

Spring 1954

Integration and Dissolution of the A & P Company: Rejoinder

Joel B. Dirlam
Connecticut College

Alfred E. Kahn
Cornell University

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Commercial Law Commons](#)

Recommended Citation

Dirlam, Joel B. and Kahn, Alfred E. (1954) "Integration and Dissolution of the A & P Company: Rejoinder," *Indiana Law Journal*: Vol. 29 : Iss. 3 , Article 5.

Available at: <http://www.repository.law.indiana.edu/ilj/vol29/iss3/5>

This Comment is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

REJOINDER

JOEL B. DIRLAM† AND ALFRED E. KAHN‡

Our article reached two conclusions, one legal and the other economic. The first conclusion was that the *A & P* decisions do not threaten the legality of vertical or horizontal integration. The second was that, apart from divestiture of the manufacturing subsidiaries, the dissolution of *A & P* sought by the Department of Justice would not have resulted in less effective competition in grocery retailing. We are gratified that so acute and diligent a critic as Professor Adelman apparently has no quarrel with these conclusions or the arguments supporting them.

Cost-plus pricing

Adelman centers his fire on our failure to become agitated about the *prosecution's* alleged advocacy of cost-plus pricing. Since, as we pointed out,¹ in deciding whether the *A & P* cases were an economic catastrophe it is "more important" to look to the decisions of the courts, this criticism is, after all, a minor one. In adversary proceedings, attorneys are prone to offer any number of alternative legal theories in the hope that if theory A fails, B will succeed; also "it is [always] possible to appeal from the government drunk to the government sober"² and find support for all sorts of contradictory theories. As Adelman has elsewhere admitted,³ and as we ourselves state at the outset of our appraisal of the promotional pricing defense of *A & P* policies,⁴ neither of the court opinions can be construed as advocating or endorsing the heretical cost-plus doctrine. The issue between us and our critic is therefore narrowed to the relatively insignificant problem of interpreting a rejected portion of a District Court brief.⁵

† Lecturer in Economics, Connecticut College.

‡ Associate Professor of Economics, Cornell University.

1. P. 2. All page references herein will be to the authors' article, *Integration and Dissolution of the A & P Company*, 29 *IND. L.J.* 1 (1953), unless otherwise indicated.

2. P. 5.

3. Adelman, *The Great A & P Muddle*, 40 *FORTUNE* 123 (Dec. 1949).

4. P. 18.

5. Adelman is correct in charging that our footnote reference (p. 21 n.78) to "isolated phrases" in the District Court brief unduly minimizes the extent to which the government embraced the abhorrent doctrine. Our error resulted, in part, from relying primarily upon the brief in the Court of Appeals for our analysis of the government's position. The language of that brief, at the point where it directs itself specifically to the promotional pricing defense, makes it obvious that the objection was not simply to sales at a loss but rather to their financing by profits from other areas by discriminatory

It is in pages 94 to 138 of the Brief that objections to low gross profit rates are set forth without being linked either to geographical price discrimination or allegedly illegal headquarters allowances.⁶ Nevertheless, the summary of the argument of that portion of the brief states:

"These low . . . profits were made possible . . . by requiring those Divisions . . . satisfactory from the standpoint of volume to make good the deficits thus incurred by the unsatisfactory Divisions. . . . That . . . was . . . an abuse of the A & P System's horizontal integration. . . ."⁷

Thus, even here the government objected to the discriminatory character of the "promotional pricing," a point Adelman consistently overlooks.⁸ In view of our doubts that the government clearly advocated cost-plus pricing outside the special context of the A & P practices, and especially in view of the courts' failure to adopt the doctrine, we are unable to share Adelman's fear that the case represents "a direct attack on the competitive process."

Predatory tactics

There is no point in reciting in detail instances of predatory pricing tactics. Judge Lindley's opinion gives a number of them, as does our article. "Cheap and easy" entry into grocery retailing may have made these tactics unintelligent, but there is no doubt that the Company employed them. Moreover, we find it difficult to reconcile Adelman's assumptions about ease of entry with his enthusiasm for A & P's vastly superior efficiency. In his model, grocery retailing seems to be an industry where economies of scale (achieved in part through "promotional pricing") should produce oligopolistic conditions. One cannot have it both ways: that entry is easy, on the one hand; and that, on the other, a \$4 billion dollar chain is far more efficient than a \$500 million one, and that promotional pricing will produce ever lower unit costs.

purchasing concessions. Gov't Brief 373-374, *United States v. New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

6. In contrast, the hostility to reduction of gross profit rates demonstrated in the section on "price wars," Gov't Brief 628-987, *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946), is premised upon the assumed illegality of using headquarter's allowances to compensate for low or negative retail profits. Adelman views this assumption as an attack on vertical integration per se. The point is, however, that the government and courts felt that these "profits" were (except for those from manufacturing) tainted at their source.

7. Gov't Brief 86-87, *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946).

8. See p. 19 n.65.

Adelman twits us for the paucity of clear-cut evidence that A & P's gunning for competitors scored so few bulls-eyes, a lack that we explicitly pointed out. The reason—which should be familiar to anyone who has ever wrestled with the evidence in antitrust suits (including even such “obvious” examples of predatory monopolies as the old Standard Oil trust)—is the difficulty of ever attributing to one causal factor the disappearance of a competitor or the attainment of a large share of the market. This is why the courts, wisely, we believe, have generally refused to make elaborate inquiries into the market consequences of predatory tactics. It is illegal even to attempt to monopolize. The record in the *A & P* case contains ample evidence of the requisite intent.

However, we did not say that no exclusion actually resulted from A & P's tactics. That its policies of “putting on the heat” and attempting to get discriminatory concessions, where successful, must have helped it maintain or increase its market shares, we still have no doubt.

Gross profit rates and losses

A & P became worried about loss of its market in New England in 1931.⁹ In 1932, the then President of the New England Division secured the Hartfords' approval “to reduce the net profit rate . . . to procure more volume. . . .”¹⁰ Because the profit rate had not been sufficiently cut, Byrnes was made President of the New England Division in 1934 (not 1940). He immediately put the Division “in the red” (as A & P phrased it—*i.e.*, before allocation of headquarters allowances) by reducing its gross profit rate in an effort to build up sales volume by lower prices at retail. In 1935, the increase in volume did not measure up to expectations based on “the severe reductions we have taken in gross profits.”¹¹

Hence, although the Boston gross profit rate may have been higher than the Company average from 1934 to 1939, it is obvious that the management as early as 1932 was trying to cut prices throughout New England in an effort to win back volume from First National Stores. We cannot be as confident as Adelman that the final reduction in the Boston gross profit rate was responsible for pulling the Unit out of its nine-year slump. In 1941, sales of all grocery chains were 20 percent higher than in 1940, for obvious reasons. A & P's company-wide increase in sales was 22.8 percent.¹²

9. Gov't Brief 663, *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946).

10. *Id.* at 665.

11. *Id.* at 674.

12. THE PROGRESSIVE GROCER, FACTS IN FOOD AND GROCERY DISTRIBUTION AS OF

What we must emphasize is that no one condemned A & P for successful promotional pricing. It was the losses of 1934-1940, at higher than average margins and admittedly subsidized by operating profits elsewhere,¹³ *not* the profits of 1941 and thereafter that the government and courts condemned as an unreasonable burden on competitors and an abuse of A & P's horizontal integration.

A & P's efficiency and comparative margins

First, the OPA compilation that Adelman cites to demonstrate A & P's superior efficiency lumps in its largest-size group—which Adelman necessarily excludes from his comparisons—A & P and four unidentified chains with annual sales of over \$100,000,000 each in 1942. Since First National and American Stores, the two chains whose margins we compared with A & P, both had annual sales exceeding \$100,000,000 in that year, our comparison is not vitiated by the fact that expense rates among some small chains were higher than A & P's during the years covered in the OPA compilation.

Second, Adelman is simply wrong when he says that our comparisons of A & P's 1943 performance with post-war figures for its leading competitors are inappropriate because of a postwar shrinkage in percentage marketing margins. Neither the available figures from *Moody's*¹⁴ nor the general opinion in the trade¹⁵ sustain his position.

May we point out again that Adelman has refrained from meeting our major contention that there is little evidence to show that a \$4 billion chain can operate more efficiently than a \$500 million one.

JANUARY 1950, p. 4; A & P Main Brief, chart facing p. 58, *United States v. New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

13. As late as 1940, headquarters was assuming that the New England Division would earn nothing on its retail operations, in contrast with the \$5,750,000 being made available from other divisions. Gov't Brief 687-688, *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946).

14. The following gross margins as a percent of sales are taken directly or computed from *Moody's Manual of Industrials*:

	1943	1950	1951
Kroger -----	15.9	15.7	15.1
Safeway -----	18.2	14.6	14.9
American -----	15.3	16.4	16.6
First National -----	13.1	13.6	13.1
Colonial -----	16.5	16.5	16.0

15. Margins are thought to be a higher percentage of sales than in 1943. Ceiling Price Regulation 15, 16 FED. REG. 2735, March 29, 1951, said, in part: "On the whole the markups used for chains and supermarkets should increase by a little more than 1 percent the margin on sales yielded by the OPA markups. . . . [T]he chains and supermarkets indicate that an adjustment of approximately 3 percent is required. . . ." One explanation for the *increased* post-war margins is the "precipitous rise in labor rates." Communication from Mr. Paul A. Baumgart, of Oxford Business Surveys, Safeway Stores, Aug. 10, 1953.

Summary

We do not think that the gulf between us is so wide as Adelman believes. His propensity to view the A & P case as a study in black and white, with the Antitrust Division unmistakably identified as the villain, leads him to neglect the virtues of chiarascuro. We only wish we could share his simple faith in the power of received economic doctrine so forthrightly, without use of fuzzy concepts like "intent" or "abuse" or "reasonable," to resolve problems of antitrust policy.

INDIANA LAW JOURNAL

Volume 29

SPRING 1954

Number 3

INDIANA UNIVERSITY SCHOOL OF LAW

STUDENT EDITORIAL STAFF

Editor-in-Chief

THOMAS M. LOFTON

Article and Book Review Editor

ROBERT J. KINSEY

Note Editor

JIM O'NEAL

Note Editor

WILLIS H. ELLIS

Note Editor

JOEL ROSENBLOOM

Note Editor

DONALD G. SUTHERLAND

JOHN W. BARCE

ARNOLD BURKE

ROBERT J. EDER

ROBERT D. HAIG

ALEX JOKAY

JAMES L. KEALING

CHRISTOPHER KIRAGES

JOHN WILLIAM KLEINDORFER

PHILIP D. PECAR

WAYNE C. PONADER

DANNY ROTENBERG

JOSEPH L. SMITH

THOMAS L. STEVENS

The Indiana Law Journal is published quarterly by

THE INDIANA UNIVERSITY SCHOOL OF LAW

Editorial and Publication Office: Indiana University School of Law
Bloomington, Indiana