CHAIN-STORE INTEGRATION AS RESTRAINT OF TRADE UNDER THE SHERMAN ACT

The defendant A & P grocery chain was charged by the United States with combining and conspiring to unreasonably restrain interstate commerce in food, and with entering into and carrying out a conspiracy to monopolize a substantial part of such products in interstate commerce in violation of the Sherman Act.[1] The government alleged that A & P, through its vertical and horizontal integration, used its power to obtain discriminatory prices in supply markets, to injure competition in retail markets by concentrated price-cutting and low-profit selling, and to control the sales of fresh produce to its competitors. The court made no findings as to specific practices, but reviewed the evidence as a whole and concluded that "though some one or all [of the practices] standing alone might not amount to a violation of the law, when coupled and inextricably interwoven with the activities of Acco [the fresh produce subsidiary] [they] reflect inevitably the misuse of defendants' power. . . . ." Accordingly, the defendants were held guilty as charged. *United States v. New York Atlantic & Pacific Tea Co.*[2]

Although Acco's produce market control was pointed out as the decisive evil, the evidence of A & P's use of its integrated power impressed the court as a mosaic of predatory and pressure practices. Notwithstanding the evidence that in some areas A & P may have had monopoly advantages because of the large percentage of the market it controlled,[3] the vertical and horizontal integration power potential appears to be the basic problem in the A & P case.[4] It has been suggested that basing illegality on specific abuses is probably an indirect way of talking about the vice of integration.[5] Integration has appeared before in Sherman Act litigation.[6] In a few cases it has been the sole or principal problem.[7]

[1] 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1–7 (1941).

[2] 67 F. Supp. 626, 678 (Ill., 1946).

[3] In 1942, A & P's retail sales of $1,444,718,000 constituted 7.1% of all United States food-store business. A & P had over 50% of the available business in eight cities, from 40 to 50% in fifteen cities, from 30 to 40% in fifty-one cities, from 20 to 30% in fifty-one cities and from 10 to 20% in fifty-five cities. Ibid., at 633. In 1946, A & P's business had grown to over 10% of the trade and $1.9 billion. The Great A & P, 36 Fortune No. 5, at 103 et seq. (Nov., 1947).

[4] A & P has a horizontal integration of 5,751 retail stores, supported by and supporting a vertical integration of coffee buyers and roasters, milk plants, canneries, bakeries, produce buyers, breakfast food factories, warehouses, and transportation facilities, all centrally controlled. 67 F. Supp. 626, 633 (Ill., 1946).

[5] Levi, The Antitrust Laws and Monopoly, 14 Univ. Chi. L. Rev. 180 (1947).

[6] Associated Press v. United States, 326 U.S. 1 (1945); United States v. Pullman Co., 50 F. Supp. 123 (Pa., 1943); United States v. Swift Co., 286 U.S. 106 (1932); United States v. International Harvester Co., 274 U.S. 693 (1927); United States v. Lehigh Valley R. Co., 254 U.S. 255 (1920); United States v. Reading Co., 253 U.S. 26 (1920); United States v. Winslow, 227 U.S. 202 (1913); United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[7] United States v. Yellow Cab Co., 67 S. Ct. 1560 (1947); United States v. General Motors Corp., 121 F. 2d 376 (C.C.A. 7th, 1941), cert. den. 314 U.S. 618 (1941); Indiana Farmer's Guide v. Prairie Farmer Publishing Co., 293 U.S. 268 (1934).

Two characteristics place integration cases in a class by themselves. One is that they have aspects of both price agreement-restraint of trade cases and dominating-firm or -firms monopoly cases. The other is that integration is often and materially anti-small business.

Integration reflects the situation in the restraint of trade-agreement cases in that it involves a combination of otherwise independent and possibly competitive market units. The law of restraint of trade by price agreement was cleared of uncertainty in the *Socony Vacuum* case.[8] Price agreements are unlawful per se. No proof of monopolistic control is required. The rule is justifiable because the only conceivable purpose of a price agreement is to exercise monopolistic market control. Supply control agreements, usually as boycotts, probably are of the same status. Although they may have a purpose other than market control, the Court has refused to recognize such other purpose as a defense.[9]

But integration is like the non-agreement, dominating-firm cases in that the combination, like the bigness of the single firm, may not have market control as its sole purpose or effect. Integration, within limits, like bigness, may result from, and make possible, efficiency. An integrated organization is likely to have some of the typical size savings of volume, management, and specialization as well as savings in selling, transportation, and storage between the market levels of the integration.[10] As in the big firm cases, the courts can be expected to balance this socially desirable intent and effect against the possible undesirable aspects. The efficiency argument may weigh less heavily in the integration cases, however. Efficiency has not as often been associated with inter-unit integration as with single-unit size.[11]

[8] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[9] Fashion Originator's Guild of America v. Federal Trade Comm'n, 312 U.S. 457 (1941); Associated Press v. United States, 326 U.S. 1 (1945); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

[10] See note 27 infra. Higher net profits as chains become larger indicate that the size of chains in general has not passed optimum efficiency. Grocery stores (without meat) are an exception.

NET PROFITS IN PERCENTAGES*

Kind of Store	No. of Stores in Chain							
	2–5	6–10	11–25	26–50	51–100	101–500	501–1000	Over 1000
Drug	2.91	4.03	4.41	4.13	4.38	4.92	4.49	....
Grocery	2.15	1.66	1.52	1.66	1.93	2.63	1.68	2.23
Grocery and meat	1.98	1.91	1.68	2.22	2.04	1.86	2.42	2.98
Variety	2.81	3.20	6.17	6.58	4.49	8.60	9.75	10.47
Women's shoes	0.97	1.24	4.08	2.42	6.77	7.59	....	....

* Compiled from Federal Trade Commission, Chain Stores, Sales Cost and Profits of Retail Chains 50–55 (1933), in Beckman and Nolan, The Chain Store Problem 57 (1938).

[11] "It is the problem of whether the individual enterpriser is to be rewarded or whether the reward is to go to those who work only in combination. . . . ." Levi, op. cit. supra note 5,

Besides its similarity to the situation where competitive units enter into price agreements, integration has another general policy against it. In combining otherwise independent units, the integration effectively places a variety of deterrents on small independent businesses, which are normally and traditionally in the markets of the integration. The general pattern of A & P's allegedly illegal practices appears to be the use of its power in one part of its integration to exert pressure on independent rivals in another part. Since the anti-monopoly policy of the Sherman Act aims at the preservation of opportunities for many small businesses, as well as the prevention of market price control,[12] this consequence of integration is highly important, particularly in the grocery field.

In the recent *Yellow Cab* case[13] the integration was between cab operating units and a cab manufacturing unit. The Court neither required nor found monopoly control of either market. It held that because the integration limited the competitive outlets through which cabs could be bought and sold in interstate commerce it violated the Act. The question of whether this limitation effected market control was not considered. The Court seemed to say that any limiting of interstate competitive outlets by vertical integration is illegal without more.[14] The *Yellow Cab* case is unusual, however, in that only a minor part of the allegedly monopolistic cab organization was engaged in interstate commerce. The integration's slight lessening of competition in this interstate business was apparently primarily used to bring the case within jurisdictional requirements of the Sherman Act.

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at 179 and footnote 128, quoting Associated Press v. United States, 326 U.S. 1, 15 (1945). "The unit of technological efficiency in modern economic life is the factory, not the firm. .... There is a great deal of evidence, in fact, that on the whole Big Business is less efficient, less progressive technically, and relatively less profitable than smaller business." Rostow, The New Sherman Act: A Positive Instrument of Progress, 14 Univ. Chi. L. Rev. 567, 568 (1947), citing Relative Efficiency of Large, Medium Sized and Small Business, TNEC Monograph No. 13 (1941).

[12] "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." United States v. Aluminum Co. of America, 148 F. 2d 416, 429 (C.C.A. 2d, 1945). "The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public. . . . ." Charles A. Ramay Co. v. Associated Bill Posters of the United States and Canada, 260 U.S. 501, 511 (1923). See also the dissent of Justice Brandeis in Liggett v. Lee, 288 U.S. 517, 568 (1933); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920); United States v. Colgate & Co., 250 U.S. 300 (1919); Levi, op. cit. supra note 5, at 154.

[13] United States v. Yellow Cab Co., 67 S. Ct. 1560 (1947).

[14] "By excluding all cab manufacturers other than CCM [the cab manufacturer of the integration] from that part of the market represented by the cab operating companies under their control the [controllers of the organization] effectively limit the outlets through which cabs may be sold in interstate commerce. Limitations of that nature have been condemned time and again as violative of the Act [citing cases]. In addition, by preventing the cab operating companies from purchasing cabs from manufacturers other than CCM, the appellees deny the opportunity to purchase cabs in free competitive market. . . . . The fact that these restraints occur in a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act." Ibid., at 1564–65.

The *General Motors* finance company case[15] suggests that harm to independent businesses resulting from the use of an integration's power is a reason for finding the integration illegal. As in the *Yellow Cab* case no monopoly market control by General Motors was found in either the automobile manufacturing or financing markets, although the Court stressed the "dominant position" of General Motors. The use of its power as an automobile manufacturer to secure business for its finance units was in itself found a violation of the Act. Harm to the independent dealers and independent finance businesses which, because they were without integration power, were the helpless victims of pressure from another market is apparently the ground for the holding.[16] The integration effects in both the *Yellow Cab* case and the *General Motors* case as well as other variations of pressure against non-integrated businesses and freely functioning competition are repeatedly shown in the alleged market practices of the integrated power of A & P.

One general category of the government's evidence against A & P concerned its gaining of unjustified price preferences in supply markets. Evidence of this kind of market control has consistently been emphasized as evidence of monopoly.[17] Since, however, A & P's volume demand is several times that of its largest rivals,[18] it is difficult to determine whether the concessions were because of volume savings or because of monopoly buying power. If A & P's supply prices were not competitively justified as against other buyers they are evidence of non-competitive monopoly control.[19] The government presented evidence purporting to show the gaining of competitively unjustified price preferences through threats to withdraw patronage from given suppliers or to engage in

[15] United States v. General Motors Corp., 121 F. 2d 376 (C.C.A. 7th, 1941), cert. den. 314 U.S. 618 (1941).

[16] If a combination "arbitrarily uses its power to force weaker competitors out of business .... it puts a restraint upon interstate commerce." United States v. E. I. du Pont de Nemours & Co., 188 Fed. 127, 151 (Del., 1911). In United States v. American Tobacco Co., 221 U.S. 106 (1911), integrated control of the various stages in the manufacture of tobacco products was pointed up as creating "perpetual barriers to the entry of others into the trade;" cf. United States v. Eastman Kodak Co., 226 Fed. 62 (N.Y., 1915).

[17] United States v. Yellow Cab Co., 67 S. Ct. 1560 (1947); American Tobacco Co. v. United States, 328 U.S. 781 (1946) (control in tobacco supply auctions); United States v. Crescent Amusement Co., 323 U.S. 1732 (1944) (supply preference control of movie films); United States v. Sisal Corp., 274 U.S. 268 (1927); Standard Oil Co. v. United States, 221 U.S. 1 (1911) (preferential rail shipping rates); United States v. Pullman Co., 50 F. Supp. 123 (Pa., 1943) (control over competition entering sleeping car supply market).

[18] In 1941, A & P did almost three times the business of its biggest rival, Safeway; four and one-half times that of Kroger; eight times that of American Stores; eleven times that of First National Stores; and sixteen times that of National Tea. United States v. New York Great Atlantic and Pacific Tea Co., 67 F. Supp. 626, 633 (Ill., 1946). Since 1941, Safeway, a Wall Street amalgam of smaller chains, has grown. In 1946 its sales were $847 million, almost half those of A & P. 36 Fortune, op. cit. supra note 3, at 103.

[19] See note 11, supra. Competitive markets are those of many sellers and many buyers no one of whom commands an appreciable fraction of the total supply or demand of the commodity on the market. Rostow, op. cit. supra note 11, at 576; Chamberlin, Theory of Monopolistic Competition ch. 3–6 (5th ed., 1946).

competing manufacturing, and the use of elaborate schemes to cover up price advantages in violation of the Robinson-Patman Act.[20] If A & P controls more demand for a product than the supplier can replace by lowering his price and selling to other buyers without decreasing his profit more than if he were to give in to A & P's demand, then A & P's threat to buy elsewhere will be effective.[21] Moreover, A & P's threat to manufacture in competition with the supplier and "price attractively" if he did not capitulate might also be effective.[22] This threat may have meant that A & P would sell its own output at a loss, which would be a comparatively small dent in A & P's total profit, while creating competition which the much smaller suppliers could not meet for long and remain solvent.

Whether or not the price preferences resulted from legitimate competitive advantages, they would make price-wise competition by independents with A & P impossible. Whatever the cause, the outcome is pressure against the independent retail grocer and possibly against the independent supplier. This inevitable detriment to small business may be decisive if there is doubt as to whether the price preferences are a result of monopoly control.[23]

There was evidence in the principal case that A & P used the power of its integration to gain market controls or place independents in a disadvantageous supply position by other means than direct price preferences.[24] A & P's produce-buying subsidiary, for example, supplied A & P and also acted as a broker for other buyers of fresh produce. By thus controlling produce-buying for both A & P and its competitors, the subsidiary was apparently able to exercise supply control for A & P's advantage. That the court believed the independents to be at the mercy of the integration is suggested by its finding that the "inconsistent functions" of the subsidiary formed the "rotten thread of the fabric"

[20] Correspondence among the A & P organization referring to the use of "buying power" was also emphasized. United States v. New York Great Atlantic and Pacific Tea Co., 67 F. Supp. 626 (Ill., 1946).

[21] If A & P's national market of the total grocery trade is composed of regular customers who will take a substitute for a product rather than go to a rival store and if a supplier refuses to comply with A & P's request, the result may be a smaller total profit at a lower general price than if the supplier had given A & P a preferential price.

[22] United States v. New York Great Atlantic and Pacific Tea Co., 67 F. Supp. 626, 638–39 (Ill., 1946). The government claimed that A & P decided that it had reached the optimum efficiency advantage in its own manufacturing in 1926 but did not make its decision known for fear of losing a bargaining advantage. Plaintiff's Brief 69, 71 (filed March 2, 1946). A & P's records for 1927 recite that the time has arrived for making a "demonstration in order to safeguard the arrangements which we now have with national manufacturers . . . . . [N]ational manufacturers . . . . will be anxious to keep their arrangements with us attractive so that we would not consider it necessary to go into their lines." United States v. New York Great Atlantic and Pacific Tea Co., 67 F. Supp. 626, 638 (Ill., 1946).

[23] See note 12 supra.

[24] United States v. New York Great Atlantic and Pacific Tea Co., 67 F. Supp. 626, 655, 678 (Ill., 1946); cf. United States v. Aluminum Co. of America, 148 F. 2d 416, 437 (C.C.A. 2d, 1945). Alcoa consistently sold ingots at so high a price that the "sheet rollers" who were forced to buy from it could not make a "living profit."

running through the entire integration.[25] The court did not state that the subsidiary was necessarily supported by a monopoly power or that such power was necessary to sustain the government's charge. It was apparently sufficient that the subsidiary, because of its integrated attachment, was able to harm or discriminate against independents who, without integrated attachments, could not counteract the pressure.

If integrations should entirely take over a marketing system, there would be no demand and supply markets for the independent, since the market units which would otherwise comprise them would be tied up in integrations. Market entry would exist only for other integrations. There is no evidence that this condition is being approached in the grocery field, but if integration is becoming necessary in order to compete in the markets, it may constitute a threatened danger in the eyes of the court.[26]

Weighing against the deleterious effects of integration on small businesses are the efficiency savings of the integration. The integration, however, may not be thought of as the traditional enterprise which, through mass production, makes otherwise prohibitive price commodities generally available to consumers. It is usually a combination of small businesses into big business when the small businesses are generally satisfactory suppliers. Although available studies show that chain store prices are 5–10 per cent lower than independent prices, the difference may be a transitory one, partially due to monopoly factors.[27] If efficiency and lower price are to be considered, the traditional preference for opportunity for the small, independent businessman for its own sake

[25] See note 16 supra.

[26] In 1931, at the height of the anti-chain taxing campaign, Senator Brookhart of Iowa said, "The growth of the chain store is perhaps the most startling development of monopoly in our country at the present moment." Address before the Institute of Public Affairs at the University of Virginia, quoted by Beckman and Nolan, The Chain Store Problem 216 (1938). In 1900, chains accounted for a negligible amount of business. Before the last war they controlled over 30% of all retail trade. Chains covered 25% of the drug trade, 35% of cigar store business, 40% of the grocery market, 50% of the shoe business, and over 90% of the variety store business. All but 13% of chain business is controlled by national chains. Census of Business for 1935, Retail Distribution, Vol. IV, Types of Operation. Urban concentration of chains was much greater. Grocery chains had over 60% of the business in Cleveland, Detroit, and Chicago; about 50% in Boston, Pittsburgh, Los Angeles, and Philadelphia; and 40% in the state of Pennsylvania. U.S. Dept. of Commerce, Retail Chains (1937). During the war, chain percentage of business dropped. In 1943 chain stores did 23.2% of the general retail business, and grocery chains had 30.6% of the national grocery trade. Business Week 94 (Dec. 18, 1943). The war forced chains to close some outlets but they plan to add new stores when it is possible. These will be moderate-size stores, conveniently located to compete with neighbourhood stores. Business Week 56, 58 (Oct. 28, 1944).

A 1937 Fortune survey showed that over half of the people interviewed wanted taxes against chains high enough to put them on a price parity with independents. In 1939, this majority fell to 37.3%, who wanted equalizing taxes, plus 6.3% who would have the chains outlawed, as against 47.7% who were for no special tax. 19 Fortune 88 (Feb., 1939).

[27] The difference between chain and independent grocery prices according to various studies is from 5–10%. These investigations included all kinds of stores. The difference between chain and independent super-markets is probably less. Beckman and Nolan, The Chain Store Problem 61 (1938).

may, therefore, bear more weight if an integration is in question than if a single unit is the alleged monopolist.

In A & P's retail selling field the general problem of integration is similar. Other means of market control are suggested. Whether they are monopolistic or not, these advantages on the retail level exert pressure on non-integrated small business. The general tie-up of the horizontal integration on the selling side with the vertical integration on the buying side, as well as the horizontal integration itself, point up the A & P organization's advantages over the independent grocer and supplier and its tendency to eliminate them.

The horizontal selling integration is the great volume outlet that supports the vertical integration and makes A & P's buying advantages possible.[28] In addition the buying end of the integration may operate at practically no profit in order to supply the selling end with lower-priced goods. Or the selling organization may operate at a very low profit to supply the buying organization with a greater demand.[29] These advantages are not available to non-integrated rivals, and can be effectively used in gradually subduing small suppliers and retailers and continuously building up the integration.

There was evidence that the horizontal integration could spread its risk to the point where it was able to operate with almost no risk cost.[30] This again is an advantage which an independent, non-integrated retailer does not have and cannot secure without integrating.

Much of the government's case dealt with specific area price cutting. This system was used by A & P with its other advantages in a merchandising program to attain given minimum percentages of retail markets. Specific selling territories were operated at a loss for the purpose of establishing the desired average volume, and such operations ordinarily proceeded until the purpose was accomplished.[31]

[28] See note 4 supra.

[29] The government argued that A & P's low retail profits were unfair as against independent retailers. United States v. New York Great Atlantic and Pacific Tea Co., 67 F. Supp. 626, 639–40 (Ill., 1946). In 1926, on sales of $440 million, the company made a profit of $12 million. In 1945, on sales three and one-half times as great, it still made only $13 million, a rate of profits on sales of .9%. 36 Fortune, op. cit. supra note 3, at 103.

[30] A & P agreed that income from profitable stores offset the losses from unsuccessful stores and stated that this is one of the incidents of any business operating more than one unit. United States v. Great Atlantic and Pacific Tea Co., 67 F. Supp. 626, 641–42 (Ill., 1946).

[31] Ibid. Plaintiff's Brief 628–986, 1088 (filed March 2, 1946). "Underselling . . . . in certain territory . . . . and maintaining a higher level of prices in other localities where competition is not so keen is a practice condemned by the anti-trust laws. . . . ." National Nut Co. of California v. Kelling Nut Co., 61 F. Supp. 76, 81 (Ill., 1945). Loss selling in given areas with the design of controlling competition first appeared in anti-trust litigation as one of many predatory practices in Standard Oil Co. v. United States, 221 U.S. 1 (1911). Loss selling of given products was emphasized as a restraint of trade in United States v. American Tobacco Co., 221 U.S. 106 (1911). Since then, area price cutting has been the basis of several consent decrees: United States v. Bowser & Co., 1 D & J 587 (1915); United States v. American Thread Co., 1 D & J 449 (1914); United States v. Central-West Publishing Co., 1 D & J 359 (1912). For suggestive common law comparisons see Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1911); Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909).

If a seller can decide how much of a market he wants and get it by systematically reducing the business of competitors, a non-competitive control over that market is suggested. If such a power is not monopolistic in the market conrol sense, it is in the sense of forcing small independent businesses in general out of the market. Similar to the non-integrated one-product markets of A & P suppliers, A & P's retail rivals are often non-integrated entities limited to a small geographic market. As in the case of supply markets, the integrated power of A & P is undoubtedly often a greater economic potential than an entire given retail market. And, as in the case of suppliers, A & P can withstand much greater losses than its independent rivals in retail markets.[32]

In some areas A & P, by the use of some or all of its integrated power, has preempted large percentages of the retail grocery markets, reaching over 50 per cent of the trade in some cities. For practical purposes a grocery market is no more than city-wide and probably smaller. If size in itself is a violation of the Sherman Act these large market percentages may be illegal per se.[33]

Related to the percentage of control of a city or area market is the factor of the very limited area monopoly of a single grocery store and the expansion of this monopoly by the integration of stores in adjoining areas. Since competition between areas is the only limit on the location monopoly, joining the area units by integration destroys the limiting factor and increases the monopoly effect in all areas.

The chain store problem is complicated. It is a problem of choice between large-scale efficiency and free competition for the small businessman. The chain system has the economy of an integrated distribution system and dispersed activity. But that economic advantage has provided an instrument readily usable as a repressive weapon against the independent merchant. The result of American business ingenuity and a progressive business economy has been lower prices and more goods, but with these developments, retail merchandising is being wrenched from the hands of independent storekeepers and concentrated in large centralized organizations. Possible remedies run a gamut of choices. But the unquestionable dictate which cannot be ignored if Sherman Act policy is not to be violated is that competitive opportunity must prevail.

[32] This is obviously true as against independent rivals and small local chains. Loss selling may not be a means of control against other national chains, however. At Springfield, Missouri, the defendants contended, A & P failed to succeed and closed its store because of the competition of Safeway. United States v. New York Great Atlantic and Pacific Tea Co., 67 F. Supp. 626, 641 (Ill., 1946). This suggests that A & P is not a monopolistic power against other big chains, at least in the retail market. It also suggests that the result may be division of territories among the national chains. Though pressure by the big against the little was the most devastating evidence against the Big Three in tobacco in American Tobacco Co. v. United States, 328 U.S. 781 (1946), the Big Three were not in competition but in collusion.

[33] See note 4 supra. The courts will consider control relative to the area or product market involved. United States v. Crescent Amusement Co., 323 U.S. 173 (1944); Indiana Farmer's Guide v. Prairie Farmer Publishing Co., 293 U.S. 268 (1934); United States v. Terminal R. Ass'n of St. Louis, 224 U.S. 383 (1912).