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INTEGRATION AND DISSOLUTION OF THE A & P COMPANY*

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Until quite recently economists who were especially concerned with antitrust problems tended to view with suspicion the arguments advanced to defend big, integrated businesses. To recall the outstanding instance, they felt that the majority of the Supreme Court was guilty of superficial reasoning in stressing the economies derived from the consolidation of independent firms, both complementary and competing, into the U. S. Steel Corporation.¹ This hostility toward size and integration continues to find expression in some quarters.² Nevertheless, since World War II there has been a strong countermovement toward criticism of antitrust authorities for bringing suits against large, integrated firms.³ Much of the controversy over integration and antitrust policy has centered about the A & P case,⁴ including both the criminal action and the remedies now

* This article is part of a broader study of the vertical relationships between large and small businesses under the antitrust laws conducted by the writers under the auspices of the Cornell University Social Science Research Center. See Dirlam and Kahn, *Price Discrimination in Law and Economics*, 11 AM. J. ECON. & SOCIO. 281 (1952); *Leadership and Conflict in the Pricing of Gasoline*, 61 YALE L. J. 818 (1952); *Antitrust Law and the Big Buyer: Another Look at the A & P Case*, 60 J. POL. ECON. 118 (1952); Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28 (1953).

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1. See the statements of Professors FETTER and WATKINS, *RELATIVE EFFICIENCY OF LARGE, MEDIUM-SIZED, AND SMALL BUSINESS* 98-100, 107-110 (TNEC Monograph No. 13, 1940). See also DEWING, *FINANCIAL POLICY OF CORPORATIONS* 699-785 (3d ed. 1934); MUND, *GOVERNMENT AND BUSINESS* 159 (1950).

2. STOCKING and WATKINS, *MONOPOLY AND FREE ENTERPRISE* (1950), *passim*; Adams, *Is Bigness a Crime?*, 27 LAND ECON. 287 (1951); Rostow and Sachs, *Entry into the Oil Refining Business: Vertical Integration Re-examined*, 61 YALE L. J. 856 (1952); Stigler, *The Case Against Big Business*, *Fortune*, May 1952, pp. 123, 158-167.

3. GALBRAITH, *AMERICAN CAPITALISM* (1952); LILIENTHAL, *BIG BUSINESS*, A NEW ERA (1953); Hansen, *Maintaining Competition in Marketing*, 21ST BOSTON CONFERENCE ON DISTRIBUTION 42 (1949); Adelman, *The A & P Case: A Study in Applied Economic Theory*, 53 Q. J. ECON. 238 (1949) (henceforth cited Adelman, *The A & P Case*); Adelman, *Integration and the Antitrust Laws*, 63 HARV. L. REV. 27 (1949); Wright, *Toward Coherent Antitrust*, 35 VA. L. REV. 665 (1945).

4. *United States v. The New York Great Atlantic and Pacific Tea Co.*, 67 F.Supp. 626 (E.D. Ill. 1946) (henceforth cited: District Court Case); 173 F.2d 79 (7th Cir.

proposed in the civil suit. Briefly summarized, the suggested remedies are (1) severance of A & P's manufacturing subsidiaries, (2) dissolution of its produce-buying and centralized purchasing organization, and (3) disintegration of retailing into seven independent companies. Issues similar in their various contexts to those in the A & P cases appear in other antitrust suits, such as those against the west coast oil companies,⁵ the United Shoe Machinery Corporation,⁶ the large meat packers,⁷ the du Pont Company,⁸ and the Western Electric Company.⁹ The lengthy record already existing in the A & P cases, the discussions that have been inspired by it, and the fact that a civil suit seeking to dissolve the company is pending, seem to justify an attempt to answer these questions: (1) Do the Department of Justice and, more important, the courts evince hostility toward vertical or horizontal integration *per se* in the A & P cases? (2) What was the role played by integration in the operation of the A & P Company? To what extent did it contribute to the firm's efficiency, as distinct from its bargaining power? (3) Do the remedies proposed by the government in the civil suit actually threaten the economic benefits—if any—of integration?

I

MANUFACTURING

Problems of integration arise when a firm encompasses more than one operation. It may sell in more than one market area or be active in more than one horizontal stratum. Where this happens, the possibility arises of unfairness to competitors not similarly equipped because one function or—at the horizontal level—geographical area may carry a disproportionate burden of contribution to the return on over-all investment. If the government accepts the responsibility for preserving competition on an equitable plane, it cannot avoid deciding whether a particular use of integrated facilities does or does not overstep the limits of

1949) (henceforth cited: Appeals Case); also Civil Action No. 52-139, U.S.D.C.S.D.N.Y., Sept. 15, 1949.

5. United States v. Standard Oil Co. of Cal., Civil Action No. 11584-C, U.S. D.C.S.D.Cal., May 12, 1950.

6. United States v. United Shoe Machinery Corp., 110 F.Supp 295 (D. Mass. 1953).

7. United States v. Armour and Co., Civil Action No. 48C-1351, U.S.D.C.N.D.Ill., Sept. 15, 1948.

8. United States v. E. I. du Pont de Nemours and Co., Civil Action No. 49C-1071, U.S.D.C.N.D.Ill., June 30, 1949.

9. United States v. Western Electric Co., Civil Action No. 17-49, U.S.D.C.N.J., Jan. 14, 1949.

fairness, thus defined in terms of disproportionate¹⁰ contribution to over-all return.

On the other hand, it is obvious that to attack all integration that exposes nonintegrated competitors to competition more strenuous than they can withstand solely on the basis of their relative efficiency in their own limited area of operations would be to deny consumers the valid contribution to efficiency of combining operations.

The government has expressly denied hostility to vertical integration, as such. It said that it was not attacking A & P's ownership of manufacturing facilities, but only "abuses" of the power which such ownership conveyed. Thus, in the criminal information, 24 types of violations of the Sherman Act were set forth, only 6 of which are at all related to manufacturing. More precisely, A & P was accused of (1) threatening to manufacture grocery products in order to extract illegal discriminatory concessions from suppliers and (2) using the profits from manufacturing¹¹ to offset losses in *selected* retail areas with the aim of securing predetermined shares in those markets.¹² In the offenses charged in the civil suit relating to manufacturing, one again finds listed what the government thought were abuses: (1) A & P sold its manufactures to competitors at prices higher than those charged its own subsidiaries; (2) by entering upon or withdrawing from manufacture, A & P depressed its buying prices below those charged to its competitors; (3) threats of manufacturing for itself were used to obtain discriminatory prices; (4) profits from sales of manufactured products to outsiders were used to offset reduced prices on sales to A & P's retail subsidiaries and were an offset to retail losses.¹³

These "abuses" of vertical integration, or, as set forth in the civil suit, the "offenses charged," might without exception be regarded either as manifestations of the company's buying policy, or else as links to its allegedly unfairly discriminatory selling-price policies. The latter will be examined in detail below. If one grants the possible illegality

10. How "disproportionate" must be the returns from different activities before an illegal "abuse" of integration may be said to have occurred? It is impossible to lay down arithmetical rules. The courts can decide only on the basis of the historical pattern of action, the relative size of the protagonists, and the intent deducible therefrom, the practices in the trade, and the economic impact of the "subsidization," whether an unreasonable restraint of trade has been effected.

11. A critic of the Antitrust Division says: "No man can make a profit by selling to himself." On the other hand, he also speaks of "returns" on manufacturing operations. Adelman, *The A & P Case* 245. The crucial question is not whether the government was guilty of sloppy thinking in employing the concept but whether the A & P decisions attack the mere enjoyment of the legitimate advantages of integration.

12. See Gov't Main Brief 3-6, Appeals Case.

13. Civil Action No. 52-139 *supra* note 4, at Par. 23 A and D.

of the company's coercive buying tactics¹⁴ and retail pricing policies, to both of which the condemned manufacturing activities were merely subsidiary, it would be fair to conclude that the A & P suits do not, at least on their face, specifically attack vertical integration.

However, it may be that some of the "abuses" condemned by the government and the courts are not clearly an exercise of coercive bargaining power but are, rather, policies that vertically integrated concerns should be encouraged to follow. Should not a vertically integrated grocery chain be encouraged to bargain with its suppliers for lower prices on the basis of what its own manufacturing costs would be? Should it not sell commodities to competitors, even though at prices higher than the (nominal) prices its own retail units are charged?¹⁵ Can it not do these things without violating the antitrust laws?

One can conceive circumstances in which both of these practices might be illegal. If A & P drove down its suppliers' prices by *threatening* to manufacture—using its successful experience to back up those threats—while competitors continued to pay higher prices to the same suppliers, the resultant discrimination might have been oppressively unfair. The line between legal and illegal bargaining of this sort is necessarily a fine one. If A & P thinks that it can manufacture at lower costs than its suppliers, there can be no reasonable objection to its doing so. But if it uses its manufacturing facilities as a kind of scarecrow to coerce suppliers into concessions, it may impose an unreasonable burden on competitors. Unfortunately, the government's statement of the "offenses" lumps together these two possible courses of action as parts of a "conspiracy" to obtain supplies at preferential prices¹⁶ and blurs the distinction, difficult

14. There have been few tests of the legality of extracting price discriminations under the Sherman Act. While buying power can obviously be used in such a way as to violate the Act (note the stress laid on the railroad rebates coercively exacted by Standard Oil Company in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 32-33, 42, 75-77 (1911); see also *United States v. Griffith*, 334 U.S. 100, 108 (1948)), this specific use of it is hard to differentiate in practice from any intense price competition. Both the District Court and the Circuit Court of Appeals (unanimously) decided that A & P's bargaining did overstep the line, admittedly difficult to draw, between aggressive bargaining leading to beneficial competition and that bargaining which is a species of unfair competition. The A & P decisions may be compared with a similar instance of discriminatory pricing, held to be illegal under Section 2 of the Clayton Act because it substantially lessened competition. *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245 (1929). There appears to be little, if any, factual foundation for the hypothesis that A & P's illegal buying activities appreciably benefited the public. See Dirlam and Kahn, *Antitrust Law and the Big Buyer: Another Look at the A & P Case*, 60 J. POL. ECON. 118 (1952).

15. In fact, A & P maintains that it has never sold any of its manufactured products to competitors. A & P Main Brief 194, Appeals Case; App. A, Vol. I, 335, *ibid.* Nowhere in its brief before the Circuit Court in the criminal case does the government mention sales to outsiders.

16. "The . . . conspiracy . . . has consisted of a continuing agreement . . . to

enough to make in any case, between legitimate and potentially illegitimate uses of integration.

If, again, A & P had monopoly power in the supply of *some* of the manufactured products which it sold to the trade,¹⁷ the courts could not regard with indifference sales to nonintegrated competitors at prices which subjected the latter to a squeeze, but of course the government never presented such evidence.¹⁸

Apart from the attack on specific practices, there are isolated statements in the government's briefs, which, pieced together, form a picture, or more accurately, a *collage*, of Antitrust Division hostility to integration *per se*.¹⁹ In effect, what these statements say is that A & P's "profits" from manufacturing enabled it to operate on lower over-all retail margins than its nonintegrated competitors. If the employment of its capital in manufacturing did provide A & P with a higher return than retailing, or enabled it to improve the performance of its retail stores, undoubtedly it could undersell equally large and efficient competitors who might have embarked all of their capital in retailing. But the government could not logically attack A & P for this competitive advantage unless it was prepared to attack any firm which integrates successfully. Successful integration (whether because it contributes to increased efficiency or merely circumvents monopolistic suppliers) may confer an advantage over nonintegrated competitors. The latter may be unable to overcome this advantage by virtue of their efficiency in retailing alone. But the incentive and ability of an enterprise to integrate backward is one of the prime limits on others' monopoly power and, like corporate size itself, is reasonably condemned under the antitrust laws only on the basis of a far stronger showing of monopoly danger and abuse than was made in the case of A & P.

However, it is possible to appeal from the government drunk to the government sober. Intermixed with a few statements that really attack integration are others—representing the government's explicit summa-

utilize their food manufacturing plants . . . to insure that defendants secure food both from their own manufacturing subsidiaries and from other manufacturers at lower buying prices than those paid by their retail competitors for the same . . . products. (2) By . . . agreeing to abstain from the manufacture of particular foods . . . with the intent . . . of thereby depressing buying prices to be offered . . . to defendants for similar products of comparable quality manufactured by other manufacturers. . . ." Civil Action No. 52-139 *supra* note 4. However, see Par. 23 D (3), *ibid.*, which specifically alleges that A & P used its plants to coerce discriminatory concessions.

17. Some such power was enjoyed in the case of produce resold by ACCO. See p. 8, *infra*.

18. See note 15 *supra*.

19. See the quotations in Adelman, *The A & P Case* 244, note 7. See also Gov't Main Brief 25, 390, Appeals Case; Civil Action 52-139 *supra* note 4, at Par. 23 E (4).

tions of its views with respect to integration unaccompanied by "abuse"—emphasizing that "the abuse of power arising from integration and dominant size, and not its mere possession, was the issue."²⁰ Nor did the District Court or the Circuit Court adopt the theory that A & P's manufacturing "profits" were illegal *per se*. In the decisions the consideration given to A & P's manufacturing facilities is oblique and brief. The District Court contented itself by saying that the earnings of the manufacturing subsidiaries "when coupled with and inextricably interwoven with the activities of ACCO, reflect inevitably the misuse of defendants' power in competition. . . ."²¹ The only times Judge Lindley mentions manufacturing profits are when he cites their use, always *in association with* other, coercively exacted "revenues," to "subsidize" retail operations, both generally *and* selectively. The Circuit Court concluded that "[t]hese corporations were tools in the hands of A & P, used and useful in maintaining the two-price level to enable it to maintain its position of dominance in the retail food business."²²

It is regrettable that the Antitrust Division and the courts did not more clearly differentiate between legal and illegal use of the power enjoyed by a vertically integrated concern. Still, there is little in the decisions which could serve as a precedent for attacking backward

20. Gov't Main Brief 391, Appeals Case. See also statement of Holmes Baldrige on oral argument:

"A violation of vertical integration occurs where you take profits illegally secured, such as the headquarters' allowances profits are, and local allowances too, for that matter, and stock gains, we claim are illegal profits, most of them, where you credit all of these illegal profits, along with the profits from their manufacturing subsidiaries, which are perfectly all right, to turn a losing retail proposition into a profitable retail operation; we say that that is an abuse of vertical integration. . . .

JUDGE MAJOR: "Suppose they have legal profits from this manufacturing business, and they decide they will put all those profits over here in one territory, we will say where they have got a price war on. . . . Wouldn't that be illegal?"

MR. BALDRIDGE: "Yes, sir, if they are selling below cost in that area for the purpose of driving out competition, and they attempt to cover up that loss by crediting profits, even though they are legally earned profits, that is a violation of the Sherman Act."

Oral argument for the government by Holmes Baldrige, Jan. 6, 1949, Transcript of Record 213-214, Appeals Case.

21. District Court Case, 67 F.Supp. at 678. Only to the extent that one feels justified in extracting from such statements the implication that manufacturing or other headquarters profits, untainted in their source, and *not* associated with other tainted profits, might not legally be used to permit *generally* low retail margins, can one find here an opposition to vertical integration *per se*. The reader will note the similarity between this general view of Judge Lindley's and that of Holmes Baldrige, *supra* note 20. And Baldrige makes it quite clear that the only way in which manufacturing profits are objectionable is in their *commingling* with other, illegal "profits" to subsidize retailing in general *or* in their use *selectively* to subsidize local price-cutting. See his oral argument, *op. cit.* at 217-219.

22. Appeals Case, 173 F.2d at 86.

vertical integration unaccompanied by a pattern of buying and selling policies approximating A & P's.

It is not clear how great was the contribution of A & P's manufacturing to its competitive position. It is possible that both the government and its critics have exaggerated its importance.²³ There are corporate chains (to name a few, Food Fair, Grand Union, Loblaw's, Albers Supermarkets, Inc.) and voluntary or cooperative chains (IGA, Red and White, NAROG) which do no manufacturing yet have provided keen competition for A & P and other corporate integrated chains. There appears to be no correlation between either size or profitability of grocery chains and the extent of vertical integration.²⁴

However, the argument is not being advanced that such considerations should have entered into the deliberations in the A & P case. It was not incumbent on the government, before complaining of A & P's use of vertical integration, to examine the relative efficiency of the Company's manufacturing or its integrated facilities. The legality or illegality of A & P's actions—and it is *actions* which the antitrust laws proscribe—could never be determined by such a comparison. Decisions about short or long-run efficiency should, of course, be left to businessmen. If they find it desirable to integrate backward (whether because they think they can do the job more efficiently or merely to participate in monopoly returns being earned upstream), they should be free to do so without having to demonstrate to outsiders that returns are thereby increased.²⁵

23. For computations showing "returns" of 50 to 100 percent annually on capital invested in manufacturing, see ADELMAN, *THE DOMINANT FIRM, WITH SPECIAL REFERENCE TO THE A & P TEA CO.* 405, 408 (unpublished doctoral thesis, Harvard, 1948). A & P's failure to expand its manufacturing facilities during the period in which these extraordinary returns are said to have been earned casts doubt on their meaningfulness. None of the competitors of A & P interviewed by the authors, even those who did their own manufacturing, believed that a dollar invested in manufacturing would increase net income so much more than a dollar invested in retailing, or that A & P actually enjoyed "profits" of such magnitude. Private label merchandise can often be purchased as cheaply as it can be manufactured. It was conceded that the "middleman" was eliminated, but of course not all of his selling costs are avoidable. For example, reduction in advertising expenditures may be offset by reduced turnover.

24. A & P was not, at the time of the criminal trial, by any means the most highly integrated chain. HARDY, *THE INTEGRATION OF MANUFACTURING AND CHAIN DISTRIBUTION—WITH SPECIAL REFERENCE TO FOOD PRODUCTS* (unpublished doctoral thesis, University of Minnesota, 1947), *passim*. A & P's propensity to shift back and forth from self-supply to outside purchasing seems to demonstrate that the savings from manufacturing were not appreciably larger than the returns the Company could achieve on capital tied up in purchases from independent suppliers. A & P Main Brief, App. A, Vol. I, 372-375, Appeals Case; Gov't Brief 130-132, District Court Case.

25. It has been suggested that "economic policy should be based on actual facts about the relative efficiency of integrated and nonintegrated firms." Adelman, *The A & P Case* 246. If a business concern makes things for years which could be made

Against this background there is the government's proposal that the manufacturing facilities be divested from the balance of the A & P organization. It appears that the only justified attacks were not really against manufacturing itself but on associated buying power and policies or geographic dispersion and selling policies. The *threat* to manufacture rather than manufacturing itself was asserted to be a club with which concessions were obtained; manufacturing profits were an integral part of a scheme to subsidize retail stores *selectively*. Apart from these abuses of economic power derived from vertical integration, there appear to be none which could be considered forthrightly unjustified.

On the theory that that punishment is best which fits the crime, and that power is best dissipated which has actually been abused or is most susceptible to abuse, the divorce of A & P's manufacturing facilities seems the least felicitous proposal of the Department of Justice. Certainly the considerable contribution which backward integration may make to effective competition offers an additional cause for restraint. The burden of proof would seem to rest on the government to show that injunctions against specific practices found objectionable, combined with direct attacks on the power which made the abuses possible (the concerted buying and the dispersed geographic operations), would be an inadequate substitute for divestiture of manufacturing.

II

A & P's BUYING ORGANIZATIONS AND PROCEDURES

a. ACCO

In the civil suit the government has asked for the dissolution of ACCO (A & P's produce-buying subsidiary) and for the prohibition of any future A & P-owned organization buying produce and selling it both to the retail organization and to the trade. Does this program represent government hostility to a form of backward integration *per se*? Was ACCO's offense nothing more than its superior efficiency as a purchasing instrument? Will the suggested dissolution and prohibition of resale of produce to competitors mean higher costs and higher prices to the public?

According to Judge Lindley A & P was convicted by "ACCO's tainted record," which permeated "all the operations of A & P's inter-
more cheaply "on the outside," this is, it is said, objectionable. Just how such pig-headedness could be dealt with by the Antitrust Division is not made clear, nor is condemnation of the practice reconciled with an earlier defense of long-period losses in retail units; *id.* at 239-244.

grated system.”²⁶ The nature of ACCO’s taint was clear enough; it consisted of (1) taking advantage of its bargaining power to extract discriminatory concessions from produce suppliers, (2) using its buying power to force growers and shippers to sell exclusively through it; (3) using its large purchases from other middlemen to induce them in turn to patronize it, with the resultant conferring on A & P of unfair advantages over retail competitors, and (4) extracting low LCL prices and double brokerage from produce jobbers under threat of withdrawal of A & P’s good will.²⁷ The Circuit Court repeated these conclusions.²⁸

In short, the evils of ACCO, as related in both the District and Circuit Court opinions, are found in the way in which it operated—exploiting its “inconsistent functions” as Judge Lindley put it—rather than its backward integration *per se*. Even if the Department of Justice has its way in the civil suit, none of the seven independent retailing organizations into which A & P will be split will be prohibited from setting up its own produce-buying subsidiary. Hostility to backward integration itself is perhaps evidenced in Paragraph 23.B(13) of the

26. District Court Case, 67 F.Supp. at 678.

27. *Id.* at 655-659. An example of the use of the heavy purchases for A & P to enhance ACCO’s income as broker for the trade is revealed in the following excerpt from an inter-office memorandum in ACCO’s Plant City, Florida, office: “We are usually able to realize auction average prices for any of our offerings in this [the Cincinnati] market due to the fact that so many of the auction buyers do business with us on other commodities and in this way we are able to ask them for support on any of our auction cars.” Government Exhibit No. 2355, Transcript of Record 8740, District Court Case.

28. We do not attempt to determine here whether the courts and the government were correct in concluding that the cash differential given to ACCO by suppliers exceeded the shipper’s savings in cost on these sales. There is much evidence to the contrary. See A & P Reply Brief, Part I, 205-210, Appeals Case. On the other hand, the government was not, as is so often contended, necessarily forcing sellers to discriminate against A & P by attacking ACCO’s attempts to obtain the equivalent of brokerage on its direct purchases. Sixty-five percent of ACCO’s purchases were at the point of shipment. A & P Main Brief 134, Appeals Case. Terminal market wholesalers and chains without field organizations likewise do a large volume of direct produce buying through buying brokers or agents. They pay the commission of the buying broker, just as A & P pays the expenses of its field organization. Thus the same price on both sales means the same net-back to the seller; A & P pays no “phantom brokerage.” Moreover, even if, for instance, a grower “rolls” a car of lettuce to a terminal market, meanwhile notifying a selling broker to get the best possible price for it, and at the same time sells a car to A & P at the shipping point, he still does not necessarily discriminate against A & P, even though the latter does not get brokerage and the receiver does. The price that the selling broker will ultimately be able to get, after the car arrives, will almost certainly not be the same as the price ACCO paid at the time of shipment; produce prices change from one hour to the next. Therefore, the net-back that an individual shipper obtains on sales to ACCO may or may not be the same as on sales through brokers four or five days hence. *Cf.* Adelman, *The A & P Case* 249: “. . . [A] system of identical list prices to all buyers (which means diverse net prices) weakens the urge to find or set up cheaper distribution methods.” In the produce business there are, of course, no “list prices.”

complaint in the civil suit, where it is alleged that ACCO's profits on sales to defendants' competitors and on brokerage transactions for others than A & P were allocated to the retail stores. But this is a minor point under the main rubric of "systematic discriminatory price preferences." Again, Judge Lindley's opinion seems to imply at times that any profits on resales to competitors would be tainted. In fact, however, the District Court was clearly influenced primarily by the tactics described above.

Admitting the abuses of ACCO's power—or at least the reasonableness of the conclusion of the Department of Justice and the courts that those powers were abused—the question remains whether ACCO does not, nevertheless, provide an efficient method of buying and distributing produce. By virtue of its size and methods of operation alone, does it not permit savings that are unavailable to A & P's competitors, savings distinct from those attributable to coercive bargaining? ACCO has field men at the most important shipping points and at strategically located distributing depots and maintains about 50 terminal offices. The terminal offices are organized in divisions coextensive with the retail divisions. They receive information on shipments and prices from, and send instructions to, the field men. Obviously ACCO permits certain savings to A & P: As the season advances the field men can move from one locality to another, following the produce "deals," while the produce warehouses can be located to serve a retail unit with maximum efficiency.²⁹ Coordination of purchases among divisions can re-route cars already rolling to minimize waste and spoilage.

Nevertheless, to conclude that ACCO is helpful to A & P is not to demonstrate that it represents a buying instrument significantly more efficient than those employed by A & P's rivals, or that its methods are significantly superior to those that will be available to A & P's successors. First of all, the direct buying which ACCO does for A & P can be done as well by many of A & P's competitors—without maintaining a staff of their own field men.³⁰ Secondly, A & P's successors will

29. Harvey Baum, then head of ACCO, claimed that its system of distribution permitted savings of \$49 per car compared with the terminal auction system. A & P Main Brief 117, Appeals Case. This saving is not an accurate measure of ACCO's superior efficiency since, as is pointed out *infra*, there are many other methods of obtaining produce besides auction purchases at terminal markets.

30. Even individual supermarkets can, and do, buy directly, either from the shipper or through a buying broker, large-volume produce items like potatoes or citrus fruits. Hence, relatively small chains can realize a large part of what savings derive from direct purchases, even though they do not have field men permanently on their staffs. Brokers are equally capable of selecting superior produce, looking after claims, and offer the additional advantage of not having to be paid except when their services are used. H. C. Bohack, a chain operating in the Brooklyn and Long Island area with about 3 percent of A & P's annual sales volume, makes about 10 percent of its produce purchases at the Washington Street Market. It has built up its direct carload buying

undoubtedly find it profitable and possible to operate through strategically located warehouses, as many of its competitors now do, thus avoiding recourse to inefficient terminal markets. Finally, it is not always more advantageous to buy directly; it is frequently more economical to make use of the facilities of terminal market wholesalers.³¹ Therefore, little relevance can be attached to the fact that ACCO's operating costs are lower than those of independent produce wholesalers;³² they perform different functions³³ and are utilized at different times and under different circumstances by A & P as well as others.³⁴ A comparison of A & P's produce costs with those of, for example, Penn Fruit in Philadelphia, Stop N Shop in Boston, or Albers Supermarkets in Cincinnati would be more pertinent; but it would fail to show the dramatic cost differences that appear when ACCO is measured against the "average" terminal market wholesaler.³⁵

Moreover, small buyers may enjoy offsetting advantages of flexibility.³⁶ Any chain with alert produce buyers, who have available to

as much as possible. Grand Union, operating retail stores on Manhattan Island, and with somewhat higher annual revenues than Bohack, currently purchases no more than 20 percent of its produce at the Washington Street Market. This is the only terminal market for produce of any importance in the New York metropolitan area. *New York Times*, Aug. 4, 1953, p. 23, § 2, col. 6-7.

31. When market prices are slumping, it is obviously better business to patronize a terminal market, where superior produce can be purchased at lower prices than would have been charged several days earlier at the shipping point. Of course, chains and independents alike tend to reduce direct purchases in periods of falling markets.

32. Adelman, *The A & P Case* 249.

33. Phillips, *A Critical Analysis of Recent Literature Dealing with Marketing Efficiency*, 5 J. MARKETING 360 (1941).

34. A & P Main Brief 112-113, Appeals Case. Terminal market wholesalers, who do a large part of their business in LCL lots with jobbers—and with A & P itself—and who operate in confined quarters often located where the produce has to be handled and transhipped two or three times, as in the Washington Market in New York City, must inevitably have higher costs than a wholesaler who does most of his business by the carload through a few strategically located warehouses. Furthermore, the spread in the gross margins of the 2 percent sample relied on by Adelman, *The A & P Case* 249, is so large as to make averages of little reliability. Margins ranged from 5.83 to 15.7 percent of sales. SURVEY OF FRESH FRUIT AND VEGETABLE WHOLESALERS 3, Table 3 (OPA Economic Data Series, No. 12, 1947). On the functions of chain produce-buying subsidiaries as compared with independent wholesalers, see GERREALD, AN ECONOMIC STUDY OF FRUIT AND VEGETABLE WHOLESALING AND JOBBING FIRMS IN NEW YORK CITY (Cornell University Agricultural Experiment Station Bulletin No. 721, 1939); HOFFMAN and BEVAN, CHAIN STORE DISTRIBUTION OF FRUITS AND VEGETABLES IN THE NORTHEASTERN STATES (U. S. Department of Agriculture, 1937).

35. Incidentally, some of these wholesalers, operating in modern, low-cost locations like the Providence or Buffalo (Niagara Frontier Terminal) markets, have operating costs very close to ACCO's.

36. For instance, a manager of a wholesale member of NAROG said that he trucked out groceries and picked up potatoes for the return trip, while A & P would typically have only a one-way load; and, because of direct connections with shippers, he could get watermelons quicker than A & P stores in his district, which had to depend on the unit's parcelling out the watermelons. It was pointed out that small

them detailed information on shipments and market prices throughout the United States provided by the Department of Agriculture or Crispto teletype services and other varied sources of market information (some of it made available by ACCO itself), can certainly come close to offsetting whatever advantages A & P derives from its field organization. Finally, the paramount determinant of profit or loss on produce is the treatment it gets in the retail store, rather than quality³⁷ or concessions at the time of purchase; in providing good handling, the independent store is at least in as favorable a position as A & P.

There is a strong feeling in the trade that the extensive field organization maintained by ACCO is a price A & P must pay for its size rather than a net competitive advantage. Given A & P's gigantic daily requirements of produce, ACCO is probably essential to it. Thus, the company continues to maintain ACCO even though it cannot legally collect brokerage and therefore must have higher costs than the rivals who negotiate directly with the shipper; and it may in some cases be at a disadvantage when compared with competitors who can avoid the overhead expense of maintaining the field men by using buying brokers. None of this is to deny that ACCO was a very efficient and successful organization, in large measure because of the efforts of its dynamic and extremely capable manager, Harvey Baum.

Under these circumstances, it would seem unrealistic to contend that ACCO represents so greatly superior a method of obtaining produce that its dissolution would be economically undesirable. There is little reason to believe that the seven independent chains proposed to be created out of the A & P organization would be any less efficient than the parent in their produce buying. The District Court may reasonably conclude that a chain doing hundreds of millions of dollars worth of business will handle produce just as efficiently, or at worst almost as efficiently, as one grossing \$3 billion a year.³⁸

chains, like Boston's Star Markets, with no warehouse expense, could market produce at lower cost than any large competitor. See also Dirlam and Kahn, *supra* note 14, at 126-127.

37. It is not feasible to appraise the extent to which the government's allegation is valid that A & P was able through ACCO to corral the best grade merchandise and to leave inferior produce for its competitors. In general, premium prices must be paid for superior produce, no matter who buys it. Attempts to compare the quality of produce sold by different chains or different stores have not been successful; it is very difficult to rate produce in retail stores. Moreover, the handling in the store may often be more important in determining the quality when it is offered to the retail consumer than the grade at the time of purchase from the shipper.

38. Other observers have suggested that the economies of bulk purchasing are fully attained at a fairly early stage. Hirsch and Votaw, *Giant Grocery Retailing and the Antitrust Laws*. 23 J. Bus. 5 (1952).

Granting that the distintegration of ACCO would have little harmful effect on the cost of handling produce, is it desirable? Would it provide a remedy for the objectionable types of bargaining attacked by the government in the criminal suit³⁹ and set forth again in the complaint in the civil suit?

The problem of selecting a proper technique for dealing with illegal practices must be faced. To begin with, it is relatively easy for the government to insist upon and enforce a prohibition of trade sales, so that ACCO's inconsistent functions could be ended by injunction.⁴⁰ ACCO would remain, however, the biggest single purchaser of produce, and the volume of business it could give or withhold from single suppliers would make it potentially dangerous.⁴¹ To devise a decree that would prevent recurrent use of illegal bargaining pressure would be almost impossible and would require continuous supervision to insure that the boundary line between coercion and legitimate haggling was not overstepped. The simple solution is to provide the produce supplier with more alternatives: Seven ACCOs instead of one.

b. *Central Buying Offices*

The A & P Company centralized its purchases of items other than produce through a Headquarters Purchasing Department and associated

39. We have already, in our study of A & P's buying policies, attempted to appraise the contention that the exercise of monopsonistic power—to which Professor Galbraith has since applied the appellation of “countervailing power”—even in violation of the traditional antitrust laws and Robinson-Patman, may make a contribution to workable competition. See Dirlam and Kahn, *supra* note 14; Dirlam and Kahn, *A Reply*, 61 J. POL. ECON. 441 (1953). Hence, we refrain here from debating whether the pressures applied by ACCO on its suppliers and customers, complained of by the government, might have been in the public interest. Professor Galbraith's defense of A & P's monopsonistic practices is entirely theoretical. He makes no attempt to find out, from the facts, to what extent this power was in fact “countervailing,” to what extent exploitative, to what extent it (as contrasted with other legally unassailable advantages) actually contributed to the effectiveness of chain store competition. His apparent implication that monopsony power is generally acceptable and cannot be exploitative (“such an opportunity exists only when their suppliers are enjoying something which can be taken away. . . .” GALBRAITH, *AMERICAN CAPITALISM* 124 (1952)), the big buyer serving as buying agent for the unorganized consumer, does not seem on all fours with his general approval of labor unions, whose growth he attributes (again in oversimplified fashion) largely to the necessity for meeting the exploitative monopsony power of the big corporation. (Significantly, four of our six largest national unions face employers who are unconcentrated and poorly organized.)

40. ACCO stopped trade sales after the decision in the criminal case.

41. See discussion of this point in Dirlam and Kahn, *supra* note 14. We contended there that ACCO probably did not enjoy superior coverage of the market; and that it was in no position regularly to pay substantially less than its competitors. This does not exclude, however, the possibility that it did obtain some discriminatory concessions. See Gov't Main Brief 264-268, Appeals Case, setting forth the Company's effort to perpetuate, under other names, the brokerage which it had been receiving from shippers on sales to A & P prior to the Robinson-Patman Act.

buying offices. Some of these buying offices operated in the field, while the tea and poultry departments were in New York. Some buying has always been done at the divisional level, but by and large "all big deals" were made at headquarters⁴² and "control and responsibility for all buying, for stocking any item and standardization of the quality of merchandise rested with the Headquarters Purchasing Department."⁴³

It was through these department and field buying offices that the illegal buying tactics (other than those associated with ACCO's activities) were carried out. Accordingly, the government has asked for their abolition.⁴⁴

Nowhere in the opinions of Judges Lindley or Minton can there be found a condemnation of the backward integration entailed in centralized purchasing. Instead, the former emphasized the ways in which the purchasing departments had been "taking advantage of . . . buying power,"⁴⁵ obtaining special concessions such as advertising allowances and discounts in lieu of brokerage, and trying to force sellers to give up the use of brokers.⁴⁶ The Circuit Court did refer to the contribution made by the special allowances obtained through the centralized purchasing departments to A & P's total profits;⁴⁷ but it went on to say: "It is the predatory method through which this accumulation of profits and allowances is obtained . . . that is challenged by the government."⁴⁸

There is little doubt that A & P still enjoys some (immeasurable) monopsonistic power. Its purchases of some items, concentrated in a single market like Chicago, have been sufficient to influence prices appreciably.⁴⁹ Although there is no evidence that the Company has ever actually exercised this power to manipulate meat or butter quotations generally,⁵⁰ there is no question that in specific instances, when dealing with individual suppliers, the power of the centralized buying offices was exerted to

42. Government Exhibit 103, abstracted A & P Main Brief, App. II, 22, Appeals Case.

43. A & P Main Brief 68, Appeals Case.

44. Civil Action 52-139, *supra* note 4, Prayer, Par. 9.

45. District Court Case, 67 F.Supp. at 639.

46. *Id.* at 643-654.

47. Appeals Case, 173 F.2d at 83.

48. *Id.* at 86.

49. "We are the biggest factors in the Chicago market, and other houses as well as the government agencies look to us for guidance and advice, knowing that we are closer to the situation than anyone else because of our large receipts." Transcript of Record 8758, District Court Case. Hence, A & P refrained from putting its own man on the Commodity Exchange but always bought through brokers so that its purchases would not be identified.

50. On one occasion, at least, an A & P official recommended a change in the scheduling of purchases in order to cause a break in livestock prices. See letter from T. A. Connor, who headed the National Meat Department, Government Exhibit 2355, Transcript of Record 8737, *ibid.*

elicit special favors.⁵¹ The question, then, centers on the appropriateness of the remedy proposed by the government to prevent repetition of the abuse of this power—dissolution of the centralized purchasing departments.

One important question, again, is whether such a change would appreciably reduce the efficiency of the successor companies in purchasing. It is even more difficult to reach conclusions about the contributions made to A & P's overall efficiency by its centralized purchasing of nonproduce items than to pass judgment on ACCO. A & P's field buying offices permitted it to correlate information on canning conditions and prices in New York State, the Middle West, and the South; its Chicago offices kept it in direct contact with the meat and butter markets. However, developments in the industry have made available to even very small chains opportunities for getting groceries, meats, and canned goods at relatively low cost.⁵²

The second question is whether dissolution of the headquarters buying offices will dissipate the power to demand discriminatory buying concessions. This proposal is, of course, only part of the government's over-all plan for reorganization of the A & P Company and cannot be considered in isolation from the proposed retail disintegration. Presumably, the seven independent retailing organizations would be free to set up their purchasing systems on a basis parallel to that of the *ci-devant*

51. Again, as in the case of ACCO, we must be careful not to generalize from the instances which the government was able to bring to light concerning the prevalence of illegal buying practices. As A & P points out, it dealt with some 25,000 suppliers, yet as of October 28, 1936, it had only 22 quantity discount agreements, and as of November 10, 1941, only 71. A & P Reply Brief, Pt. I, 97, Appeals Case. At another point, the Company said it had only 17 cost saving agreements. *Id.* at 109. Infrequency of such arrangements would not be pertinent to a decision about the Company's guilt under the criminal sections of the Sherman Act. It might, as will be brought out *infra*, be of importance in deciding upon a remedy in a civil suit.

Of course, the Company might have received discriminatory concessions from suppliers with whom it did not have permanent contractual relations. See Florida Citrus Canners Cooperative, FTC Docket No. 5640, Findings as to the Facts and Conclusions, July 14, 1952. A & P was given the March 18, 1946, price on canned grapefruit juice as late as April 22, by which time prices to other customers had advanced by 37 percent, or 8.8c per 46-oz. can.

52. The large packers have devised a system which permits direct shipment of good quality meat to small buyers from the main plant, circumventing the branch salesmen. Armours calls this a Q & D (quantity and direct sales) account; Swifts, STA (sold to arrive). The competitors interviewed believed that, since the period covered in the A & P trial, they had not been at a serious disadvantage in purchasing groceries and canned goods. As far as nationally advertised goods are concerned, everyone is on the same footing: The maximum discount applies to a carload purchase of soap, corn-flakes, Kraft cheese, etc. As for private label canned goods, there is confidence among smaller chains and voluntaries that they can rely on brokers or direct negotiation with those few canners not using brokers to put these goods on their shelves about as cheaply as on A & P's. Canning is an extremely competitive industry and is represented by some 2,000 competing brokers.

A & P. While they might be tempted to apply the same techniques that the courts found objectionable in the A & P cases, their economic power would be relatively limited. Of course, it should be recognized that not all the cases of illegal concessions brought forward in the trial were negotiated by headquarter's purchasers.⁵³ Once the retail organization has been shrunk, however, it is doubtful if preferences of this kind would as easily take on an illegal character.

The final question is whether dissipation of this concerted buying power is necessary, or whether a less drastic step like an injunction would suffice. In deciding this the District Court will probably want to determine if, as the government asserts, A & P is still using centralized purchasing to extract illegal discounts despite the verdict in the criminal case.⁵⁴ The evidence available to outsiders is not clear. Some competitors and suppliers interviewed ventured the opinion that the Company is bending over backward to avoid being accused of exercising illegal pressure. Before receiving an advertising allowance, A & P today requires the supplier to fill out an elaborate questionnaire that goes into great detail about the nature of agreements with other customers.⁵⁵ However, there is still widespread belief in the trade that a buyer as powerful as A & P would inevitably obtain preferences in one form or another.

The District Court may therefore conclude that policing negotiations between officials of A & P headquarters and suppliers to make sure that discriminatory concessions are not received in defiance of an injunction would present an impossible task, requiring as much time and effort as the preparation of the criminal case itself whenever violations were thought to have occurred. If so, abolition of the present system of centralized purchasing would seem to be the only feasible solution to the problem.

If the Company had been guilty of abusing its power, and if its concentration of power was such that it could substantially affect market prices, at least in the short run,⁵⁶ and if the issuance of a decree forbidding the continuance of specific practices is unenforceable, then certainly the dissolution of the instrument through which the power was illegally exercised is a defensible solution for the government to propose.⁵⁷

53. *Vide*, the Albany Packing Co., Boston Sausage & Provision Co., I. J. Grass Noodle Co., Illinois Meat Co., and Mrs. Baird's Bread Co. *histoires*. A & P Main Brief 229, 242, 251, 264; App. II, 320-324, Appeals Case.

54. Civil Action 52-139 *supra* note 4, at Par. 23 A.

55. For instance, Question 4 reads as follows: "Is any customer required to render greater services than A & P? If so, is he allowed a proportionally greater amount?" Question 5: "If the contract provides for payment of flat sum, how is this arrived at?" Question 8: "Does the supplier insist upon compliance with the contract?"

56. It should again be emphasized that this power was not utilized to manipulate market prices. See Dirlam and Kahn, *supra* note 14, at 127.

57. It might be argued, of course, that dissolution is a *punishment*, rather than a

III

HORIZONTAL INTEGRATION

Horizontal integration—the operation of more than one unit of business at the same marketing level—offers opportunities for anti-competitive manipulations as well as for enhancing efficiency. As pointed out earlier, horizontal integration might possibly be abused when A & P accepts low returns or losses⁵⁸ in some of its stores and makes up the difference from other outlets operating outside the area. But the mere fact of differing rates of return in different stores is not enough in itself to demonstrate an illegal abuse of power nor should it be. Such a doctrine would prevent A & P's reaching out for additional business, over which to spread an already incurred item of overhead cost, by charging only the incremental cost of that business. In short, it might deny to the customer the cost- and price-reducing benefits of integrated operations. Another related objection to requiring that a "normal profit" be earned on each operation is that it prevents management from adopting a policy of promotional pricing—that is, accepting a low return temporarily in order to build up a larger volume of business which will in turn permit normal profits to be earned on the lower mark-up. In appraising the retailing aspects of the A & P case, it is necessary to inquire first whether the Antitrust Division and the courts condemned either the legitimate savings on the economically beneficial competitive tactics of horizontal integration, and second, what consequences may be anticipated if the government's remedy is imposed.

a. *The Courts and A & P's Retail Tactics*

The critics of the A & P decisions concede that predatory competition on a discriminatory basis is and should be illegal.⁵⁹ How, then, do they defend the Company's practices in retailing?

remedy, and that it is too drastic in view of the small number of cases where A & P was proved to have misused its bargaining power. The Supreme Court refers to divestiture as a "harsh remedy" in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 602 (1951). But presumably a remedy is harsh only if it results in financial loss to somebody. There was no showing that the divestment requested by the government in the *Timken* case would cause unemployment or a drop in profits, nor could any such showing be reasonably made in the A & P case.

58. A & P retail stores, grouped as units or divisions, compute financial statements on a monthly, quarterly, and yearly basis. Only the yearly statements fully credit the stores on the basis of sales volume with earnings from manufacturing, quantity discounts received by headquarters, etc. A & P officials spoke of stores, units or divisions operating "in the red" or suffering "losses," even when they were unprofitable only *before* receiving their pro rata allocation of these credits from headquarters.

59. "Admittedly, it may be hard at times to draw the line between 'predatory' and 'competitive' price-cutting. This is particularly true where an integrated concern, with sizeable financial resources is involved. . . ." Note, *Trouble Begins in the "New" Sherman*

First Defense: That A & P's price cutting was promotional; the Company did it in hope of increasing volume; this is the way in which price competition works;⁶⁰ therefore, it scarcely behooves the enforcement agencies to condemn a company for suffering losses or accepting low returns, under the terms of a statute whose purpose is to encourage price competition.

A reading of the decisions of the District and Circuit Courts supplies very little foundation for the conclusion that the A & P case was a blow against legitimate promotional pricing. There are several reasons why the courts might have been justified in characterizing A & P's price cutting as unreasonable or predatory.⁶¹ First, losses⁶² were sustained in some territories for very long periods of time. In the Boston and Springfield Units, for example, losses (after credits from headquarters) were suffered for five years in succession. The Los Angeles Unit lost \$1,406,194 during the years 1932-1940, when it was continuously in the red.⁶³ The low margins which produced these losses were in a sense

Act: The Perplexing Story of the A & P Case, 58 Yale L.J. 969, 977 (1949). The same Note goes on to say, "... price reductions which would not have raised an eyebrow if considered individually, somehow acquired an aura of illegality when practiced by one big firm." *Id.* at 978. There is nothing mystifying about this "aura of illegality;" an individual price cut does not constitute discrimination. Adelman, in a footnote, backs into an admission that A & P might have been guilty of illegal conduct: "Incidentally, if we add the allowances, discounts, and buying-office profits back into the profits of local A & P areas . . . then most of the bases for thinking that Company sold below cost in selected geographical areas in order to drive out competition apparently disappear. But there is general agreement that such conduct, if it *did* exist, would be an unmitigated burden on competition. Since no issue of principle is involved, this charge has not been discussed at length." Adelman, *The A & P Case* 244-245 n.7. "This charge" was the heart of the government's case.

60. *Id.* at 241-242.

61. As should be apparent from our discussion, we do not pretend to be able to offer a brief rule which will enable a judge or the Antitrust Division to separate predatory from legitimate promotional pricing activities. The task is admittedly difficult, but no one doubts that it must be undertaken. See note 10 *supra*, and note 79 *infra*.

62. The word "loss" is used here advisedly to mean failure of a unit at the end of the year to return enough profit to cover allocated administrative overhead and other overhead costs (or in extreme cases, failure to cover even direct operating expenses) after proportionate credits from Headquarters for quantity discounts, allowances, ACCO profits, coffee, bakery, butter and cheese profits, subsidiary manufacturing profits, and stock gains. See Gov't Main Brief 374-382, Appeals Case.

Measuring retail profits in this fashion is perhaps unduly generous to the retailing function because it tends to minimize the extent to which retailing fails to carry its proportionate burden of expense. It is not wholly justifiable to credit an A & P retail unit with all of the profits on products of a manufacturing subsidiary sold by its stores. The efficiency of the manufacturing subsidiary is best measured by having it transfer its output at competitive, open-market prices. From its profits, thus arrived at, should be deducted some hypothetical normal to arrive at that part of the "manufacturing profit" attributable to the integrated relation between the seller and buyer. Only this differential is properly allocable to retailing if the purpose is to discover whether retailing is being "subsidized."

63. See Gov't Main Brief 375, Appeals Case, and A & P Reply Brief, Pt. I, 485, *ibid.*

“promotional”—A & P wanted to increase its share of the market. But the courts might reasonably feel that no company should be allowed, merely because it is wealthy, to compete at a loss for a five or eight year period in some of its markets.⁶⁴

Secondly, the “promotional pricing” defense overlooks the discriminatory feature of A & P’s long-term losses.⁶⁵ While the Los Angeles, Cincinnati, Boston, Springfield, and Seattle units were losing money for four years and more in a row, other divisions and units were profitable and subsidizing⁶⁶ large numbers of unprofitable stores. The subsidy was not an accident; divisional boards of directors voted their appreciation to the management for being permitted to operate “without making a profit on our store operations.”⁶⁷

Second defense: That even if A & P were engaged in discriminatory price cutting, its actions were defensive and designed merely to meet competition, not destroy it.⁶⁸

Many of the losses were in fact forced upon the Company. However, there were also numerous instances, discussed at length in Judge Lindley’s opinion, of A & P employees threatening or trying to put specific rivals out of business.⁶⁹ Without trying to reach a conclusion here about how typical these tactics were or how many rivals actually were bankrupted,⁷⁰ there would certainly be agreement that a practice of selling some items far below the normal mark-up, or at a loss, in order to “turn the heat” on individual competitors may provide reasonable grounds for the con-

64. We refrain from pursuing the problems of the Company’s intent in taking losses of this magnitude. If losses were incurred after all credits over several years, they were certainly “intended,” if only in the sense that they were the necessary consequences of a deliberate pricing policy, resulting in the inadequate gross profit rate. We examine later the question of the purpose of the Company, vis-a-vis its competitors in accepting long-period losses. According to Adelman’s interpretation, the losses resulted from an attempt to realize, at a larger volume of business, a lower expense rate per unit. However, A & P itself, or at least its lawyers, deny that it ever intended to run a store at a loss for over a year and attributes losses not to promotional pricing policy but to ineptitude of management or to long-term leases. “No program was ever planned which called for a net loss.” A & P Main Brief 201, Appeals Case. See also, with regard to policies in particular divisions and units, A & P Reply Brief, Pt. I, 305, 307, 321, *ibid*.

65. Adelman’s discussion of A & P’s “promotional pricing” policy, *supra* note 59, nowhere mentions that what the government objected to was price discrimination.

66. Lest we forget, it was A & P, not the government, that first employed the word “subsidy” to describe the process by which certain units or divisions were enabled to operate for lengthy periods without a profit, or at less than normal profit. For three separate instances of use by A & P officials of the term “subsidy,” see Gov’t Brief 833, 909, 931, District Court Case.

67. See Gov’t Brief 100, *ibid*; Government Exhibit 140, p. 2, *ibid*.

68. See A & P Main Brief 39-56, Appeals Case.

69. District Court Case, 67 F.Supp. at 664-671.

70. As a matter of fact, the cases related by the government in its brief are not convincing on this score. Compare Gov’t Main Brief 93-94, Appeals Case, with A & P Reply Brief, Pt. I, 353-359, *ibid*.

clusion that A & P did employ predatory competitive tactics.⁷¹ Likewise indicative of a predatory policy was A & P's practice of meeting below-cost prices of competing stores on specific items and then holding the price at the unprofitable level for weeks in order to punish the price cutter.⁷²

Third defense: That A & P was not pre-empting, as the government alleged, an "ever increasing share of the grocery market."⁷³

It is true that A & P's share of the total sales of grocery and combination stores rose slightly from 1929 to 1941 and dropped from 1941 to 1949, never exceeding fourteen percent. Nor have its sales much exceeded thirty percent of all chain store grocery sales in the past ten years.⁷⁴ On the other hand, A & P did strive to attain a minimum share of the business—usually about twenty percent—in most communities in which it had stores.⁷⁵ In twenty-three towns in the Central Division, the Company did approximately half the grocery business.⁷⁶ Furthermore, Judge Lindley in his opinion cited government data showing that in 1941 A & P had eight units where it did over fifteen percent of the business, compared with only one such unit in the period 1925-1926.⁷⁷

The government did not show that the markets where A & P did over half the business had been won by discriminatory pricing; the market shares might have been high merely because the towns were too small to support more than a few stores. There is no question that the A & P record is devoid of evidence drawing a clear line of causation from illegal practices to an increasing market share for the offender, or to a decline in the intensity of competition. But there is also no doubt that A & P's discriminatory tactics, in buying and selling, must have contributed to these high market shares, as was the Company's explicit intention.

71. See A & P Main Brief, App. A, Vol. I, 132, Appeals Case; Government Exhibit 3025, quoted in Gov't Brief 766, District Court Case; Government Exhibit 2778, Gov't Brief 744, *ibid.* The explanation given on the stand, that directives to "turn on the heat" or "hit them with meat and produce" merely meant to "feature meats and produce in advertising," is not convincing. Transcript of Record 16, 525, *ibid.*

72. A & P Main Brief, App. A, Vol. I, 210, Appeals Case; Gov't Brief 791, District Court Case. Similar to this tactic was the organization of buying brigades to buy up competitors' specials, thus preventing rivals from utilizing specials as a drawing card. Gov't Brief 756-757, *ibid.* Many A & P meat markets were operated at net losses for as many as four successive years. Gov't Main Brief 380-381, Appeals Case. See also A & P Main Brief, App. A, Vol. I, 132, *ibid.*; Government Exhibits 2778 and 3025, District Court Case.

73. Gov't Main Brief 386, Appeals Case.

74. Percentages derived from *Facts in Food and Grocery Distribution as of January, 1951*, The Progressive Grocer, 1951, and previous issues.

75. Transcript of Record 16,098, District Court Case.

76. A & P Main Brief 59-60, Appeals Case. This was the only study of the kind made and included only 189 out of 647 towns in the Central Division.

77. District Court Case, 67 F.Supp. at 633.

In view of the evidence brought forward by the government, set out at great length by Judge Lindley and summarized by Judge Minton, it would be myopic to conclude that the A & P criminal and civil suits represented an attack on promotional pricing or the good faith meeting of competition.⁷⁸ When one looks at the government's case and the two decisions as a whole, the essence of the crimes stands out as the Company's *intention to increase its business by the use of coercive bargaining in buying and to eliminate competitors by discriminatory sharp-shooting in selling*. Thus the contention that the briefs and decisions in the A & P case represent a threat to competitive pricing or to the efficiency advantages of geographical integration is without substantial foundation.

b. *Impact of the Suggested Remedy*

In order to prevent repetition of local price discrimination as well as to dissipate the concentrated buying power of the chain, the Antitrust Division has suggested that A & P's control of the seven retail divisions be dissolved. In this fashion the possibility of widespread and long-continued subsidization would be lessened, if not eliminated.⁷⁹ There may be grounds for believing that disintegration into seven huge, geographically distinct divisions would not go far enough in reducing A & P's

78. Admittedly, there are isolated phrases in the government's brief in the District Court Case—a document of over 1,000 pages—that appear to advocate cost-plus pricing; and similar inferences may be drawn from isolated statements in the decisions.

79. The Antitrust Division's position is not undermined by pointing out that, no matter how small a chain may be, it is always *possible* for subsidization to take place. Where the chain is nationwide, the presumption of unfairness is a heavy one to overcome. If the chain operates, let us say, only in New England, not only is it less likely to permit all the stores in the Boston area to run at a loss for a long period of time, but when the management does lose money in isolated cases in an effort to meet competition, there is little likelihood such conduct could reasonably be classified as unfair competition. Fairness is partly a matter of current mores, partly determined by the current market pattern, and partly a function of the size and power of the firm using the tactics in question. That the giant doing thirty percent of the business of all grocery chains had the power to compete unfairly cannot be ignored in assessing its action and deciding how free it may be to compete as it sees fit.

In the A & P case the government was successful in excluding from the trial evidence which might have proved that other retailers followed a policy of reducing prices under similar circumstances. It argued that the other retailers could not "recoup their losses in one area from the profits in another," nor could they "maintain such a policy until control of a predetermined desired percentage of an available local market had been obtained"—in short, that the same practice becomes more objectionable the more powerful its perpetrator. Gov't Main Brief 453, Appeals Case. This is certainly correct, both ethically and economically, merely mirroring Justice Cardozo's recognition in the *Swift* case that size carries an unusual opportunity for abuse. *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932). Moreover, the government argued that use by others of the same techniques, under the same circumstances, would also have constituted an unreasonable restraint of trade.

market power.⁸⁰ Perhaps the distintegration should create competing chains within the present divisional organizations.

This solution would probably not diminish price competition—particularly if the chain were split in such a way that those market areas with several A & P supermarkets were assigned to more than one legatee of the former controlling division.⁸¹ The present A & P management, in an effort to prevent recurrence of the type of local discrimination that led to the criminal case, now abstains from week-end price wars,⁸² although it continues in many areas by an “every-day” low price policy to set the retail target for which its competitors shoot, day in and day out. In most large cities the small chains and large independents are the most vigorous price cutters. A & P’s conduct after the trial seems to suggest that a rearrangement of its structure, leaving it free to engage in vigorous price competition without the power it once possessed, would leave it a far more effective competitor than would an injunction or the threat of future criminal suits.

Would the severance of A & P into smaller chains raise the cost of grocery distribution? A precise answer to this question would necessitate a comparison of A & P’s costs today with those of competitors roughly the size of First National Stores in New England or American Stores in Pennsylvania and New York.⁸³ While recent data for A & P are not available, it is known that in 1943 what A & P calls the gross profit rate, or the difference between cost of merchandise and gross sales, expressed as a percentage of the latter, was 14.20 percent. (This margin of course

80. See Hirsch and Votaw, *supra* note 38, at 16.

81. None of the competitors of A & P interviewed by the writers believed that splitting up A & P would dampen competition in the slightest degree. Some hazarded a guess that it would intensify price competition because the independent divisions would be relieved of the centralized control over gross profit rates.

It is possible that any separation of stores within present units now jointly using the same warehouses might involve some inefficiency. However, the normal growth of total business and the increasing tendency for individual supermarkets (including A & P’s), themselves growing larger and larger, to take direct shipment would tend to minimize the resultant disruption.

82. Analyses of price wars and price competition, from the point of view of independent stores and supermarkets, can be found in SUPERMARKET INSTITUTE, 13TH ANNUAL CONVENTION 43-45 (May, 1950); SUPERMARKET INSTITUTE, PROCEEDINGS 36 (Midyear, 1949); SUPERMARKET INSTITUTE, 11TH ANNUAL CONVENTION 48-49 (1948); *Hearings before Subcommittee No. 1 of the House Select Committee on Small Business, on Monopolistic and Unfair Trade Practices*, 80th Cong., 2d Sess. 124-129, 342-363, 626-642, 708, 725, 776-790 (1948). See also SAFEWAY STORES, POLICIES 43 (1947) (“Meet the lowest price of every competitor, item by item, day by day, and town by town.”). However, *cf.* Cassady and Grether, *Locality Price Differentials in the Western Retail Grocery Trade*, 21 HARV. BUS. REV. 190 (1943).

83. The Boston Star Markets can buy carload lots or part of a shipload of canned goods and distribute directly to its 7 or 8 stores; a chain with hundreds of retail stores, however, must incur the costs of breakdown, storage and assembly.

has to cover the chain's wholesaling as well as retailing costs.)⁸⁴ This compares with a later estimate for all chain supermarkets of 15 percent.⁸⁵ First National's margin was under 14 percent of sales in each of the years 1947 through 1951, while American Stores' margin ranged from 14.7 to 16.4.⁸⁶ It might be assumed that the total margin for independents, including an allowance for wholesaling, would be significantly higher than the foregoing since the average retail margin is 17 percent and the wholesale 8 to 9 percent; but this is not necessarily the case. In the first place, the larger stores can do business with lower margins because of the opportunities for reducing labor expense. There are owners of supermarkets and chains of supermarkets claiming expense ratios as low as 13 or even 11 percent.⁸⁷ Efficient independent supermarkets with annual sales of over \$500,000 were doing business with a gross margin of 15 percent in 1950.⁸⁸ The wholesaler's margin cannot be added in its entirety to this 15 percent because these stores buy a large part of their groceries and produce directly from the manufacturer or grower in car-load lots.

Although no recent comprehensive survey of food chain profits is available, an OPA survey indicated that chains doing a tenth or less of A & P's volume of business had higher returns on net worth than chains in any other size groups.⁸⁹ Computations from financial statements in *Moody's* show that in recent years A & P has earned a lower return on net worth than the small chains like Food Fair, Winn & Lovett, Loblaw's, Albers Supermarkets, Dixie Stores, and has run neck and neck with First National Stores.

In order to achieve maximum efficiency at the wholesale level, it is not necessary to be a member of a national chain doing annually \$3 billion of business. The prospective performance of the proposed retail chains to be carved out of A & P may be gauged by the record of wholesalers for the voluntary chains (like IGA, Red and White and Clover Farms) and cooperative wholesalers (like the National Association of Retail-Owned Grocers). According to one well-grounded estimate, expense

84. See A & P Main Brief, Headquarters Chart II, facing p. 58, and Government Exhibit 3670, facing p. 188, Appeals Case. A & P does not publish its cost of sales or sales volume so that for subsequent years there are no comparable data.

85. SHEIELDS, *EVOLUTION OF MODERN FOOD DISTRIBUTION* (15th Annual Meeting, National Association of Food Chains, 1948).

86. Computed from *Moody's*. The retail sales volume of these chains is approximately equal to what each of the proposed successors to A & P will enjoy.

87. SUPERMARKET INSTITUTE, PROCEEDINGS 128 (1948).

88. *Facts in Food and Grocery Distribution as of January, 1951*, The Progressive Grocer, 1951, p. 16.

89. SURVEY OF RETAIL CHAIN GROCERY STORES AND WHOLESALE GROCERS (OPA Economic Data Series No. 26, 1947).

ratios of wholesaling processed groceries have been cut on the average by 50 percent since 1929.⁹⁰ Several voluntary group wholesalers interviewed by the authors were operating on a margin of 4 percent or less.⁹¹ And, as Professor Converse points out, well managed, retailer-owned (or cooperative) wholesalers operate at slightly lower expense rates than chain warehouses.⁹²

Moreover, thanks to the Robinson-Patman Act, these wholesalers can, through their national organizations, purchase most dry groceries, canned foods, meats, and high profit items like drugs, nylons, and other household articles as cheaply as the corporate chains. They have their own labels for many items of standardized quality; they prepare advertising, posters, and sales campaigns, including selection of specials for weekly promotion; and in general they function in much the same fashion as an A & P or other chain parent warehouse. Voluntary and cooperative wholesalers long ago eliminated salesmen, so laid out their warehouses that the selection line conforms to the order in which items are listed in the order, installed punch-card billing and inventory equipment, palletized the selection and reserve storage areas, and installed conveyor systems. There is every reason to believe that well-managed wholesale members of national organizations, such as IGA, Red & White, Clover Farms, and NAROG, as well as outstanding unaffiliated voluntary wholesalers like Winston and Newell, have invoice and operating costs matching those of chain warehouses.⁹³

90. Converse, *Marketing Costs Have Not Increased in 40 Years*, Printers Ink, Aug. 3, 1951, p. 29.

91. A cooperative in Los Angeles works on a 2.5 percent margin. CASSADY AND JONES, *THE CHANGING COMPETITIVE STRUCTURE IN THE WHOLESALE GROCERY TRADE* 37 (1949). Some Red and White wholesalers are doing business on a 4 percent mark-up. Communication from H. T. Webb, Feb. 6, 1951.

92. Converse, *supra* note 90.

93. For operating and merchandising techniques of voluntary and cooperative wholesalers and their national organizations see the following: Tousley, *Reducing Distribution Costs in the Grocery Field, A Case Study*, 12 J. MARKETING 455 (1948); Cole, *General Discussion of Vertical Integration*, in WEDDING, ed., *VERTICAL INTEGRATION IN MARKETING* 69-70 (University of Illinois Bureau of Economic and Business Research, Bulletin No. 74, 1952); GORE, *THE NEW CONCEPT IN WHOLESALE-RETAILER TEAMWORK* (General Foods Sales Division, 1951); MESSEROLE AND SEVIN, *EFFECTIVE GROCERY WHOLESALE* (U. S. Department of Commerce, Economic Series No. 14, 1941), *passim*; Zimmerinan, *Olean Wholesale Grocery Cooperative's System for Handling Customers' Orders*, reprint from *The Voluntary and Cooperative Groups Magazine*, July, 1949; *THE IGAUTOMATIC PLAN FOR WHOLESALE DISTRIBUTION* (1949); *29th Anniversary Issue*, Red & White News, May, 1950; *FORWARD WITH CLOVER FARM STORES* (Clover Farms Organization, no date); *How to STEP FORWARD THROUGH YOUR ASSOCIATION WITH WINSTON AND NEWELL Co.*, (2d ed. 1950). See also *Grocer's Bid in Wholesaling*, Business Week, Nov. 11, 1950, pp. 66-68 for a description of minimum cost operation of Certified Grocers, Ltd. There are approximately 3,000 retail members of the Clover Farm plan. Communication from R. E. George, Jan. 19, 1951. IGA members total about 10,000 and have an estimated sales volume of \$1,500,000,000. Coin-

It is not likely that the projected plan would retard innovation in the field of grocery distribution. The chains were not responsible for the conception and introduction of the most important technological innovation of recent years: The self-service supermarket. The supermarket was a creation of independent wholesalers and far-seeing individual entrepreneurs.⁹⁴ The A & P management did not react to the threat of supermarkets until some three years after they had become a disturbing element.⁹⁵ Also, it is not clear that the introduction and development of frozen foods or pre-packaging of meats are innovations attributable to giant chains.

There is a possibility that severance of the control of the present A & P owners might lead, through a distribution of the stock, to greater pressure for dividends and earnings, which would result in increasing the Company's gross profit rate and raising prices. The present management is concerned with maximizing not profits but total volume of business. Because of high personal income tax rates, there is no incentive to increase the \$7 dividend on shares of common stock presently outstanding.⁹⁶ It is questionable whether this contingency should deter the Antitrust Division from pressing for a dissolution if it seems otherwise warranted.

IV CONCLUSION

The government's disintegration program for A & P has presented legal and economic problems of some consequence. To some degree the suits have represented a deviation from previous antitrust law. True, A & P enjoyed various kinds of substantial economic power—the power to coerce suppliers into preferences, the power to apply heavy leverage in individual retail markets. True, also, in many individual markets it enjoyed so large a market share that it must have enjoyed some monopoly power—a power limited by relative freedom of entry but enhanced by the manifest dangers of entry into competition with so powerful an

munication from Helen Clark, Jan. 18, 1951. Red & White stores number about 8,500 and do about \$1,000,000,000 of business. Red & White News, May, 1950. The National Retail Owned Grocers Cooperative organization is probably larger than any of the other voluntary groups but provides no information in published form. It comprises in all about 100 wholesalers, operating some 120 warehouses with 3 regional buying offices.

94. The origins of the supermarkets are discussed in Zimmerman, *The Supermarket*, Printers Ink, July 9, 1936, p. 10; July 16, 1936, p. 53. See also Larabee, *Grocery Manufacturers Condemn Supermarket Price-Cutters*, Printers Ink, March 2, 1933, and Landau, *Is the Price-Wrecking Market Here to Stay?*, Chain Store Age, Grocery Edition, March, 1933, p. 74.

95. A & P Main Brief, App. A, Vol. I, 194-197, Appeals Case.

96. A & P Main Brief 22, *ibid.*

antagonist. Finally, it may also be true that the Company sought monopoly power, in a sense, when it set targets for market shares large enough to give it some influence over those markets and set margins low enough to assure those shares. On the other hand, A & P's monopoly power, in the relatively narrow economic conception, was very limited. Probably never before had a firm with *that* little monopoly power, of *that* kind, been convicted of violating Section 2 of the Sherman Act.⁹⁷ Probably never before were competitive tactics, so many of which may be regarded as having been truly and unexceptionably competitive, so questionably lumped together as evincing an intention to monopolize.⁹⁸

Nevertheless, the foregoing survey has also indicated the reasonableness of the rationale of the criminal decisions: There was clear evidence of an unfair exertion of market leverage; there were clear instances of use of predatory tactics. The question now is whether the criminal conviction will be sufficient to clear the air and prevent recurrence of the undesirable practices and yet leave A & P substantially free to compete vigorously in the public interest. It scarcely seems fair to the Company to direct it to continue competing as vigorously as possible, while keeping it under the threat of prosecution if it again oversteps the (necessarily indistinct) mark. Both pricing and bargaining tactics of the chain have apparently been under wraps since the first conviction; this is not necessarily in the public interest. It is difficult to see how all these operations, involving a nationwide chain doing billions of dollars worth of business a year and hiring thousands of employees, could be adequately policed by injunctions—which would be an alternative to the disintegration proposed in the civil suit—without hamstringing the Company excessively; it is likewise difficult to believe that a mere criminal conviction will serve as an adequate deterrent. Why not remove the condition which makes the delinquency possible—that is, the excessive size of the chain?

Does the government proposal run counter to good economics? There is nothing to show that the community will lose by unscrambobbling, as Pogo would say, this immense omelette.⁹⁹ Vertical integration could still be practiced on a somewhat reduced, but nonetheless efficient,

97. This point is elaborated in Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A & P Case*, 58 YALE L.J. 969 (1949).

98. A reading of minutes of the meetings of the Divisional Presidents leaves the impression that John Hartford was wholeheartedly devoted to increasing the volume of business by keeping prices and costs consistently and permanently low. See A & P Main Brief, App. A, Vol. I, 136-137, 149, 170, 197, 210-211, Appeals Case.

99. Note the parallel conclusion in Dirlam and Kahn, *Leadership and Conflict in the Pricing of Gasoline*, 61 YALE L. J. 818, 858 (1952), that competition might be assisted by setting up a greater number of integrated marketers of reduced size.

scale by the large successors to the present A & P. They might cooperatively continue to maintain their essentially unexceptionable manufacturing organization. The success of many smaller chains shows that the economies of horizontal integration become negligible well before the point reached by the A & P.¹⁰⁰ Hence, little would be lost by severance of economic relations between the divisions.¹⁰¹

Dissolution is not intended to be a form of punishment. In fact, apart from the capital gains taxes which do impose a punitive burden on owners forced to divest, it is not necessarily injurious to the defendants. Dissolution was probably the best thing that could have happened to the Standard Oil Company in 1911, and U. S. Steel would probably have been far better off had it not escaped that fate in 1920.¹⁰² The fact remains that the courts, the public, and most antitrust defenders all feel that dissolution is an extreme sort of treatment. The question remains therefore whether A & P in fact had sufficiently great power, and demonstrated a sufficiently consistent tendency to abuse what power it had, to justify breaking it up rather than relying on an injunction. Much of what has been said would indicate that the power and the extent of its use may easily be exaggerated.¹⁰³ This is the ultimate policy question which can be decided only by the courts.

This article has in general concluded that if A & P is eventually broken up it will not be because the antitrust laws condemn integration as such, but because, as Justice Cardozo put it,¹⁰⁴ they frown on size and power which carry an opportunity for abuse, particularly when the power has been so exerted. The "workability" of competition does not depend solely on the efficiency with which competitors perform. It also requires a balance of power between them, and between sellers and buyers. Where the balance has apparently been upset, the law cannot ignore the unbalance and may well move to correct it. In addition, the conclusion seems inescapable that a decree of dissolution in the interest of making this correction would probably result in more, not less, effective competition in grocery retailing.

100. This argument is made convincingly by Hirsch and Votaw, *supra* note 38, at 2-4.

101. A relevant parallel is provided by the disintegration of the holding company empires. Cries of alarm turned out to be premature, to say the least. The final judgment of the financial community is that disintegration has made for greater not less efficiency. *The Public Utility Holding Company Act of 1935* (Report of the S.E.C. to the Subcommittee on Monopoly of the Select Committee on Small Business, U. S. Sen.) 82d Cong., 2d Sess. 16-23 (1952).

102. Kaplan and Kahn, *Big Business in a Competitive Society*, Fortune, February, 1953, Sec. 2, p. 12.

103. See *supra* notes 28, 37, 41, 51, 70 and pp. 5, 14-15, 19-20.

104. In the *Swift* case, *supra* note 79.