this case Borden sold to A&P's competitors milk in the same quantities and with the same service, yet charged those competitors a significantly higher price than it charged A&P.

QUESTION: You are talking about the $83,000 figure there?

MR. EASTERBROOK: No, I am not talking about the $83,000 figure. The $83,000 figure is the amount by which

Borden's bid was lower than Bowman's, and that goes to the meeting competition defense. The actual charge of price discrimination is not that charge, it is the charge that A&P sold the milk -- I'm sorry, that Borden sold the milk to A&P at less than it sold the same milk with the same service to other grocery stores. And as to that argument, the Commission introduced evidence that there were many stores who got milk in greater quantities than A&P, with the same service as that given to A&P, and yet were charged prices that were approximately 8 percent greater than those charged to A&P.

Now, at that point I think it is fair to say that the chance that that discrimination in price is cost justified is exceedingly small. The Commission --

QUESTION: Are you making comparisons without reference to volume, comparisons on plant price are --

MR. FASTERBROOK: No, Your Honor, I am not making comparison without respect to volume. The administrative law judge found the facts at some length with respect to this, and I may draw the Court's attention particularly to the findings at page 1106 of the appendix. The administrative law judge found that there were other stores who bought greater quantities of milk than A&P per store and that those stores were charged a price and received services identical to those given to A&P and yet were charged higher prices by approximately 8 percent than those that were charged to A&P. So the Commission has

controlled for quantity of service and for the terms of service. I will have to qualify that --

QUESTION: You say they bought more per store?

MR. EASTERBROOK: Right.

QUESTION: Well, what if they had only one or two stores? That doesn't go to the Chief Justice's question at all.

MR. EASTERBROOK: We think it does go to the Chief Justice's question, Your Honor, for reasons that have actually been persuasively stated by A&P in this case. The principal costs of service for milk distributors --

QUESTION: Is delivery?

MR. EASTERBROOK: -- is delivery and labor and the cost of packaging.

QUESTION: That is the 2-2-2?

MR. EASTERBROOK: It is the 2-2-2 formula that A&P has talked about.

QUESTION: Right.

MR. EASTERBROOK: By and large, those costs do not vary with the quantity supplied. The fact that A&P has 600 stores in Chicago primarily is not material.

QUESTION: Well, those don't, but there are certainly other -- there must be some other advantages, in the scale of advantages.

MR. EASTERBROOK: I understand that, Your Honor, and I was going to qualify my assertion with the fact that the

administrative law judge also found elsewhere that there were some possible savings of that sort, and there were some differences in the advertising terms. That is, many of A&P's competitors receive Borden label milk, which A&P did not on this particular service arrangement. And there was evidence in the record going to those particular costs. The evidence in the record was that those costs amounted to about two to three mils per point or per quart of fluid milk.

QUESTION: Was the quantity identical? Because if the quality between Bowman was one percent butterfat or one hundredth of one percent butterfat --

MR. EASTERBROOK: A&P was apparently servicing all its stores with 3.4 butterfat content milk, and although one can dispute whether the Bowman bid was really based on 3.5 butterfat milk is irrelevant to the basic price discrimination, which is the difference that A&P received versus Borden's other customers. But I think it was more than that.

I think it is important to point out, too, that the administrative law judge in this case accepted on behalf of the Commission the burden of showing -- accepted the proposition which A&P urges here, that complaint counsel have the initial burden of showing both lack of knowledge, both knowledge and the lack of cost justification. That appears at pages 1127 to 1128 of the appendix. The administrative law judge was very plain about that, and the Commission adopted the administrative

law judge's opinion in all respects except that with which it was inconsistent.

The reason why it hasn't received extended attention by the administrative law judge or by the Commission or by the Court of Appeals is precisely because of what I initially said in answer to your question, Mr. Justice Rehnquist, that it is exceedingly difficult if not absolutely impossible to show that somebody knows something to be true, that is to show that A&P knew that there was no cost justification, without showing that in fact there was no cost justification.

QUESTION: But here that is exactly what the Commission tried to do, wasn't it?

MR. EASTERBROOK: I don't think it did that, and with the Court's permission I will go over now the four different kinds of evidence that the Commission used to show A&P's knowledge that there was no cost justification.

QUESTION: Before you do that, Mr. Easterbrook, what if this -- the spread was $83,000 here, was it?

MR. EASTERBROOK: That was the difference the Commission found between the Borden bid and the Bowman bid to A&P.

QUESTION: Suppose it was $40,000, what would you say?

MR. EASTERBROOK: The argument would be identical.

QUESTION: $20,000?

MR. EASTERBROOK: Identical.

QUESTION: One dollar?

MR. EASTERBROOK: Identical. But let me point out once more that we are -- that that difference goes only to the cost, the meeting competition defense. There has been no argument in this case about the extent of the discrimination between the prices to A&P and the prices to A&P's competitors. Those prices were, as the administrative law judge found, as the Commission found, and as the Court of Appeals said were supported by substantial evidence, were a great deal lower than the prices that Borden was charging to A&P by many, many thousands of dollars and in some cases by --

QUESTION: Correct me if I am mistaken about my understanding about the statute, but even assuming that was true, it did not violate Robinson-Patman if it was -- if there were successful meeting competition defense?

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: That is correct, isn't it?

MR. EASTERBROOK: Yes, we agree --

QUESTION: It is a complete defense, isn't it?

MR. EASTERBROOK: It is a complete defense.

QUESTION: And that is conceded?

MR. EASTERBROOK: It is conceded by the Commission.

QUESTION: That is what I thought.

MR. EASTERBROOK: But I would like to get through, if I may, with the cost justification arguments and then I will turn to the meeting competition arguments.

The Commission introduced four kinds of evidence that bore on that question. The first is the kind of evidence that was described at page 80 of the Automatic Canteen opinion, simply that Borden charged higher prices to A&P's competitors than it charged A&P, even though the competitors received larger quantities per store and received the same service. The only difference in service was the advertising on the Borden label and possible savings in negotiating a single contract with a single large buyer. But those essentially are not, and no one argues, large enough to cover the difference in price.

The second kind of evidence was A&P's trade experience. The administrative law judge canvassed what A&P knew about the dairy business from its dealings with other dairies in other parts of the country. And the administrative law judge's findings with respect to this appear at pages 1103 to 1106 of the appendix.

A&P knew and relied on as a rule of thumb, for example, a formula that has been called in this litigation the 2-2-2 formula, that the price of milk is the price of fluid milk on the open market, plus two cents for packaging, two cents for labor and two cents for overhead and profit. A&P knew, however, that it was receiving from Borden a price lower than the price it received in other parts of the country. That is one-half of the proof. The other half of the proof is that A&P knew to its sure knowledge that its other suppliers in other parts of the

country had lower costs of serving A&P.

A&P knew, for example, that the labor costs of service of milk in Chicago were the highest in the nation, and it certainly must have known, for there is a good inference that can be drawn from a fact-finder like the Commission that if Borden is charging lower prices than those who have given competitive bids in a market with higher costs, it is most unlikely that there is a cost justification for that bid.

The third kind of evidence was Borden's refusal to justify its bid on a cost basis or to say that it was available to others, and this comes up in two ways. One is there is extensive evidence in the record and findings of the administrative law judge that Borden's personnel told A&P's personnel not once but over and over that this bid was justified only on a meeting competition basis and not on any other basis.

A&P asked whether it was proportionally available to others, asked for the standard letter that anyone engaged in Robinson-Patman counseling would have his client ask for, and they didn't get it. What they got is a letter saying that Borden would defend its prices to someone who had been engaged in --

QUESTION: Would you say that is broader or narrower?

MR. EASTERBROOK: I would say that it is narrower, because Borden refused to say that it was proportionally available to others and refused to say that it was cost justified.

A&P was aware I think, and reasonably could be found by a fact-finder to be aware, that Borden thought its bid was justified. That is, Borden thought it had a meeting competition defense, and that was within the terms of the letter that Borden gave. But a reasonable antitrust counselor who had received that letter from Borden and who understood the purport of the question to Borden would understand that it hadn't been answered, and that that, too, was telling.

QUESTION: Or it could have thought — so far as the letter went, Borden thought it either had a cost justification defense or a meeting competition defense or that there wasn't a prima facie case and that it therefore needed no defense?

MR. EASTERBROOK: That's right, or that there was no injury to competition nor —

QUESTION: That is what I mean.

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: It could include all or any of those.

MR. EASTERBROOK: But A&P's question was much more specific. Their question was is this proportionally available, and that is the information in which they were interested. When you ask for a proportional availability question, you are asking are you engaged in price discrimination in the first place.

QUESTION: Right.

MR. EASTERBROOK: And the answer was no.

QUESTION: I don't quite understand how you

characterize that as an error answer.

MR. EASTERBROOK: Your Honor, I wouldn't want to characterize --

QUESTION: On its face, it is incomprehensive.

MR. EASTERBROOK: I would characterize it as an evasive answer. The question was is this price proportionally available, and the answer is I won't tell you whether this price is proportionally available but I will tell you it is legal, but I won't tell you why.

QUESTION: An evasive answer.

MR. EASTERBROOK: But I won't tell you why it is legal, that's right. If this were a perjury prosecution, doubtless A&P is not guilty of perjury -- I'm sorry, Borden is not guilty of perjury. That is not quite what an antitrust counselor would look for.

But there is a fourth kind of evidence in this record, and those were the cost calculations that were given directly by Borden's cost accountant to A&P at the time the negotiations were under way here. The cost calculations showed actually again quite clearly, as the administrative law judge found, that the bid in this case was not and could not be cost justified by differences in the price of serving A&P versus the price of serving other persons.

A&P's essential response to this -- these are the Malone calculations -- is to say that they were discredited by

the Commission, not to say that they were not evidence, that there was no cost justification in fact. I don't think that is correct. The administrative law judge first endorsed them and relied on them, and that appears at page 1110 of the appendix. Indeed, he specifically praised Mr. Malone's credibility and said that A&P had had a high view of him, and that is at page 1078 of the appendix.

What the Trade Commission said about them appears at page 1218, note 25 of the appendix. The Trade Commission said simply that they are not a cost justification study, and that is true. No one has ever argued that they are a cost justification study. They don't fully show the costs. They were given by an interested party, and there is no doubt that if they were being evaluated under the standards of cost justification studies, they are not enough. But the Trade Commission never said that they weren't evidence, and indeed they are probative evidence with which complaint counsel could discharge its initial burden of introducing some evidence, some persuasive evidence to show that there was no cost justification in fact, and that Borden knew it and that A&P knew it.

QUESTION: Does that suggest that the Commission disagreed with the ALJ on that point?

MR. EASTERBROOK: No, Your Honor, the ALJ had never said that the Malone calculations were a cost justification study. He had used the calculations in the same way I have

used them here. I view the Commission's footnote simply as a cautionary statement that we don't think that this amounts to a cost justification study.

QUESTION: Do you think the four types of evidence that you have just discussed would support a finding of fact by a finder of fact that if Borden's prices were not in fact cost justified?

MR. EASTERBROOK: I think they would, Your Honor. I think that evidence would be sufficient under the substantial evidence standard to support it. I think that the affirmative burden of the Commission at least to discharge its affirmative burden -- let me put it in the negative way -- it at least discharges its burden by showing that the chance that there is cost justification is very small, and that the four kinds of evidence that I have just described show that the chance that there is cost justification is very small, they don't preclude it to an absolute certainty. A&P introduced its own cost justification study in an attempt to show that although the chance was quite small, in fact there were cost justifications. The administrative law judge discussed those studies exhaustively at pages 1131 to 1150 of the appendix and concluded that they did not discharge that burden.

But I think it is sufficient here to say, as the Commission found, that the chance that there was a cost justification was quite small, and that is what the record shows.

I would like to turn then to the meeting competition defense, and that is the problem with the $83,000 which has been discussed earlier in the argument. The statute on its face in section 2(a) prohibits the charging of different prices to different customers. It makes uniform prices the rule.

Section 2(b), meeting competition defense is simply that, it is an exception to the basic rule of the statute. The seller can argue that a price, although discriminatory and although not cost justified, was given in good faith to meet an equally low price offered by a competitor. The defense which Congress adopted in recognition of the demands of competitive reality, as this Court said in Standard Oil, establishes a rule of meeting but not beating the competition. Section 2(b) talks about a price given in good faith to meet an equally low price of a competitor. It does not talk about a price given in good faith that beats the competitor's price.

QUESTION: But do you think that has any application in the real world of business, Mr. Easterbrook, if one supplier is told I have got a bid for $240,000, what can you do for me, the second supplier says, well, I will do it for $240,000, too? He is not going to get the bid.

MR. EASTERBROOK: My answer, Your Honor, is that it does and that it doesn't, and it depends on how you look at it. From the point of view of a buyer -- and if we are talking about buyer's liability, this is such a case -- the "meet, not

beat test" is really quite easy to apply. The buyer knows what the lower of the competitive offers is. The buyer knows what he has been offered. He knows who is in the running. He knows in this case who he has been doing business with for a long time, and who has a slight edge. In this case, I would assume Borden would have gotten the contract even if its bid had been a littler higher than Bowman's, precisely because A&P had been dealing -- and I understand that Mr. McInerney said that in oral argument today.

From the point of view of the seller, as you pointed out, the meeting competition defense is not nearly so easy to administer, because the seller doesn't know what the competing prices are, and the buyer has absolutely no incentive to tell him. Indeed, the Commission's disposition of the first count of the complaint in this case is precisely that the buyer does not have to tell the seller. And that is why, as the Court indicated in the A. E. Staley case and repeated in Gypsum, there is leeway in the good-faith standard if the seller, despite making reasonable efforts to verify what it is he is competing against, in fact beats the bid. He has not violated the Robinson-Patman Act. That is how the good-faith standard works with respect to sellers. Sellers are understandably ignorant. And for the reasons given in the Gypsum case, they should be kept in ignorance --

QUESTION: But the buyer would know necessarily?

MR. EASTERBROOK: Absolutely, the buyer would know.

QUESTION: And then he had beaten the bid and therefore I suppose it is incumbent upon the buyer to tell the lowest seller, the lowest price to increase your bid a little bit or else I am going to be guilty of a 2(f) violation?

MR. EASTERBROOK: Mr. Justice Stewart, we don't argue that the buyer should necessarily have to tell that to the seller. Our argument in this respect concerns only the meeting competition defense. The buyer may have -- it may be that there is no violation of the Robinson-Patman Act to begin with when the seller goes under the buyer and when the seller goes under another bid.

QUESTION: In this case there is --

MR. EASTERBROOK: In this case there is.

QUESTION: -- and you say there is necessarily knowledge of it on the part of the buyer, and there always will be.

MR. EASTERBROOK: There always will be knowledge of that, but it is important for me to stress, and I think it is important to the outcome of this case to understand that the fact that Borden was under Bowman's bid was not a violation of the Robinson-Patman Act. It simply affects the meeting competition defense. The elements of Robinson-Patman liability in the first instance have nothing to do with the fact that Borden came in with a bid under Bowman's. They have to do with, first,

the fact that Borden was selling to A&P at a price lower than it was selling to A&P's competitors --

QUESTION: This is merely a defense?

MR. EASTERBROOK: This is purely a defense.

QUESTION: Yes.

MR. EASTERBROOK: And I think it is absolutely crucial to the understanding of this case to recognize that it is purely a defense. There is absolutely nothing wrong.

QUESTION: From your point of view, then, Mr. Easterbrook, if they were $83,000 higher, it could make no difference to this case?

MR. EASTERBROOK: It would indicate that they had a meeting competition defense, Your Honor, and it would change the outcome of this case.

QUESTION: Well, how would it affect it, that is my question?

MR. EASTERBROOK: Because the bid would not be lower than Bowman's bid, it would be one in good faith to meet another bid. I am sorry, my point may have been confusing. What I was trying to say with respect to this bid is suppose a store like A&P asks suppliers to compete on the basis of price, to give A&P the lowest possible cost in milk, and one person comes in lower than another. Nothing in the Trade Commission's holding requires A&P to go to the low bidder and say raise your bid. Nothing requires A&P to turn down that bid. It is a violation

of the Robinson-Patman Act to accept that bid if, and only if, one, the price is not available to A&P's competitors; if, and only if, two, it is not cost justified by Borden's costs; if, and only if, three, A&P knows that it is nost cost justified; and if, and only if, four, there is a farm to competition that can be proved as a result of that lower bid. Now, I think that --

QUESTION: You have those kind of out of order.

MR. EASTERBROOK: Pardon?

QUESTION: You have those kind of out of order. You have to show several things to have a prima facie violation of Robinson-Patman, and then there are two things that are completely facets to that --

MR. EASTERBOOK: Yes, there are two things you have to show to have a prima facie violation, are the lower cost to A&P than its competitors and the harm to competition, and meeting competition is part of the affirmative defense and so is cost justification.

QUESTION: And the burden is on the purchaser to establish those before he enters into the contract?

MR. EASTERBROOK: The ultimate burden on the purchaser, Your Honor, is that specified by section 2(b) --

QUESTION: If called upon, he must be able to --

MR. EASTERBROOK: If called upon, he must be able to do it. But my point, rather, is that nothing in the Commission

holding here interferes with the r dinary give and take of bargaining.

My final point with respect to good faith is the one that Mr. Justice Stewart made in the course of questioning. That is, the relaxation of the "meet, not beat" test from the seller's point of view is one that is justified understandably by the seller's ignorance and by the fact, as this Court held in Gypsum, that the seller should be kept ignorant, that that is an important part of the competitive process. But the justification of seller ignorance that call for the relaxation of the "meet, not beat" test when the seller is the defendant simply has no application when the buyer is the defendant because the buyer almost by definition is not ignorant.

It is our submission then that the buyer has no need for a rule that is based on the seller's ignorance. As the Sixth Circuit held in the Kroger case, the meeting competition defense should be available to a buyer only if the seller who knew what the buyer knew would have had a good-faith meeting competition defense. And in this case it seems clear that if Borden had known what A&P knew, it would have had no such defense.

QUESTION: Of course, in Kroger you had the so-called lying buyer.

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: And at one stage, at least in one part of

your brief, you assert that the facts of this case bring it under the rationale of that.

MR. EASTERBROOK: We believe that it does.

QUESTION: But you haven't argued that today.

MR. EASTERBROOK: We by no means abandon that argument. We think that it is, but the broader principle is the one for which I have argued and I think it is the more accurate interpretation of when the good-faith standard is met.

I think I have covered both the meeting competition defense and the cost justification defense. The Commission was entitled to enter a remedial order in this case, and we therefore submit that the judgment of the Court of Appeals should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. McInerney, you have something further?

ORAL ARGUMENT OF DENIS McINERNEY, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. McINERNEY: If it please Your Honor, Mr. Easterbrook spent a great deal of time in reliance on the administrative law judge's decision with respect to cost justification, and that is understandable because the administrative law judge did try to apply Automatic Canteen and did make some findings about lack of cost justification which were vacated by the Commission.

The Commission said that those findings based on the so-called Malone data were not reliable, and it made it very clear that there was no finding of lack of cost justification here. Indeed, it said at one point, at page 1206a of the record, that there were differences in the way in which A&P was served and the others were served, and it said at page 1220 that it is at least conceivable that the $20,000 savings did represent savings to Borden. And faced with that, the Court of Appeals in its opinion made it clear that there was of course no findings of lack of cost justification here.

So I think a great deal of this emphasis on the administrative law judge's findings with respect to cost justification is misplaced. Further, the statement that many other stores were sold milk in the same quantities and bought in the same quantities and were delivered by Borden in the same quantities as A&P, is simply not so.

I respectfully recall Your Honors' attention to --

QUESTION: Well, did the administrative law judge find that or not?

MR. McINERNEY: I don't believe he did, Your Honor.

QUESTION: Well, that should be easy to tell. Let's assume he did, are you saying we should nevertheless read the record and find otherwise?

MR. McINERNEY: Your Honor, I think what the Commission made plain was that there were differences in service.

What happened was they said those differences we want to consider in connection with the cost justification defense. When they got to that defense, they sidestepped the whole issue by putting the burden on the buyer here.

Now, I would just like to point out one difference as to which there can be no dispute. When dairies supply their own branded products to stores, if that store reduces its out-of-store price to meet a retail competitor ,the dairy subsidizes the price reduction with a competitive allowance, and the reason for that is that the dairy has the risk of spoilage when it is its own brand milk. It does not have that risk on private label. None of A&P's competitors had the burden of taking back out-of-date milk at its own expense, which was a considerable item here. The testimony was that it was well over $100,000 on that one item alone.

There are in addition in the record at page 781a a whole series of things that A&P had to give up in this private label deal that no one else had to give up, and those are collected at our brief at page 31, note 31, and in the reply at page 23, note 30. I respectfully call your attention to that.

I don't think on the undisputed facts here there can be any question that this is the kind of case where anyone looking at it could without proof say that there was no cost justification.

Now, I really don't think I need to take up any more

of the Court's time unless the Court has any other questions. I would simply like to point out one thing in conclusion. The economists tell us that when a buyer elicits a price concession from a seller, even though it is an oligopoly situation, those lower prices have a tendency to spread, and we have an example of that here. The first offer that Borden made, the $410,000 saving offer, in exchange for A&P taking over a substantial amount of expense from Borden, when this private label arrangement went into effect, Borden gave those identical prices down to the mil to everyone on Borden brand milk without giving up any services or allowances. So even though A&P gained no competitive advantage out of that price reduction, other competitors of A&P in the area, and presumably consumers in Chicago, profited from the spread of that price reduction. And that is an illustration, and I think a good one, of what we are saying here, that there is no need to protect rigid pricing, that there is no need to impair the normal competitive give and take of bargaining.

QUESTION: I would take it you would argue, then, that on that basis -- and you do, I take it -- that unless the seller is guilty of a violation, the buyer certainly can't be?

MR. McINERNEY: I think that is right, Mr. Justice, under the Robinson-Patman Act. The Robinson-Patman Act is not a truth-in-bargaining act. There is section 5 of the Federal Trade Commission Act which I believe a buyer might be guilty

of, which --

QUESTION: So you would say here even if the bid to A&P was substantially lower and A&P knew it and knew that -- say it knew and they were right that it was neither cost justified nor was it a meeting competition situation, as long as the seller wouldn't be liable, neither would A&P?

MR. McINERNEY: As long as there was no misrepresentation on the part of --

QUESTION: That's right, unless you say the Kroger case was wrongly decided by the Sixth Circuit Court of Appeals, you can't accept Justice White's --

MR. McINERNEY: Well, I believe that it was properly decided if it had been under section 5 of the FTC Act.

QUESTION: But it wasn't.

MR. McINERNEY: It was under section 2(f), that's right.

QUESTION: Yes. Therefore, is that a negative implication, that you think it was wrongly decided?

MR. McINERNEY: Your Honor, I do think it was wrongly decided on the Robinson-Patman Act, but that is not our case.

QUESTION: Exactly.

MR. McINERNEY: Here, of course, there was no misrepresentation, and there is really no substantial contention that there was.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:52 p.m., the case in the above-entitled matter was submitted.)

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