

INTEGRATION AND DISSOLUTION OF THE A & P COMPANY: A REPLY

PRICE POLICY IN THE A & P CASE

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It is impossible, in what must be a brief note, to do justice to an article recently appearing in this *Journal*.¹ But a representative sample is its discussion of sales and price policy as an issue in the A & P case. According to the prosecution briefs, prices must be set equal to cost at an uneconomic low volume, plus a markup. For it was illegal to cut prices in order to attract more volume “. . . ‘to the point where the expense rate was low enough to permit the store to operate at a profit.’ *We know of no more clear and concise words with which to express the Government’s charge.*”²

This is the way the Antitrust Division repeatedly posed the issue. Despite a few (probably sincere) avowals that they really favored competition, there is only one way to characterize this doctrine: “a direct attack on the competitive process.”³ Here is the way Dirlam and Kahn meet this rather serious allegation: “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.”⁴

And this is the complete refutation made by the authors. Note the implication of mere “phrases” when there were actually complete statements and whole paragraphs. Note also the implication (of sober second thought?) that such statements do not appear in the Circuit Court brief—which, in fact, they do. Dirlam and Kahn do not claim that the statements have been given a meaning contrary to what they had in the original context. They do not even make the weaker claim that these state-

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1. Dirlam and Kahn, *Integration and Dissolution of The A & P Company*, 29 *IND. L.J.* 1 (1953). All references will be to this article unless otherwise noted.

2. Gov’t Brief 110, *United States v. The New York Great Atlantic and Pacific Tea Co.*, 67 *F. Supp.* 626 (E.D. Ill. 1946).

3. Note, *Trouble Begins in the “New” Sherman Act: The Perplexing Story of the A & P Case*, 58 *YALE L.J.* 969, 977 (1949). And see Adelman, *The A & P Case: A Study in Applied Economic Theory*, 53 *Q.J. Econ.* 238 (1949).

4. P. 21 n.78.

ments could somehow be given another and less antisocial interpretation. Rather, they simply ignore them.

What do Dirlam and Kahn take to be the issue? They state it as selling below costs in selected areas,⁵ "unreasonable or predatory" price cutting,⁶ and in their peroration (with their italics), the "*intention . . . to eliminate competitors by discriminatory sharpshooting in selling.*"⁷ At no point are we told what this means.

We can only pause to wonder why two economists would never think it necessary to show *how* predatory competition—to eliminate or browbeat competitors and then raise prices—could ever possibly succeed in an industry where entry is so cheap and easy. Predatory competition is an expensive pastime, undertaken only if monopoly and its fruits can be obtained *and held*.⁸ One might also ask the chances of a "reasonable and prudent" A & P management not knowing this, or of a reasonable or at least not completely insane A & P management, knowing (by the chain store taxes, the Robinson-Patman and Miller-Tydings Acts, and their state kindred) of the political power of the retailers, trying to "eliminate competitors."

But what is the evidence of this intent "to eliminate competitors by discriminatory sharpshooting in selling"? When there is a lot of sharpshooting, a lot of people are bound to get shot. The case covered eighteen years, and there was an average of over ten thousand stores operated at any moment, or roughly 200,000 store-years. Even a limited, temporary, ineffective, predatory campaign would give us hundreds of thousands of victims. Where are they? Despite "numerous instances" of threats or attempts to "put specific rivals out of business," Dirlam and Kahn prefer not to say "how typical these tactics were or how many rivals actually were bankrupted" because the government's cases "are not convincing on this score."⁹ So for years on end there was an intent "to eliminate competitors," yet there is no convincing evidence. To paraphrase Winston Churchill: Some elimination! Some intent!

Furthermore, "the A & P record is devoid of evidence drawing a clear line of causation from illegal practices to an increasing market share. . . . But there is also no doubt that A & P's discriminatory tactics,

5. P. 17 n.59.

6. P. 18.

7. P. 21.

8. See WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* 57 (TNEC Monograph No. 21, 1940), on the chances of holding a monopoly here. See also Cassady & Grether, *Local Price Differentials in the Western Retail Grocery Trade*, 21 HARV. BUS. REV. 190, 205-206 (1943).

9. P. 19 n.70 and accompanying text.

in . . . selling, must have contributed to these high market shares. . . ."¹⁰ There is no evidence, but there is also no doubt. It "must" have happened.

Let us, therefore, take Dirlam and Kahn's own leading example of these tactics: the Boston Unit of A & P which lost money during 1934-1939. They tell us of "the *low margins* which produced these losses . . . [because] A & P wanted to increase its share of the market."¹¹ It was "a deliberate pricing policy, resulting in the *inadequate* gross profit rate."¹² Now for the actual facts, easily available in the A & P record and incredibly absent from the article. During five of those six years, the "low" and "inadequate" Boston gross profit rate was higher than the Company average. Naturally, the Boston Unit *lost* part of their market share during this time, and naturally, too, they lost money. Starting in 1940, after prolonged needling from higher up, Boston was able to get that "low" and "inadequate" gross profit rate down as low as (and then even lower than) the rest of the Company, whereupon they immediately began making money again and increasing their market share.¹³ This was in miniature the whole process of cutting prices to increase volume, lower expenses, and raise profits which the government attacked. Since they ignore the voluminous documentation and statistics, small wonder that Dirlam and Kahn ignore the government charge. To them, a program aimed at higher profits and involving the risk of loss is a planned loss.¹⁴

This strategy of lower prices was profitable partly because of A & P's greater efficiency and lower cost than its rivals. Dirlam and Kahn never mention the repeated and considered opinions of A & P executives around 1940-1941, for intra-Company consideration only, that A & P operating expenses and gross margins were well below those of any competitor.¹⁵ But one need not stop there. For the years 1939-1943, despite an expensive conversion to supermarkets through 1941 and an unfavorable wartime position, A & P's expense rate averaged 12.7 percent of gross sales; the gross profit rate averaged 14.7 percent. An OPA compilation shows that no group of chains came within four percentage points of matching that expense rate. (This excludes the group of which

10. P. 20.

11. Pp. 18-19.

12. P. 19 n.64 (*italics added*).

13. Boston gross profit rates are in Gov't Exhibit 314, United States v. New York Great Atlantic and Pacific Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946).

14. This statement is literally true. Compare p. 19 n.64 with Adelman, *supra* note 3, at 241-242.

15. Gov't Exhibits 225, 226, 236; Defendants' Exhibit 143, United States v. New York Great Atlantic and Pacific Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946).

A & P itself constituted more than half.¹⁶) In making their comparisons, Dirlam and Kahn disregard this evidence. Instead, they follow the astounding procedure of comparing the A & P gross profit rate for 1943 with *postwar* estimates for other chains. This despite the tremendous postwar inflation of food prices and the consequent shrinkage in the percent allocable to marketing margins. Further comment on this statistical procedure would be superfluous.

Perhaps Dirlam and Kahn will now favor us with some striking definition of "intent" and "eliminate" which will not lack the charm of novelty and will follow from any set of facts—or the absence thereof. The reader will need to judge this, and the original article, for himself.

16. OPA, ECONOMIC DATA SERIES No. 20, tables 1-8 (1947).