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FOOD DISTRIBUTION IN THE UNITED STATES, THE STRUGGLE BETWEEN INDEPENDENTS AND CHAINS

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I. INTRODUCTION.*

The late Huey Long, contending for the enactment of a statute levying an occupation or license tax upon chain stores doing business in Louisiana, exclaimed in a speech: "I would rather have thieves and gangsters than chain stores in Louisiana."¹ In 1935, a few years later, the director of the National Association of Retail Grocers submitted a statement to the Judiciary Committee of the House of Representatives,

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* Throughout these pages frequent reference will be made to the case of *United States v. N.Y. Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946), aff'd, 173 F.2d 79 (7th Cir. 1949), and to the record and some of the briefs. Hereafter these will be cited as follows:

District Court report—A & P case, 67 F. Supp.;
Court of Appeals report—A & P case, 173 F. 2d;
Transcript of record—A & P Tr.;
Government Brief in the District Court—Govt. Br. (D.C.);
Government Brief in the Court of Appeals—Govt. Br. (C.A.);
Defendant's Brief on Appeal—A & P Br.;
Appendix A to Defendant's Brief on Appeal—A & P Br. App.;
Defendant's Reply Brief on Appeal—A & P Reply Br.

Appendix B to the defendant's brief on appeal and the defendant's brief in the District Court, which was not available to the writer, are not cited.

1. Quoted in BECKMAN AND NOLEN, *THE CHAIN STORE PROBLEM*, 228-229 (1938).

then engaged in considering various proposals for the amendment of the Clayton Act,² in which, asking for a curb on "the food monopolies," he said: "The present condition of affairs in the food industry has put thousands of salesmen out of work. It has driven many brokers out of business. It has closed the doors of many wholesale grocers and has shut up thousands of retail grocers all over the country. All of these men were engaged in useful and gainful occupations. Many of them now are on the relief roll. And this was done, not to bring goods to the consumer cheaper, but in order to fatten the income of a few chosen people who invested their money in chain stores."³

The devil whose ugly features were thus conjured up was, however, not without advocates. Significantly, an Illinois housewife, appearing in 1936 before a Senate Subcommittee on the Judiciary, delivered an almost impassioned plea in favor of the food chains and in opposition to proposed legislation which, in her opinion, would destroy their usefulness. Referring to President Wilson's request to the Federal Trade Commission to find the reasons for the high cost of food during the period following the First World War, and to the Commission's findings as to excessive distribution costs caused by too many middlemen, she implored the Senators not to destroy "the progress which has been made toward getting necessities of life to the public not only at lower prices but improved in quality and with sanitary and hygienic methods of handling foodstuffs."⁴

These quotations epitomize "one of the great economic controversies of our time,"⁵ the conflict between independent food distributors and large corporate chains, or, to speak in concrete examples, between the corner grocer and the Great Atlantic and Pacific Tea Company with its 6000 food stores⁶ scattered through 40 states and the District of Columbia.⁷ Why and how did this conflict arise? What weapons—

2. 38 STAT. 730, 15 U.S.C. § 12 *et seq.*

3. Statement of John M. Pohlhaus, *Hearings before the Committee on the Judiciary on H.R. 4995 and H.R. 5062*, 74th Cong., 1st Sess. 58 (1935).

4. Testimony of Mrs. Virginia H. Morrison of Chicago, *Hearings before a Subcommittee of the Senate Committee on the Judiciary on Sen. 4171* 74th Cong., 2d Sess. 91-92 (1936).

5. Edwards: *The Place of Economics in the Course on Trade Regulation*, 1 J. LEGAL EDUC. 1, 6 (1948).

6. MOODY'S INDUSTRIALS, 1548 (1949), attributes to A & P "about 6000 food stores" in 39 states.

7. In 1943 the number of stores was 5,751, A & P case, 67 F. Supp. at 633. The company operated in 40 states, Govt. Br. (C.A.), p. 7.

It should, of course, be noted that chains exist not only in the food industry, but in many other industries, such as drug stores, department stores, variety stores, and clothing, shoe, furniture, hardware, and cigar stores. However, the food chains account for the largest single part of total chain store sales (32.67% in 1935) and, consequently, have been the targets of most legislative and other attacks which will be considered in this study. See BECKMAN AND NOLEN, *op. cit. supra* note 1, at 34; Winston and Osborne, *The Pattern of Chain Store Sales in Retail Distribution*, Survey of Current Business, June 1947, p. 12.

political, economic and legal—were used by those who advocated restrictions against chains? How effective were these weapons? And what is the significance of this struggle from the point of view of the public interest in the preservation of a free, competitive society?

The following is an attempt to find some answers to these questions. Obviously, we must begin by looking at the business of food distribution in the United States. How is it done, who does it, and what are the respective functions of the various groups which participate in it?

II. THE CHANNELS OF FOOD DISTRIBUTION IN THE UNITED STATES

According to the classical pattern of distribution, the producer or manufacturer sells to the wholesaler, the wholesaler sells to the retailer, and the retailer sells to the consumer. In the food industry the process of distribution begins when food grown on the soil or processed from raw materials furnished by the grower (e.g., slaughtering of cattle and dressing of meat or the canning of fruits, vegetables and other foodstuffs) is ready for sale. The system of food distribution from this point on, prior to the advent of the corporate chains, which is still being practiced among large numbers of independents, has been characterized as “the multiple middleman system.” In fact, most small and medium-sized manufacturers do not sell directly to the wholesaler but use the services of an additional middleman who is generally called a broker. The constitution of the National Food Brokers’ Association, which counts among its members a majority of the brokers, defines a food broker as “an independent sales agent who performs the services of negotiating the sale of food and/or grocery products for and on account of the seller as principal, and who is not employed or established by, nor an affiliate or subsidiary of, any trade buyer, and whose compensation is a commission or brokerage paid by the seller.”⁸

In a statement submitted in 1935 to the House Judiciary Committee, the National Food Brokers Association, explaining in great detail the function of the food broker, said that “the small manufacturer is helpless without the food broker” because “his volume will not permit him to employ sufficient salesmen to cover the potential market of some several thousand wholesale grocers.”⁹ He must depend upon the food

8. *Hearings, supra* note 3, at 66. A statement submitted by the National League of Wholesale Fresh Fruit and Vegetable Distributors defined a broker as a middleman who represents either seller or buyer and brings them together to complete the transaction. *Id.* at 77.

9. See FTC, REPORT ON DISTRIBUTION METHODS AND COSTS, pt. I, 120 (1944): “By selling so largely through brokers, canners are able to reduce their own sales

broker as his sales organization, one which serves him fully without cost until a sale has been made, and which is compensated with a small, fractional percentage of the actual returns from the sale."¹⁰ "The manufacturer with 40 brokers has 40 offices upon which to depend for sales service. . . . In some of these offices there may be 5 or 6 salesmen, but the broker represents not only this particular manufacturer, but probably 20 or 30 other manufacturers who produce other items used in the food trade. The broker competes with other brokers in his market, and these other brokers represent, in a similar manner, competitors of this particular manufacturer."¹¹

Manufacturers thus are using brokers for the purpose of securing contact with wholesalers. The wholesaler purchases foods in large volume for distribution in smaller quantities to retailers. He must maintain adequate stocks in warehouses strategically located in the territory he serves and he frequently extends credit or furnishes business guidance and merchandising advice to independent retailers. He serves as "liaison agent between the producer or manufacturer, on the one hand, and the retail grocer on the other, advising on trade conditions and current and potential supply and consumer demand factors."¹² Wholesalers operating on this basis are often called "old-line" wholesalers¹³ to distinguish their operation from the more recent business methods which will be discussed later. There are about 5000 wholesale grocery concerns now operating in the United States, some of which have resulted from mergers and consolidations of small companies into large wholesale enterprises with branch houses in many cities.¹⁴

forces to a minimum. Many small, and even some fairly large companies had only a sales manager who visited brokers and sold by mail or wire from the plant office." The Commission quotes from *Business Week* for Aug. 10, 1940 to the effect that of the 3,500 fruit and vegetables canners in the country only 50 sell direct without brokers.

10. *Hearings, supra* note 3, at 65.

11. *Id.* at 66. The statement continues: "There are some 1400 food brokers located in various markets . . . Approximately 1,000 belong to the National Food Brokers' Association. The annual volume of business done by these members of this association is estimated at about 4 billion dollars. The general public hears little or nothing about the food broker, because his work is primarily that of personal service to the particular manufacturers he represents, and he does no advertising, as he depends upon his personal relationship with the manufacturer, and the personal contact that he makes with the buyer to whom he sells the products of these manufacturers . . . Sometimes he represents large manufacturers, whose product is particularly seasonable, and who, as a consequence, finds it much more economical . . . to use a broker than . . . a salaried representative, but to a large extent he represents the medium-sized or smaller manufacturer."

12. MOCKLER: THE WHOLESALE GROCERY INDUSTRY (American Industries Series, No. 16) 9-10 (1947).

13. FTC, *op. cit. supra* note 9, at 205.

14. MOCKLER, *op. cit. supra* note 12, at 16. Particular attention is invited to the table of wholesale food and grocery sales (by types of operation) therein set forth. *Id.* at 14.

Several types of "old-line" wholesalers deserve brief reference. The "full-line" service wholesaler renders limited credit and delivery service, maintains salesmen, and distributes a "full-line" of food products. The largest number of concerns is in this classification.¹⁵ By contrast, the "cash-and-carry" wholesaler, who developed in the years preceding World War II, extends no service or credit; here the retailers pick up the merchandise with their own trucks or cars at the wholesaler's warehouse. Some service wholesalers maintain cash-and-carry departments or branch depots. This type of wholesaler is comparable to the self-service retail store, which also developed in the thirties. There is also the "institutional wholesaler" who specializes in the sale of food to hotels, restaurants, public institutions, steamship lines and industrial users, and the so-called "wagon jobber" who maintains a fleet of trucks servicing regular "routes," taking the retailer's order and often making immediate delivery from stocks carried on the truck. There are many individuals who operate only one truck.¹⁶

In general, the methods of wholesalers have tended to change in recent years. Whereas wholesale grocers formerly concentrated on "dry groceries," consumer preference for "one-stop-shopping" which led to complete retail food markets has been reflected on the wholesale level in the addition of new departments such as frozen food, fresh fruit and produce, dairy, and even meat and bakery. At the same time, wholesalers have become increasingly "brand conscious" and have established many "house brands," some of which have achieved national distribution.¹⁷

After leaving the wholesaler, the groceries and foodstuffs finally reach the retail store, where they are sold to consumers. At this stage the classical system of distribution in the United States depends upon some 370,000 separately-owned or small-group stores. The so-called "chains" which compete with them, each owning from four to 6,000 stores,¹⁸ embrace a national total of 26,500 stores.¹⁹ Approximately

15. MOCKLER, *op. cit. supra* note 12, at 17.

16. *Id.* at 17-19.

17. *Id.* at 21-22.

18. The 1939 Census of Distribution contains the following table:

Distribution of Food Chain Store Business, by Size of Chain (1939)

Size of Chains	No. of Organizations	% of Chain Store Sales
4-10 Units	1,127	13.5
11-25 Units	293	9.7
26-100 Units	144	10.0
Over 100 Units	40	66.8

The FTC in contrast to the Bureau of the Census, has included organizations of two or more units in its definition of "chain." SEN. DOC. No. 31, 72d Cong., 1st Sess. 2 (1929).

19. Store figures from THE PROGRESSIVE GROCER, FACTS IN FOOD AND GROCERY DISTRIBUTION 5 (1950).

two-thirds of all dollar sales by food chains are made by organizations controlling more than 100 stores.²⁰ The most important of these, with numbers of stores and latest sales figures, are enumerated below.²¹

How does the chain method of doing business differ from the "old-line" system of distribution? Perhaps the most fundamental characteristic of the corporate chains is the economy achieved (a) through mass volume and centralized management at the retail level and (b) through integration of wholesaling, retailing, and, in many cases, manufacturing operations.

As to operations at the retail level, it is, generally, "more economical to run two stores than it is to run one, . . . more economical to operate 100 stores than 10, . . . more economical to operate 1000 stores than 100, and so on."²² Although a point of diminishing returns may be reached somewhere, it is, nevertheless, a fact that the percentage of net profits on sales in grocery and meat stores has been highest in chains operating more than 1000 stores.²³ Centralized management under headquarters' control, which supervises all buying, advertising, and merchandising with careful attention to cost factors on a standardized basis, is an essential element in the reduction of expenses and overhead.²⁴

Centralization further enables the chain buyer to secure a better knowledge of market conditions. For instance, the Atlantic Commis-

20. See note 18 *supra*.

21. Only three operate on a national basis. They are: *The Great Atlantic & Pacific Tea Co.*, operating about 6000 food stores in 39 states and Dist. of Col., sales in fiscal year ending Feb. 28, 1949: \$2,837,291,185 (MOODY'S INDUSTRIALS 2753 (1949)); *Safeway Stores*, operating 2,103 stores in 23 states and the Dist. of Col. during 1948, sales in 1948 \$1,276,792,822 (MOODY'S INDUSTRIALS, 2584 *et seq.* (1949)); *The Kroger Co.* (until 1946 known as the Kroger Grocery & Baking Co.), operating on Jan. 1, 1949, 2,349 stores in 19 states, sales in 1948 \$825,668,000 (MOODY'S INDUSTRIALS 2361 (1949)). All others are more or less regional.

22. BLOOMFIELD, TRENDS IN RETAIL DISTRIBUTION 256 (1930).

23. FTC, CHAIN STORES—SALES, COSTS AND PROFITS OF RETAIL CHAINS 54, 55 (1933) found the following percentages of net profit to sales, by size of grocery and meat chains:

No. of stores	Percentages	No. of Stores	Percentages
2-5	1.98	51-100	2.04
6-10	1.91	101-500	1.86
11-25	1.68	501-1000	2.42
26-50	2.22	1000 & above	2.98

See also BECKMAN AND NOLEN, *op. cit. supra* note 1, at 58.

24. HOFFMAN, LARGE-SCALE ORGANIZATION IN THE FOOD INDUSTRIES 65, 66 (TNEC Monograph No. 35, 1940). "The purchase of all goods is attended to by buyers located either at the chain headquarters or at the district warehouse. Window displays, advertising copy, store arrangements, etc., are designed by specialists in these matters, their ideas being transmitted to the store managers via the store superintendent. All the larger chains instruct their employees in selling techniques and give their store managers rigid training in store operation. Most important of all, the systems of records and cost accounts kept by the chains enable them to detect and rectify the sources of loss and inefficiency." *Ibid.* See also Costvet, *Inadequate Book-keeping as a factor in Business Failure*, 45 YALE L.J. 1201 (1936).

sion Company, a wholly-owned subsidiary of A & P charged with buying fresh fruits and vegetables for the parent company, operates in all important producing areas. "Its buyers receive daily and even hourly instructions relative to general market conditions and prices to be paid. Against such buyers are pitted sellers whose knowledge of the market is usually confined to their own situation and locality. In such circumstances the chain buyer naturally has an advantage in the way of market information not only over the sellers but probably over most other local buyers as well."²⁵ In addition,—and here we come to the most crucial feature of the chain-store operations which will be examined in detail in this study—chains necessarily buy the great bulk of their supplies in very large quantities; therefore they often are able to secure an advantage over their independent competitors, because the quantity purchased affects the price paid.

The integration of the chains contrasts with the classical system of distribution by transforming the traditional series of buying and selling transactions involving brokers' fees, wholesalers' commissions, salesmen's salaries and advertising expenses into what are in effect intra-company operations even when they take the form of sales by a subsidiary to its parent corporation.²⁶ The mass distributor thus moves its products forward according to the requirements of the various parts of its far-flung organization. The cost of soliciting patronage from the retail trade, which has been described as "stupendous," is replaced by the expense of a managerial organization, which is probably much less.²⁷

Integration of successive distribution functions, in the absence of unfair practices, has advantages for growers and processors, offsetting to a greater or less extent the augmented bargaining power with which it confronts them. In the field of fresh fruits and vegetables, for instance, the Federal Trade Commission observed that "the principal problem facing the individual grower is to find the most direct and economical method of marketing his produce in order to minimize the transportation and distribution charges assessed against his produce and thereby maximize the net price received at the point of production. Reducing the number of middlemen and the number of charges, or

25. HOFFMAN, *op. cit. supra* note 24, at 104.

26. See *infra*, c. 5.

27. HOFFMAN, *op. cit. supra* note 24, at 67: "The average independent retailer is visited daily by at least a half-dozen salesmen, each trying to sell him a small bill of merchandise which he may or may not need. Those who seek the retailer's business cannot permit him simply to order his merchandise as he needs it; the competition between them is such that they constantly must persuade, cajole, and coax him. The cost of this sort of thing in time and money is nothing short of stupendous."

merchandising margins, taken by middlemen is a matter of prime importance to both growers and consumers. Growers often are handicapped in their efforts to establish the most direct marketing connections in terminal markets because groups of assemblers and shippers and terminal market receivers entrenched in their control of limited packing, shipping and freight terminal facilities, insist that produce must go through their hands on its way to and through the terminal markets."²⁸ Apparently, this is the reason for the Commission's findings that in many cases growers of fresh fruits and vegetables obtain higher net returns from sales to chain-stores than from sales to independents.²⁹

To this combination of wholesaling and retailing the food chains have added considerable manufacturing, thus completing their "vertical" integration. According to *Moody's Manual of Industrials* for 1949, the A & P operates, directly and through various subsidiaries, 35 bakeries, four salmon canneries in Alaska, six manufacturing plants, three cheese plants, two milk processing plants, a creamery, and nine

28. FTC, *op. cit. supra* note 9, at 136.

29. In FTC, *op. cit. supra* note 9, at 140, are a series of tables showing comparisons of average wholesale prices, average net proceeds, and respective distribution charges for specified fresh fruits and vegetables sold to chain stores and to independent grocers in 1936 in Boston, New York, Philadelphia, Baltimore, Chicago, Atlanta, New Orleans, Dallas, Kansas City and St. Louis. These tables were prepared pursuant to Public Resolution No. 112 74th Cong., 2d Sess., June 30, 1936.

"In a total of 7 out of 16 instances the average wholesale prices per sales unit paid by chain stores exceeded, and in one instance was the same, as that paid by independents purchasing the same commodity produced in the same producing region. In the remaining 8 instances, the prices paid by independents averaged higher than those paid by chain stores.

"In terms of net proceeds to growers, however, chain store sales yielded the grower higher prices than sales to independents in 9 of the 16 instances and were the same in one case, making 10 instances out of 16 in which the grower's proceeds per unit from sales to chain stores were equal to or greater than those realized from sales to independent grocers.

"The fact that for each item the higher average wholesale selling price and the higher net proceeds to grower did not always go in pairs, and even that sometimes the lower of a pair of wholesale prices shown in the table yielded the higher average proceeds to grower, indicates that differences in distribution expenses sometimes affected the grower's proceeds more importantly than the wholesale prices at which commodities were sold." Lower storage charges in sales to chain stores were found in almost all cases to be "due to the chains taking delivery at their warehouses in full carload or truckload lots and providing whatever storage was necessary in redistributing to their retail stores." *Id.* at 142. See also *id.* at 145, 146, 148, 150, 161, 162. The Commission states that growers of peaches whose sales were traced through chain stores "fared better on the average, than did those whose peaches reached the consumers through other channels." The figures are \$1.13 against \$1.09 per bushel in Boston, \$1.26 against \$.99 in New York, \$1.12 against \$1.01 in Philadelphia, \$1.55 against \$1.29 in Baltimore. Only in Chicago did the growers receive less from Chains (\$.92) than from independents (\$1.13). *Id.* at 160. See also testimony by Karl C. King, owner of a vegetable farm in Morrisville Pa.: "Our net from chain stores has been definitely better than our net from regular sales." *Hearings, supra* note 4, at 121. To the same effect see also testimony of G. A. Boger, milk producer and president, Lehigh Valley Cooperative Farmers Association, Allentown, Pa., *Hearings, supra* note 3, at 124, 125.

coffee roasting plants.³⁰ Most of the other larger food chains also engage in manufacturing operations on a comparable scale.³¹ Manufacturing was begun by the food chains, according to an unnamed A & P official, "for reasons of economy," for the purpose of lowering prices to the consumer and satisfying the consumers' desires for branded goods by the adoption of the Company's own brands.³² Products of subsidiaries account for a substantial though not a preponderant, part of total sales by food chains;³³ but the importance of these activities from a profit standpoint is apparent from the example of A & P. That company derived 28% of its profits in 1941 from its manufacturing subsidiaries and bakeries,³⁴ and from 1939 through 1941 its bakery sales were the second largest in the baking industry.³⁵

An excellent illustration of the economies achieved by chains through the integration of manufacturing with distribution is to be found in Part I of the Report of the Federal Trade Commission on Distribution Methods and Costs, which deals with Important Food Products. The Commission assembled data showing the cost in dollars per cwt. to produce and sell bread and rolls for three different types of bakeries in March and September 1942. The three types included wholesale bakers who sell to large users and to retail grocery and delicatessen stores, house-to-house bakers who sell at retail from their trucks, and chain store bakers. The data were broken down into two groups of figures: (a) total selling and delivery expenses (route-men, supervisors, delivery vehicles expense) and (b) administrative and general expense. The result was as follows:³⁶

30. MOODY'S INDUSTRIALS 1548 (1949). The most important of these subsidiaries, the Quaker Maid Company, Inc., produces under its own brands baking powder, beans, peas, barley, bird food, candy, cereal, cocoa, cod liver oil, corn meal, condensed milk, currants, extracts, fish, gelatine desserts, puddings, lemon pie filling, honey, jam, jelly, liquids (ammonia and bluing), ketchup and chili sauce, dry macaroni, spaghetti, marmalade, mayonnaise, mustard, olives, peanut butter, pork sausage, seasoning, preserves, relish, rice, salad dressing, salad oil, sandwich spread, salmon, spices, syrup, tapioca, tea, vinegar and bakery products. A & P Br. App., v. I, pp. 330-335. Quaker Maid also has a printing department for the printing of labels.

31. SEN. DOC. No. 13 73d Cong., 1st Sess. 21 (1933).

32. *Id.* at 51. The official is quoted as saying: "In the operation of our business, we have found that we could sell merchandise to our customers at a lower price if we produced or processed certain merchandise or had it processed for us." He added that the increasing brand-consciousness of the public made it desirable for the company to sell under its own brands.

33. FTC reported in 1933 that no chain manufactured as much as 25% of its sales. *Id.* at 11.

34. A & P Br., p. 20.

35. A & P Br. App., v. I, pp. 408, 409.

36. FTC *op. cit. supra* note 9, at 43. See also *id.* at 34 as to the several classes of bakeries.

MARCH 1942			SEPTEMBER 1942		
Wholesale Bakers	House to House Bakers	Chain Store Bakers	Wholesale Bakers	House to House Bakers	Chain Store Bakers
a) 1.66	3.17	.76	1.61	3.00	.81
b) .38	.39	.40	.37	.36	.41
<u>2.04</u>	<u>3.56</u>	<u>1.16</u>	TOTALS	<u>1.98</u>	<u>3.36</u>
				<u>1.22</u>	

The Commission observed that chain store bakeries occupied the peculiarly favorable position revealed by these figures by reason of the fact that they served "only their own affiliated grocery chains." According to the Commission, "The chain store bakers transferred their products to their affiliated stores at prices considerably lower than those charged by wholesale bakers selling to independent grocers." Although the production cost of the chain-store bakers did not differ greatly from that of other bakers, chain-store bakers "due to the captive nature of their market through affiliated stores . . . were able to dispense with a large part of the selling expense that wholesale and house-to-house bakers incur. The savings in distribution costs were such as to enable the baking operations of the chain-stores to show a profit in both periods notwithstanding the lower prices at which products were transferred to their affiliated retail stores." Hence, the Commission concluded that "if independent stores, chain-stores and house-to-house bakers all sold bread at the same average retail price per pound (for instance, 8.5 cents per pound, as shown by house-to-house bakers for the March, 1942, period), the independent stores would be operating on a gross margin of 1.43 cents per pound as compared with 2.23 cents per pound for the chain-store retail unit. Herein lies the ability of chain stores to undersell independent grocers on bread and rolls.³⁷

The business advantage enjoyed by chain-stores over the old-line enterprises thus consists in part of economies resulting from large-scale operations embracing all levels of distribution and, to a considerable extent, manufacturing. In addition, it includes the benefit of lower prices the chains often are able to obtain as buyers. As a result they have generally been able to sell to the consumer at lower prices than their independent competitors. The fact that chain stores, on the average, "can and do sell at prices which are somewhat lower than

37. *Id.* at 44, 45.

the prices charged by independent retailers" was well established and amply proven fifteen years ago and is probably still true.³⁸

Inevitably, the phenomenal growth of chain-stores since the beginning of this century³⁹ has had an almost revolutionary influence on the merchandising practices of many independent distributors. Cooperative and "voluntary" grocery chains, which have assumed great importance, came into existence for the specific purpose of fighting chains by giving each independent all the obvious advantages of chain operations.⁴⁰ The so-called "voluntary" chain is a group of retail grocers in a wholesaler's territory who voluntarily affiliate themselves with him while preserving their individual ownership. "In this relationship the

38. SEN. DOC. No. 4, 74th Cong., 1st Sess. 28, 29 (1935). The FTC presented on p. 29 the following tabular statement showing the aggregates of the average chain and independent grocery prices in four cities:

City	No. of Items	Chain Prices	Indep. Store Prices	Index of Selling Prices in Terms of Chain Prices as 100%	
				CHAIN	INDEP.
Washington D. C.	274	\$54.07	\$58.03	100	107.310
Memphis	193	35.95	38.10	100	105.985
Detroit	183	33.25	35.66	100	107.232
Cincinnati					
Large Chains	120	21.95	23.34	100	106.35
Small Chains	120	22.07	23.34	100	105.74

The Commission found that "as high as 45% of the difference between chains and independent selling prices on standard grocery items" in these four cities was attributable to the lower buying prices of the chains. *Id.* at 53. The example of Detroit was typical: The 183 grocery items selected for comparison "would have cost a consumer at average prices a total of \$35.66 through the independent stores but only \$33.2565 through the chains, a difference of \$2.4051 in favor of the latter. These items, however, cost the chain only \$24.5253 at average buying prices, whereas the wholesaler (where the merchandise moved through the wholesaler) or the retailer (where the goods were sold directly) paid \$25.3532 at average prices, or \$0.8279 more than the chain. This last figure represents between 34 and 35% of the \$2.4051 by which average chain retail selling prices were lower than those of the independents." A & P Br. App., v. IV, pp. 73-81, contains some comparative sample data as to A & P retail prices and prices of other chains and independents. For instance, in October 1934, out of a total of 85 items, A & P's prices in Chicago were lower than independents' prices on 55 items. In June 1936, out of a total of 122 items, A & P's prices were lower than independents' prices on 111 items (p. 76). In 1933 an official of the New England Division of A & P reported that three lists, each containing ten items of nationally advertised commodities, were made up and purchased in independent stores and in A & P stores. The total price comparisons were as follows: List 1: Independents—\$1.98, A & P—\$1.76; List 2: Independents—\$1.77, A & P—\$1.48; List 3: Independents—\$1.01, A & P—\$.81. A & P Br. App., v. IV, p. 244.

39. For a brief historical survey see BECKMAN AND NOLEN, *op. cit.* *supra* note 1, at 14-28.

40. See SEN DOC. No. 12, 72d Cong., 1st Sess. 8 (1932). See also statement by R. W. Lyons, former executive vice-president of the National Chain Store Association, *Hearings before Special House Committee to Investigate the American Retail Federation*, 74th Cong., 1st Sess. v. II, 148 (Rev. Print. 1935): "I realize . . . that the voluntary chain may have been something that was forced into existence by reason of the existence of the corporate chain, but I believe that today those merchants who are members of the voluntary chains perform a service to the consumer which has no counterpart in the service which independent merchants perform. . . . [There is] a greater tendency toward merchants banding together to get more efficiency."

wholesale grocer performs the functions customarily performed by the corporate chain headquarters and warehouse, and maintains a force of field men or supervisors who assist the affiliated retail merchants in solving merchandising, store engineering, operating and other problems."⁴¹ Some of the effects of the formation of such "voluntary groups" by wholesalers are described in a typical case history published by the Department of Commerce in 1941:

"Before becoming a voluntary we had wide distribution. A housewife could find our coffee in nine out of ten food stores in the city. We thought that was pretty good, until we had opportunity to check up with a large chain organization which also pushes coffee. We found that the chain sold only to their 200 stores, as against our 5,000, but they were doing a better job. They were selling more coffee than we were, and they were growing while we were declining. The chain was pushing its brand of coffee hard in its 200 stores while we spread our selling efforts among 5,000 outlets, most of which weren't pushing our coffee at all because they had no incentive. Obviously, the job for us was to concentrate.

"Another factor that helped us to decide to concentrate our sales effort was that we noticed it was easier to get successful merchants to concentrate their purchases with us than it was to get the less successful ones to do so.

"Look at us now; once we had 5,000 actively solicited accounts, today we have only 700 to 750. The rest were dropped because they were unprofitable on the order size basis. Our average order size now is about \$100. Sales volume didn't decline as a result of this change, but there has been a sharp reduction in expenses. These two results were what we sought when we entered the voluntary field."⁴²

The second major type of cooperative organization is the "retailer-owned cooperative wholesaler." These organizations are formed by groups of independent retail grocers who typically purchase their supplies from their own wholesale warehouses, which are managed by personnel hired for that purpose.⁴³ The majority of these cooperatives are incorporated⁴⁴ and the stockholders receive dividends based upon their purchase volume.⁴⁵ The scope of cooperative activities varies. In some groups cooperation is limited to advertising; others engage in

41. MOCKLER, *op. cit. supra* note 12, at 17, 18.

42. *Id.* at 23, 24. Another wholesale grocer reported that he entered the voluntary group field in order to be able to "level off the peaks and valleys of sales volume and to predict what, how much and when customers would purchase." *Ibid.*

43. See note 41 *supra*.

44. SEN. DOC. NO. 12, *op. cit. supra* note 40 at 37.

45. See note 41 *supra*.

cooperative buying in addition to advertising; a third group engages in these activities and also operates warehouses; finally, the most centralized type of cooperative also employs supervisory personnel and often establishes uniform features such as store signs, store fronts and layouts.⁴⁶

The headquarters office of perhaps the oldest and most widely known cooperative grocery chain, the Red and White Corporation, began by operating as a selling agent for the manufacturers of branded goods and receiving commissions from them. The company is a "non-profit service organization," performing all of the functions enumerated above and several others in addition.⁴⁷ Its net income, which originally was derived almost entirely from commissions on sales to its members, is expended "for cooperative advertising and sales promotion work for its independent wholesale and affiliated independent retail members." The Corporation "was created for the purpose of assisting independent wholesale and retail grocers to defend themselves against the competition of the corporate chain-stores, . . ." ⁴⁸

The relative importance of voluntary chains at the present time is not definitely established. According to testimony before the House Judiciary Committee in 1935 there were then 800 wholesale grocers operating under voluntary plans and 105,000 retailers affiliated with them; they did from 35% to 40% of the total grocery business.⁴⁹ In 1930 the Federal Trade Commission estimated that there were 395 cooperative grocery chains with a membership of 53,400 retail stores as against 52,514 grocery chain stores owned by 693 corporate chains.⁵⁰ In this connection it should be noted that an individual retailer may belong to four or five voluntary chains.⁵¹

The advantages of membership in a voluntary group are illustrated by comparative cost data assembled by the Federal Trade Commission.

46. SEN. Doc. No. 12, *op. cit. supra* note 40 at 11. See also *id.* at 49.

47. *Id.* at 22.

48. Letters from Red & White Corporation, Chicago, Feb. 8, 1936, *Hearings, supra* note 40, v. IV, 213. See also *Red & White Corp. v. FTC*, 149 F.2d 970 (7th Cir. 1945), *infra* note 216 and text, which held the Corporation's receipt of commissions from sellers to be illegal under the Robinson-Patman Act of 1936.

49. Testimony by G. M. Ungaro, Secretary, National Voluntary Groups Institute, and Vice-President, Independent Grocers Alliance Distributing Co., *Hearings op. cit. supra* note 3, at 116. He described the voluntary movement, stressing the autonomy of the individual group members. THE PROGRESSIVE GROCER, *op. cit. supra* note 19, at 9: "Voluntary and cooperative group stores gave a good account of themselves in 1948. The groups continued to enroll more large volume stores in their membership, hence increased their portion of the independent business. Not only did the number of affiliated stores increase, but they enjoyed a slightly larger sales gain per store than unaffiliated stores." See also *id.* (1950) at 6.

50. SEN. Doc. No. 4, *op. cit. supra* note 38, at 7.

51. Testimony of Traver Smith, vice-president in charge of grocery operations, Standard Brands, Inc., *Hearings, supra* note 40, v. IV, 31.

A sample study based on reports received from 150 old-line wholesalers and 21 cooperative wholesalers showed that the cooperative wholesaler operated in 1939 with distribution expenses of 5.87 cents for each dollar of sales as compared with 9.65 cents per sales dollar for the conventional wholesaler.⁵² The Commission commented that "the possibility of such savings by groups of independent retailers cooperatively undertaking the wholesale distribution of grocery products, and the necessity that independent retailers take advantage of every possible saving in their struggle to maintain their position in competition with chain stores and supermarkets, are the two principal bases underlying the growth both of the retailer-owned cooperative wholesaler and of voluntary chains of individually owned retail stores affiliated by purchase-and-service-contracts with independent wholesalers."⁵³

That the members of voluntary grocery chains have been able not only to hold their own against the corporate chains, but sometimes even to surpass them in economic efficiency is shown by another cost comparison presented by the Commission: A sample study of 156 individual retail grocers, 43 grocery chains, and 13 cooperative chains showed 22.8¢ per sales dollar of distribution expenses and bad debts in 1939 for the independents as against 20.68¢ for the corporate chains and only 19.56¢ for the cooperatives. The advantage of the latter was attributed to the fact that the cooperatives had a ready-made clientele in their owners, that the majority of them operated in smaller towns, that they did not find it necessary to operate from expensive business locations, and that they were not heavy advertisers. However, even the largest cooperative had smaller net sales per store than either the corporate chains or the independents.⁵⁴

Independent food stores were responsible for a change of overriding importance which began in the late 1920's and spread to all groups participating in food distribution. That change was the invention of the so-called self-service supermarket. The supermarket, as its name implies, is a very large food store having weekly sales in excess of the yearly average of traditional food store sales, which in 1935 was \$15,719. "It represents the broad application of mass selling technique within the store; i.e., instead of applying this technique to a large number of relatively small stores in widely scattered locations (the orthodox grocery chain store idea), the supermarket seeks to

52. FTC, *op. cit. supra* note 9, at 207.

53. *Id.* at 208.

54. *Id.* at 214. In his testimony before a Senate Committee in 1936, the then treasurer of First National Stores, Inc. referred to the cooperative chains which consolidate their purchasing power as "the most strenuous competition" the corporate chains have to face. See *Hearings, supra* note 4, at 45.

apply it to each separate store.”⁵⁵ It is a large departmentized food store operated on a self-service and cash-and-carry basis. Its operating costs are necessarily lower than those of the conventional food store because it renders no credit or delivery service and employs fewer people; in addition, its overhead is reduced and its buying power increased by reason of its huge volume. Parking facilities, the wide variety of merchandise sold under one roof, carriages to carry merchandise around in the store and bus boys aiding customers in carrying packages to their cars have contributed to its popularity.⁵⁶ Apparently large markets of this type appeared first in the Los Angeles area in the late twenties, where they cut heavily into the business of the corporate chains during the depression. In the East, independent supermarkets were started in New Jersey, New York, and the Boston area by wholesalers in an effort to check chain store competition. Many of these supermarkets begun by independents on a one-store basis grew in the early thirties into small chains.⁵⁷

The reaction of the corporate chains to this revolutionary innovation has been best described by Mr. John A. Hartford, president of the A & P, as follows: “Well, the first supermarket that came to my attention was in the Eastern Division. We did not take it very seriously at first, but the competition was pretty aggressive, independents got into it very fast, and I went out to Detroit and I saw this old freight house converted into a supermarket. I talked to the personnel and I made up my mind it was necessary for us to adopt that type of operation. Later, we had a demonstration in Brooklyn . . . We had a competitor there by the name of King Kullen, and a great many independents, who opened these stores very fast and very rapidly. We had had a very profitable operation in Brooklyn. In a very short space of time, they forced that Brooklyn into deep red figures. I was very much concerned about it . . . because we had had a conflict at Headquarters whether we should adopt that type. Some said it won’t last—you can’t operate without selling under cost, and that we won’t

55. 1 CENSUS OF BUSINESS 1-18 (1935), quoted in Phillips, *The Supermarket*, 16 HARV. BUS. REV. 188 (1938).

56. *Id.* at 191, 198, 199. Carl W. Dipman, editor of *The Progressive Grocer*, stated in 1936 that the “trend is toward larger complete food markets” and in the direction of more self-service stores selling on a cash basis. Fruit, vegetable and meat departments in addition to “dry” groceries were said to be the most important factors in competitive success. Dry groceries made up only 30 to 40% of the market owner’s operation. Broadening of lines in fresh baked goods, dairy products, delicatessen and ready to serve foods as well as store modernization were also deemed essential. See *Hearings before the Subcommittee of the House Judiciary Committee on H.R. 4995, 8442 and 10486, 74th Cong., 2d Sess. 362, 365, 366*. Expense rates of self-service stores were given as 4 or 5% lower on each sales dollar than the expenses of well operated service stores. *Id.* at 364.

57. Phillips, *supra* note 55, at 192-195.

do. . . . We finally tried out a store to see whether this operation could be run without under-cost selling. It confirmed it could and we went in very aggressively to supermarket operation."⁵⁸ As a result of this decision, A & P began with 20 supermarkets in 1936 and from then on heavily stressed a supermarket development program.⁵⁹ Other chains soon adopted the same policy of "less stores rather than more" in order "to get larger units in the more central locations."⁶⁰ Indeed, the tendency toward "more cash and controlled-credit⁶¹ stores, more self-service stores, more large-volume stores"⁶² which had been initiated by independents was soon adopted by the chains as their guiding principle. Contemporaneously, the adoption by some states of taxes graduated according to the number of stores under one ownership stimulated the policy of the chains to concentrate upon fewer but larger stores.⁶³

Here again, A & P exemplifies the general development. In 1927 that Company operated 15,566 retail stores in the United States. There was a slight decrease during the depression, but in 1936, when the decision to go into supermarkets was finally adopted, there were still 14,446 stores. From then on the drop in number of stores was precipitous until 1943 when it reached 5,751; of these 1,646 were of the supermarket type.⁶⁴ The total dollar volume of sales, on the other hand, increased from \$757,900,000 in 1927 to \$1,258,600,000 in 1943; of this 1943 total, the supermarkets alone accounted for \$760,800,000, or more than 60%, and other self-service stores of smaller size added an additional \$205,200,000, so that total sales in self-service stores amounted to more than 76% of total sales.⁶⁵ The experience of the other leading food chains has been similar, showing a precipitate drop in the number of stores operated, accompanied by an increase in business.⁶⁶ The unabated vigor of this movement is demonstrated by the

58. A & P Tr., pp. 20, 438-39. The events described by Mr. Hartford took place in 1935. See also Phillips, *supra* note 55, at 195.

59. A & P Br., p. 45.

60. Testimony on behalf of First National Stores, *Hearings*, *supra* note 40 v. IV, p. 137.

61. Meaning weekly payments of bills by customers.

62. Carl W. Dipman, editor of *The Progressive Grocer*, *Hearings*, *supra* note 56, at 367. See also Winston and Osborne, *supra* note 7.

63. *Id.* at 12, 13; see part IV *infra*.

64. A & P Br., p. 58.

65. *Ibid.*

66. Testimony by Mr. Charles F. Adams, then treasurer of First National Stores, *Hearings*, *supra* note 4, at 45; MOODY'S INDUSTRIALS 10 (1949) (dollar sales of First National); Testimony by A. H. Morrill, President of the Kroger Company, *Hearings before the Special House Committee to Investigate the American Retail Federation*, 74th Cong., 1st Sess. 39 Comm. Print. (1935); MOODY'S INDUSTRIALS, 2361 (1949) (dollar sales of Kroger); *id.* at 2585 (Safeway).

fact that the number of chain units continued to decrease from 28,500 in 1947 to 26,500 in 1949.⁶⁷ During the same period the total dollar volume of independent grocery and combination (grocery and meat) stores increased from \$13,950,000,000 in 1947 to \$15,150,000,000 in 1949, while sales of chains increased from \$8,440,000,000 in 1947 to \$9,600,000,000 in 1949.⁶⁸

Generally, among the independents, "small stores on the average did not do as well as large and medium-sized stores regardless of whether located in cities or country districts," and "full-line market or combination stores outdistanced their single-line competitors in sales gains."⁶⁹ In 1944 independent grocery, combination, and delicatessen stores with an annual sales volume per store of less than \$100,000 accounted for 68.5% of all sales by such independents; in 1948 the share of these stores had dropped to 52.5%.⁷⁰ According to *The Progressive Grocer*, independents and chains alike now recognize that the majority of shoppers prefer self-service in stores which must carry "as complete a variety of merchandise as possible, including groceries, produce, meat, dairy products, frozen foods, ice cream, selected drug products, and household supplies."⁷¹ In 1948 almost 88% of all dollar sales by chains were made in self-service stores,⁷² while 80% of all sales by independent grocery and combination stores occurred in self-service or semi-self-service⁷³ establishments.⁷⁴

Among independents 48% of the number of stores offered delivery service in 1949, but over 7% of these stores made a specific extra-charge for delivery; however, only 16% of total sales by independents

67. *THE PROGRESSIVE GROCER* (1949), *op. cit. supra* note 19, at 5; see also *id.* (1950) at 5.

68. *Id.* (1949) at 3, *id.* (1950) at 3.

69. *Id.* (1949) at 7. "Grocery Stores without meat barely held their own." Among independent stores two-thirds reported gains and one-third reported losses in volume during 1948. "Most of the gains were among the larger stores." *Id.* at 4, 7. In 1948, 89% of the larger independents handled meats and 73% handled frozen fruits, as against 76% and 26% respectively in 1939. *Id.* at 5. See also *id.* (1950) at 4-5.

70. *Id.* (1949) at 8. A comparison of 1948 versus 1947 sales shows that shoppers favored medium and large independent stores; sales in stores with annual volume ranging from \$250,000 to \$300,000 increased 18.1% and sales in stores exceeding \$300,000 per annum increased 15.7%, while stores doing an annual business between \$50,000 and \$75,000 increased 1.7%. *Id.* at 11.

71. *Id.* at 10.

72. Estimated 1948 sales by chains: \$8,180,000,000 in 16,300 self-service stores, \$1,330,000,000 in 11,400 counter-service stores. *Id.* at 6, 8.

73. Semi-self-service stores are those which offer self service only with respect to certain products.

74. *Id.* at note 72. 1948 sales of \$7,550,000,000 in 73,000 self-service stores; \$4,550,000,000 in 125 semi-self-service stores; \$3,000,000,000 in 177,500 counter-service stores. As compared to 1947, self-service stores had average gains of 11.6%, semi-self-service stores had gains of 5%, and counter-service stores 3.7%. See also *id.* (1950) at 4-5. Gains by the larger independents were greater percentage-wise in 1949 than those of the chains. *Ibid.*

was delivered. Similarly 70% of the independent stores offered some credit service, which accounted for 27% of all independent sales;⁷⁵ consumer credit purchases, which gained noticeably in 1948 over the previous year, did not increase further in 1949. Apparently delivery and, particularly, credit services remain as the chief attraction of independent stores.⁷⁶

Reflecting these developments, the Department of Commerce summarized the relative position of the chains with respect to total food sales during the 17 years before 1947 as follows:

"In the period 1929 to 1938 chain store sales declined slightly relative to the total. Thus, comparing the years 1929 and 1938, while sales of all grocery stores had decreased from 7,353 million dollars to 7,187 or only 2%, chain sales had dropped from 2,833 million dollars to 2,618, or about 8%. This downward trend tended to be progressively true over the entire period. After 1938, however this trend was sharply reversed. Chain store sales in 1939 and 1940 increased at a greater rate than the total * * *.

The upward trend in the sales of chain grocery stores continued until the middle of 1942. Thereafter the situation was reversed. In 1943 sales of chain groceries actually declined while those of independents rose.

After 1943 the downward trend in sales of chain grocery stores continued, but at a considerably smaller rate until the middle of 1945. After V-J day, as restrictions began to be removed and supplies increased the upward trend in sales of chains relative to independents was once more resumed. Some indication of these gains in chain store sales may be seen from the fact that in the prewar period 1929-1940 a 6% gain in chain store sales was associated on the average with a 10% change in total grocery store sales; on the other hand, in the period since mid-1945 a change of 15% in chain store sales has tended to correspond to a 10% change in the total."⁷⁷

The Progressive Grocer gives the following percentage figures indicating the part of the chains in relation to total food store sales:⁷⁸

1929	32%	1943	32%
1931	34%	1945	32%
1933	37%	1947	38%
1937	32%	1948	39%
1941	37%	1949	39%

75. *Id.* (1949) at 12; *id.* (1950) at 12-14.

76. *Id.* (1949) at 8.

77. Winston and Osborne, *supra* note 7, at 12, 13.

78. THE PROGRESSIVE GROCER (1950), *op. cit. supra* note 19, at 6.

About 69% of all food chain-store sales in 1948 were made by ten corporate chains—almost 30% by A & P alone, whose total sales volume exceeded by some 700 million dollars the combined volume of its two closest rivals, Safeway Stores and Kroger.⁷⁹ A & P's share in the total United States food business was 7.1% in 1943;⁸⁰ by 1948 it had increased to 9%.⁸¹

III. THE PLACE OF THE FOOD CHAINS IN OUR COMPETITIVE SOCIETY: SOME PROBLEMS OF PUBLIC POLICY

What has been said so far indicates that the food chains present a problem of unusual complexity. Enterprises striving for maximum distribution of goods at low prices obviously do not violate the classic prohibitions against restrictions of output and price gouging of consumers. It is arguable, however, that price-fixing agreements with competitors or suppliers which, as we shall see later, have cropped up occasionally,⁸² might present a greater danger if the chains were to become definitely dominant. The inquiry thus narrows down to the question whether the food chains actually constitute or threaten to grow into monopolies; in other words, whether the food chains as a whole, or any one of them, threaten to drive their competitors out of business and to acquire control of the market. Consequently, the problem of protecting the consumer is not of immediate, but only of prospective, importance.

Representative Patman of Texas himself, probably the leading opponent of the chains in American public life during the last 15 years, acknowledged in 1935 that "from the short-range point of view" the consumer would get better prices from the chains "for a very short

79. The following ten chains had 1948 sales exceeding 100 million dollars:

A & P	\$2,837,291,185
Safeway Stores	1,276,792,822
Kroger	825,668,323
American Stores	417,466,738
First National Stores	354,444,614
National Tea Co.	270,176,795
Colonial Stores	169,202,900
Jewel Tea Co.	153,226,034
Food Fair Stores	142,035,602
Grand Union Co.	116,096,097

TOTAL \$6,562,401,110

MOODY'S INDUSTRIALS (1949). According to THE PROGRESSIVE GROCER (1949) *op. cit. supra* note 19, at 3, total chain grocery and combination store sales in 1948 amounted to \$9,510,000,000.

80. A & P case, 67 F. Supp. at 633; A & P Br., p. 59.

81. According to THE PROGRESSIVE GROCER, total U. S. food sales in 1948 were \$30,910,000,000; total grocery and combination store sales in 1948 were \$24,610,000,000; A & P's share in this latter total was 11.5%.

82. A & P case, 67 F. Supp. at 671-673; see also text at note 274 *infra*.

time;"⁸³ nevertheless, he advocated legislation intended to protect independent merchants from being wiped out by the chains—the legislation enacted in 1936 and known as the Robinson-Patman Act,⁸⁴—on the theory that

“ . . . we know when a few people get control of the food business, or any other business, we know what they are going to do—they are going to tell the producer what he can get for his products, and are going to tell the consumer what he will pay for what they sell. So, looking at it from the long-range standpoint . . . this Congress should determine whether or not they are going to give the independent merchants in this country an opportunity to live, or whether or not they are going to let them be frozen and squeezed out of existence by unfair methods of competition.”⁸⁵

He added that the chains could “sell all the goods on their shelves this morning for the same price the independent has to pay for his and make enormous profits and pay enormous dividends.”⁸⁶ Perhaps even more significant was the testimony of the secretary of the National League of Wholesale Fruit and Vegetable Distributors. Conceding with disarming frankness the benefits to the consumer resulting from the low retail prices of the chains, he said that permitting chains to flourish was “generosity with the producer and shipper’s money” and tantamount to “taking it right out of his (the shipper’s) pocket and giving it to the consumer.”⁸⁷ Hence, in this view, long-range protection to consumers and immediate protection to the competitors and suppliers of the corporate chains coincide.

The “old-line” wholesalers have been particularly affected by competition of the chains⁸⁸ and their ability to operate with lower dis-

83. *Hearings, supra* note 3, at 6.

84. 49 STAT. 1526, c. 592 (June 19, 1936).

85. *Hearings, supra* note 3, 6. Another advocate of the Robinson-Patman Act expressed himself as follows: “If it were possible for a single seller of food products to offer a food supply ample for all consumers at a price so low that all competitors would promptly be put out of business, the consuming public would blindly and thoughtlessly buy of that seller, without regard to the certain fact that they would then be left in absolute and slavish dependence upon that single and monopolistic source of supply.” *Hearings, supra* note 56, pt. 2, 470.

86. *Hearings, supra* note 3, at 7

87. Testimony of Horace H. Herr, *id.* at 74.

88. FTC, *op. cit. supra* note 9, at 96. One-third of reporting companies manufacturing packaged cereals stated “that their sales to independent grocery wholesalers decreased between 1929 and 1939 due to the growth of chain stores, supermarkets, retailer-owned wholesale houses, and cooperative purchasing agencies, all of which had absorbed volume previously handled by independent wholesale grocers.” *Id.* at 121, 122: “The principal changes in the nature of markets noted by canning companies included an increase in sales to chain stores and supermarkets and a corresponding decrease in sales to wholesalers.” See also CASSADY AND JONES, *THE CHANGING COMPETITIVE STRUCTURE IN THE WHOLESALE GROCERY TRADE* (A case study of the Los Angeles market) 28 (1949): “By 1946, almost 30% of the aggregate wholesale grocery volume of the territory was reaching chain store units from

tribution costs by combining retailing with wholesaling.⁸⁹ In fact, elimination of middlemen and of their profits has been from the beginning one of the openly proclaimed operating principles of the chain stores. Typical in this respect is an advertisement of the Great American Tea Company, which in 1869 adopted its present name the Great Atlantic & Pacific Tea Company and on October 27, 1866 advertised in Harper's Weekly, as follows:

"The proprietors became fully convinced, several years ago, that the consumers of tea and coffee were paying too many and too large profits on these articles of everyday consumption, and therefore organized the Great American Tea Co. to do away, as far as possible, with these enormous drains upon the consumers, and to supply them with these necessaries at the smallest possible price.

To give our readers an idea of the profits which have been made in the tea trade, we will start with the American houses, leaving out of the account entirely the profits of the Chinese factors.

1st. The American House in China or Japan makes large profits on their sales or shipments * * *.

3rd. The importer makes a profit of 30 to 50% in many cases.

4th. On its arrival here it is sold by the cargo, and the Purchaser sells it to the Speculator in invoices of 1,000 to 2,000 packages, at an average profit of about 10%.

5th. The Speculator sells to the Wholesale Tea Dealer in lines at a profit of 10% to 15%.

6th. The Wholesale Tea Dealer sells it to the Wholesale Grocer in lots to suit his trade, at a profit of 10%.

7th. The Wholesale Grocer sells it to the Retail Dealer at a profit of 15 to 25%.

8th. The Retail Dealer sells it to the Consumer for all the profit he can get.

When you have added to these * * * profits as many brokerages, cartages, storages, cooperages, and waste, and add the orig-

their own warehouses, completely by-passing ordinary wholesale channels. Moreover, by 1946, retailer cooperatives had become the most important source of supply for independent grocery stores, accounting for more than 30% of the aggregate business in the Los Angeles market."

89. Throughout the report cited in the preceding note the FTC emphasized that the largest share of the consumer's price consisted of the margins taken by distributors. On p. 16 the Commission said: "Inflation of consumer price may occur either by the interposition of more middlemen than are necessary, each taking his customary margin, or by the necessary number of middlemen, each taking a specified or customary percentage margin based either on the cost or selling price of the commodity * * *."

inal cost of the tea, it will be perceived what the consumer has to pay. And now we propose to show why we can sell so very much lower than other dealers.

We propose to do away with all these various profits and brokerages, cartages, storages, cooperages, and waste, with the exception of a small commission paid for purchasing to our correspondents in China or Japan, one cartage, and a small profit to ourselves which, on our large sales, will amply pay us.

Parties getting their teas from us may confidently rely upon getting them pure and fresh, as they come direct from the custom house stores to our warehouses."⁹⁰

The entire case for the chain stores was skillfully presented in this advertisement; by the same token, it is hardly surprising that a company announcing such policies would arouse bitter opposition. As early as 1870, the magazine "The American Grocer," founded in 1869, began attacks against the Great American Tea Company by publishing one hostile article every week. In 1871 a crusade against "monster tea establishments" was conducted in the country newspapers.⁹¹

In judging the controversy thus begun, a distinction must of course be made between the essential costs of conducting distributive operations, including a profit to the entrepreneur, and economically unjustified charges. The former cannot be avoided by any form of private enterprise; the latter are subject to reduction.

At the retail level, the large and medium sized independent stores seem to have no difficulty in meeting chain competition. According to the latest available estimate, there are 4,700 large independent supermarkets with annual sales of over \$300,000 per market; they made 15.3% of all independent sales in 1949. Moreover, the number and sales volume of independent stores in the middle brackets, often called "superettes," is steadily increasing, perhaps aided by a rising level of prices. In 1944 there were 16,500 independent food stores with annual sales between 100,000 and 300,000 dollars per store which accounted for 25.7% of all sales by independent food stores during that year; in

90. Bullock, *The Early History of the Great A & P Tea Company*, 11 HARV. BUS. REV. 289, 293 (1933). See also HOFFMAN, *op. cit. supra* note 24, at 70: "The most notable example of transportation waste and inefficiency in food distribution is to be found in the intricacy of cartage of perishable food products. The wholesale produce markets of most large cities are antiquated. * * * Buyers and sellers * * * are subject to costly delays and inconvenience. Many of the markets do not have direct rail connections, which adds to the cost of terminal cartage. The situation has been such as to provide an opportunity for associations of truck owners and drivers to impose costly regulations and restrictions upon the free movement of produce within large cities."

91. Bullock, *supra* note 90, at 293, 298. It should be noted that until the early nineties A & P sold only tea and coffee; see Bullock, *A History of the Great A & P Tea Company since 1878*, 12 HARV. BUS. REV. 59, 62 (1933).

1949 the number of stores in the same sales bracket had risen to 32,250 and their share of total independent sales to 34.0%. On the other hand, the number of independent stores with an annual sales volume below \$20,000 per store dropped from 229,500 or 22.6% of total independent dollar sales in 1944 to 194,550 or 11.1%, respectively, in 1948.⁹² Even stores with annual sales between \$20,000 and \$100,000 are encountering difficulties in keeping their share of the total available business, although, due to growth of the population, their actual sales continue to increase.⁹³ Here again, however, the results reflect changes in the classification of successful stores, caused by the rising price level, as well as loss of business by the smaller stores.

In this connection it is essential to point out also that mortality among retailers has always been high and that business failure may be attributable to causes other than competition. According to a survey conducted in the 1930's jointly by the United States Department of Commerce and the Yale Law School, well over one-half of all retailer bankruptcies were due to "inadequate capital, going into business on a shoestring," or "inadequate experience, such as retiring as a street car conductor and branching out as a grocery storekeeper * * * not realizing that it takes more than just the capacity to wrap up a neat package to run a store."⁹⁴ The Progressive Grocer reports that in 1948 there was a considerable turnover of owners among small stores and that some of the military veterans who acquired stores at the close of the war passed out of the picture.⁹⁵ It would certainly be unrealistic to overlook the fact that not every failure is caused by the chains and that many failures are definitely due to inefficiency. Indeed, the editor of The Progressive Grocer, a well-known friend of the independents, long ago conceded that tens of thousands of grocers who could or would not adjust themselves to modern business methods would constantly sink into oblivion and that "no amount of legislation can stop the carnage."⁹⁶

92. THE PROGRESSIVE GROCER (1950), *op. cit.* supra note 19, at 4, 5, 8, 14.

93. Independent stores with annual sales from \$20,000 up to \$99,999 accounted for 45.9% of total independent sales in 1944 and for 39.6% in 1949. Actual sales have increased for all stores from 1944 to 1949 except for the stores doing an annual business below \$20,000. *Id.* at 8.

94. Testimony by Dr. Julius Klein, *Hearings, supra* note 40, v. IV, 260-261. According to Dun and Bradstreet, percentages of failure due to competition were 3.9 in 1929 and 2.2 in 1930. The *Louisville Study* by Dr. Paul C. Olsen of the Wharton School of Commerce showed that "retail mortality rates have been fairly constant since 1890, and that individual merchants have been going out of business during the last decade in the same ratio they did 30 years ago, notwithstanding the growth of chain stores." Testimony by B. D. Silliman, representing the Kroger Co. and other chains, *Hearings, supra* note 3, at 186. See also Hutchinson and Newcomer, *Study of Business Mortality*, 28 AM. ECON. REV. 514 (1938).

95. THE PROGRESSIVE GROCER (1949), *op. cit.* supra note 19, at 5.

96. *Hearings supra* note 3, at 366. He added that the efficient grocers would survive and prosper. The president of the National Association of Retail Grocers

Monopoly or restraint of trade may be achieved on a local or regional, as well as national, scale;⁹⁷ hence, it is important to inquire into the position of the chains as a group, or any one of them, in particular areas. In 1928, prior to the first Census of Business, grocery chains claimed 70% of the total retail volume in New York and Philadelphia and over 50% in sixteen other large cities.⁹⁸ These figures may have been overstated, but the record of the recent prosecution of A & P for violation of the Sherman Act⁹⁹ contains more recent data of general significance. In the Company's Central Division, which in 1941 operated 647 stores in parts of six states, the 1941 business of 189 stores was compared to the total business in the towns where these stores were located as given in the 1939 Census of Business. The result was that eight of these stores in towns with only one store did more than 50% of the local business, the percentages ranging from 52.35 to 81.3. There were 15 towns (16 stores) where A & P had from 40% to 50% of the total business, 52 towns (55 stores) where it had from 30% to 40% of the total business, and 51 towns where 20% to 30% of all retail sales were made in A & P stores.¹⁰⁰ All of these towns were small, with populations ranging from 2,505 to

stated recently: "Success in the independent retail food field is a highly individual matter. It depends upon the retailer's business acumen, his love of his business and of hard work and his salesmanship. He needs certain protections, it is true, against unfair and discriminatory trade practices, but we could legislate every one of those things out of existence and he would still not be successful. Food retailers are their own secret of success and cannot be legislated to success by controls over their competitors." N.Y. Times, October 3, 1949, p. 27, col. 4. Dr. Julius Klein, *Hearings*, *supra* note 40, at 257, said: "I do hope that, in rigging up to protect the weak and the small, you very carefully eliminate the inefficient, because I think one of the real dangers is to have an umbrella rigged up to keep alive your small distributor who is not operating efficiently. In other words, I see no reason for burdening down the American Consumer for him." Representative Patman agreed with this. In addition, there is a question as to the need for many distributive establishments. HOFFMAN, *op. cit. supra* note 24, at 74, 75: "The number of grocery stores in the United States has increased out of all proportion to the increase in the population. * * * Part of this increase in store numbers is due to the fact that a larger proportion of the population now lives in towns and cities, so that consumers require more in the way of retail services. But it also signifies an uneconomic use of labor and capital resources, the cost of which will be reflected either in wider marketing spreads than would otherwise be necessary or in a proportionately lower rate of recompense to those engaged or employed in distributive enterprises."

97. *United States v. Yellow Cab Co.*, 332 U.S. 218, 226 (1947).

98. BAXTER, *CHAIN STORE DISTRIBUTION AND MANAGEMENT* 179 (1928). The cities named were Boston, Baltimore, Washington, Norfolk, Atlanta, Chicago, Seattle, San Francisco, Des Moines, Kansas City, St. Louis, Memphis, Detroit, Cincinnati, Dallas, and Los Angeles. The accuracy of this study, written by the Director of Research of the Chain Store Research Bureau, cannot be verified. BECKMAN AND NOLEN, *op. cit. supra* note 1, at 12, state that in some of the larger cities chains have more than 70% of the grocery business.

99. See note 7 *supra*.

100. *A & P Br. App.*, v. V, pp. 1, 8. The states are Kentucky, Ohio, New York, Pennsylvania, Maryland and West Virginia, *id.* at 8-10. See *A & P case*, 67 F. Supp. at 633.

37,651.¹⁰¹ No similar figures were offered as to the other divisions of A & P, but tabulations for each division and for the units within each division,¹⁰² show the following percentages of available business done by A & P in 1940: 9.22 in the Middlewestern Division, 13.99 in the Central Division, 11.87 in the Central Western Division, 11.52 in the Eastern Division, 9.00 in the New England Division, 8.45 in the Southern Division, and 9.20 in the Atlantic Division.¹⁰³ A & P claimed that during the first quarter of 1939 it did 11% of the available business in 67 cities throughout the country with populations from 50,000 to 75,000 inhabitants, and 13% of available business in 22 cities with 75,000 to 100,000 inhabitants.¹⁰⁴ During the same period A & P's business in Madison, Wis. (population 67,447) was 25.1% of the total business and in Rockford, Ill. (population 84,637) 29.4%.¹⁰⁵

In most parts of the country, of course, there are several food chains competing with each other and with the independents; hence the A & P data summarized above do not reveal fully the potential or actual threat of the chains to the independents' business in many places. In measuring this threat, the fact is pertinent that many food chains have grown to their present size through mergers and consolidations.¹⁰⁶

101. In the largest town on the list (Steubenville, Ohio), A & P did 31.3% of the business; in the smallest (Chagrin Falls, Ohio) A & P did 40.8%.

102. For a description of the Company's organization in divisions and units see A & P case, 67 F. Supp. at 632. For instance, the Middle Western Division operates retail stores in parts of Illinois, Michigan, Indiana, Iowa, Kansas, Missouri, Nebraska, Minnesota and Wisconsin. The units of that division had headquarters in Chicago, Milwaukee, Des Moines, Kansas City, and St. Louis but covered a territory much larger than that of the city after which it was named. Thus, the St. Louis unit included Peoria, Decatur and Springfield, Ill.; the Des Moines unit included Minneapolis and St. Paul, Minn., Omaha, Neb., and Rock Island and Davenport, Iowa. A & P Br. App., v. IV, 1, 12, 13.

103. *Id.*, v. IV, 11, 478; v. V, 11, 183, 345; v. VI, 150, 392.

104. A & P Br., p. 59.

105. A & P Br. App., v. IV, 12. See also *id.*, v. I, 313-320, containing tabulations of A & P's percentages of available business in each of the seven divisions and for the company as a whole during the first quarter of 1939. The highest percentage was obtained in towns with supermarkets having less than 10,000 population: 15% in New England, 20% in the Eastern Division, 21% in the Atlantic Division, 34% in the Southern Division, 42% in the Central Division, 33% in the Central Western Division. See text and note 326 *infra*.

106. The most important merger was that of Safeway Stores and MacMarr Stores in 1931 through acquisition of the latter's assets by the former. At the time of the acquisition the two companies each operated in 10 Rocky Mountain and Pacific States; in five of those states the two companies together controlled 25% of total grocery sales. "With this consolidation, the only competition in this territory between chains with national and sectional distribution was eliminated." SEN. DOC. NO. 4, *op. cit. supra* note 38, at 10, 21. Kroger purchased 38 other chains during the period 1908 to 1928 with an aggregate number of 2,141 grocery stores. All of these acquisitions, except two, were accomplished through the purchase of assets, *id.* at 9. National Tea Company, during the period 1923 to 1928, acquired the capital stock of 10 grocery chains with an aggregate number of 767 stores at the time of the several acquisitions, *id.* at 21. First National Stores resulted from the merger of four New England chains; see testimony by Charles F. Adams, then treasurer of First National Stores, *Hearings, supra* note 40 v. IV, 136: "These New England

Since section 7 of the Clayton Act placed restrictions only upon the acquisition of capital stock and not upon the purchase of assets, the question of imposing legislative limitations on the growth of chains to prevent injury to competition presented itself.¹⁰⁷ Representative Patman was reported in 1949 to be considering legislation to limit to 500 the number of retail stores which any one company might own or to freeze existing companies to their current number of stores.¹⁰⁸

The search for an answer to the questions of public policy presented by the growth of the chains induced the United States Senate in 1929 to direct the Federal Trade Commission to undertake the comprehensive investigation of both corporate and voluntary chains which has been cited frequently above. The Senate Resolution¹⁰⁹ refers to all the aspects of the problem previously mentioned. Accordingly, the Commission issued 33 reports dealing with all phases of chain store activities,¹¹⁰ including, of course, chains other than food chains. The Final Report, issued in 1934, summarized the findings of the entire investigation and has influenced decisively the course of events since the early thirties.

These events can best be characterized as a long drawn-out struggle between the independents and the chains which resulted in a series of legislative and forensic activities directed against the chains and in answering moves on their part. This contest is still being waged in the national arena, and it is impossible to foretell the outcome. At the time this is written the fifth round is under way. The several stages of this contest will be reviewed in the chapters that follow.

IV. CHAIN STORE TAXATION

A nation-wide movement to impose special occupation or license taxes upon chain stores was the first legislative result of the independent

groups operated in competition with each other on the four corners of an intersection, and interspersed with our stores were stores of outside general chain store organizations like the Great A & P, and it became very apparent to those who had studied economics that with the New England group paying 4 rents for 4 stores at the same location, with operations repeated three or four times to serve each of the groups, we would be at a disadvantage in comparison with the cost of distribution with a larger organization." Many of the smaller chain organizations (e.g. P. H. Butler, Dixie Home Stores, Food Fair Stores, Grand Union, Red Owl Stores) also resulted from mergers and consolidations; see MOODY'S INDUSTRIALS (1949). Only the A & P grew almost entirely by the opening of new stores; SEN. DOC. NO. 4, *op. cit. supra* note 38, at 9.

107. The FTC recommended an amendment of Section 7 of the Clayton Act to include the purchase of assets within the activities which may be prohibited by the Commission. *Id.* at 96. This has now been enacted: Pub. L. No. 899, 81st Cong., 2d Sess. (Dec. 29, 1950).

108. Wall Street Journal, September 29, 1949, p. 3, col. 4.

109. Sen. Res. No. 224, 70th Cong., 1st Sess. (1927).

110. These reports dealt, *inter alia* with Scope of the Chain-Store Inquiry, Sizes of Stores of Retail Chains, Growth and Development of Chain Stores, and Prices and Margins of Chain and Independent Distributors (selected cities).

merchants' fear of chain store competition.¹¹¹ The movement gained relative constitutional security in 1931 when the Supreme Court in *State Board of Tax Commissioners of Indiana v. Jackson*¹¹² sustained the constitutionality of an Indiana statute providing for an annual license tax graduated from \$3 on one store to \$25 on each store in excess of twenty stores. A few years later, in *Great Atlantic & Pacific Tea Co. v. Grosjean*,¹¹³ the Court upheld a Louisiana license tax on stores located in that State; the tax rate was to be measured by the total number of stores controlled by the chain both within and outside Louisiana. Similarly, municipal ordinances imposing such taxes have been upheld in several states.¹¹⁴

A detailed analysis of these tax measures is not within the scope of this study; but it is pertinent to note that these tax statutes were sustained on the ground that chain stores were so different from independently owned stores and, as a result, enjoyed such advantages over the independents, that a law singling them out for special tax treatment did not violate the equal protection clause of the 14th Amendment. In the *Jackson* case, Mr. Justice Roberts described these differences as resting

“ . . . in quantity buying, which involves the application of the mass process to distribution, comparable to the mass method used in production; buying for cash and obtaining the advantage of a cash discount; skill in buying, so as not to overbuy, and at the same time keep the stores stocked with products suitable in size, style and quality for the neighborhood customers who patronize them; warehousing of goods and distributing from a single warehouse to numerous stores; abundant supply of capital, whereby advantage may be taken of opportunities for establishment of new units; a pricing and sales policy different from that of the individual stores, involving slightly lower prices; a greater turnover, and constant analysis of the turnover to ascertain relative profits on varying items; unified and therefore cheaper and better advertising for the entire chain in a given locality; standard forms of display for the promotion of sales; superior management and method; . . . special accounting methods; standardization of store management, sales policies, and goods sold.”¹¹⁵

111. See, generally, Blakey, *Chain Store Taxation*, 19 TAXES 594 (1941); Feldman, *Legislative Opposition to Chain Stores and its Minimization*, 8 LAW & CONTEMP. PROB. 334 (1941).

112. 283 U.S. 527 (1931). Jackson was engaged in the business of selling groceries, fresh vegetables, and meats in 225 stores in Indianapolis.

113. 301 U.S. 412 (1937).

114. See Feldman, *supra* note 111 at 338.

115. 283 U.S. 527, 534, 535 (1931). The Court went on to say that cooperatives could not keep up with the chains because of the formers' lack of sufficient integration. Cf. *Great A & P Tea Co. v. Board of Comm'rs. of Camden*, 122 N.J.L. 47, 4 A.2d 16, 18 (1939), holding invalid a municipal ordinance requiring a \$10,000 license

The history of these tax statutes has further significance here because it affords a unique illustration of the political and economic arguments which the independents continued to present to the state legislatures in their fight against the chains and of the defensive measures devised by the chains. Thus the preamble to the Kentucky statute of 1940, after reciting some of the chain store advantages enumerated in the *Jackson* case, declared that these advantages and practices "tend strongly to create monopolies and restrain or limit trade" and that

" . . . the stability of the local communities is important to the welfare of the state, and small merchants are essential to that stability in that they necessarily maintain an intimate business relationship with local bankers, wholesalers, mechanics, artisans and farmers and take a greater interest in local charitable, religious, educational, cultural and civic affairs and thereby use their influences and resources for the purpose of creating a higher degree of loyalty to their community, state and institutions than can be expected of chain organizations and transients."

Hence, continues the preamble,

" . . . chain organizations should be permitted to continue their operations in this state only under regulations and conditions that will not permit them to destroy or unfairly impede the operation of the business of the independent merchants, and that this act is intended to offset in a measure the advantages and practices peculiar to the chain organization, so as to make the advantages of merchandising of chain organizations and independents more nearly equal in the interest of the general welfare. . . ." ¹¹⁶

The license taxes on chain stores were thus not designed to raise revenue for the state treasuries, but solely for the purpose of helping the independents in their fight against the chains. That fight was not limited to the state legislatures. In 1937 Representative Martin Dies of Texas introduced in the House of Representatives an amendment

fee of self-service food stores. The Court said: ". . . the payment of the tax in every instance could be effected only by substantially raising the prices to consumers, or by an exhaustion of capital. * * * The municipality may not require its residents to forego the exercise of an economy in order that a group of merchants, unwilling to take advantage of economy and management, may prosper."

116. Quoted in Blakey, *supra* note 111, at 594. Cf. the dissenting opinion by Mr. Justice Douglas in *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 318, 319 (1949): . . . "there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry."

to the District of Columbia appropriation bill providing for a federal chain store tax based on the number of stores in operation. The amendment passed the House but was rejected by the Senate. In 1938 Representative Patman introduced another federal chain store tax measure which died in the Committee on Ways and Means. It was introduced again in 1940, when extensive public hearings were conducted before a Subcommittee of the House Ways and Means Committee.¹¹⁷ At the opening of these hearings Representative Patman stated that interstate corporate chain stores were objectionable because they were monopolies, involved unreasonable concentrations of money and credit, destroyed local communities from which business was taken by absentee owners; and did not support local charities, churches, and schools as generously as local businessmen.¹¹⁸ The bill was again killed in committee when it was discovered that under its terms A & P would have been liable to pay a tax of \$523,620,000 on an annual net income of \$9,119,114.¹¹⁹ No further attempt at imposing a federal chain store tax has since been made. Significantly, chain store taxes were opposed by the Federal Trade Commission on the ground that

“ . . . to tax out of existence the advantages of chain stores over competitors is to tax out of existence the advantages which the consuming public have found in patronizing them, with a consequent addition to the cost of living for that section of the public.”¹²⁰

The movement for state license taxes¹²¹ on chain stores created a tremendous public relations problem for the chains and brought about widespread lobbying activities on their part to defeat such legislation wherever possible. The chains found it necessary, for example, to defend themselves against the charge that their absentee ownership is “turning us into a nation of clerks by depriving individuals of the opportunity of establishing their own businesses and, in that way, impairing individual initiative, since standardized merchandising oper-

117. *Hearing on H. R. 1*, 76th Cong., 3d Sess. (1940).

118. Blakey, *supra* note 111, at 602, 628.

119. *Id.* at 670.

120. SEN. DOC. No. 4, *op. cit. supra* note 38, at 91. The Commission also said: “That portion of the public which is able to pay cash and is willing to forego delivery service in return for the advantage of lower prices will be deprived of that privilege, generally speaking.”

121. In 1938, 20 states had effective chain store tax laws. BECKMAN AND NOLEN, *op. cit. supra* note 1, at 72. CCH TAX SYSTEMS 182 (11th ed. 1948), lists 19 states with chain store taxes. These are: Alabama, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Maryland, Michigan, Mississippi, Montana, North and South Carolina, South Dakota, Tennessee, Texas, West Virginia. In many other states chain store tax bills were introduced but did not pass. In 1939, 99 “punitive” chain store tax bills were introduced in 44 state legislatures; in 1941 there were 64 such bills in 23 states. A & P Br. App., v. I, 609.

ations tend to make of employees mere routine workers,"¹²² and that it has socially undesirable consequences for the communities in which their stores are located.¹²³ When a witness was told by a member of the House Committee on the Judiciary that local managers of A & P, Kroger, and other chains often refused to contribute to community chests and other civic organizations on the ground of lack of authority and that this had created resentment in many places, he replied:

"I am not prepared to deny that there are not some companies who have been niggardly and narrow along that line, entirely too small on it. But they, too, have come in a large extent to realize that that is a duty that they owe the community."¹²⁴

The efforts of the chains to tell their story to the public and to create, by their conduct, the greatest possible good will culminated in a number of developments. In 1937, for example, A & P employed public relations counsel.^{124a} In 1935 and 1936 public hearings were held before a special House committee under the chairmanship of Representative Patman for the purpose of investigating the organization

122. BECKMAN AND NOLEN *op. cit. supra* note 1, at 225. On p. 63 the same authors observe: "* * * chain stores suffer disadvantages in the lack of personal contact between their management and the public. * * * Even though those [chain store] workers, because of a desire for promotion or to retain their jobs, and with a certain amount of training and supervision, may produce some measure of efficiency, they, nevertheless, usually function with less effectiveness than do the owners of small business with their sharpened personal interest in customers. It is the age-old principle of self-interest stimulating individual initiative to produce effective results."

123. A typical example is the following colloquy in 1935 between the Chairman of the House Committee on the Judiciary and an official of the National Tea Company:

Chairman: Do you not believe that a man who runs his store . . . if he makes a good buy gets a kick out of it, or if he makes a bad deal, gets a lesson from it? He risks his own judgment. Do you not think that probably he has a better chance to develop to be a good citizen than a man who merely wraps up or exchanges merchandise that you put in his store, that you tell him where to put, and what to sell it for?

Witness: If you will line up in a classroom 30 average merchants and 30 average chain store managers, you will find that there is a greater amount of real knowledge of facts pertaining to their business in the minds of those chain store managers than there is in the minds of those individual operators . . . nobody progresses as a manager of one of our stores unless he develops a knowledge and an individuality for the business in which he is engaged."

Hearings, op. cit. supra note 3, at 136, 137.

124. *Id.* at 139. An officer of American Stores testified that each store manager is allowed to contribute to civic affairs up to \$25, and that he must get in touch with headquarters with respect to larger contributions; *id.* at 158.

124a. Carl Byoir and Associates. In 1938 Mr. Byoir told the Company's Middle Western Division "that the job a public relations counsel could do was no better than the performance and policy of the client and that all you could do was to make known what they did and that would reflect forward looking, liberal, social, responsible conduct or it would reflect conduct that would not build good reputation and the opportunities for such reputation building in big corporations was exactly the same as in the life of an individual * * *." He warned particularly against discourteous clerks, letting sellers cool their heels in the office, refusing to see suppliers and labor leaders. A & P Br. App., v. I, pp. 605, 606.

and lobbying activities of the American Retail Federation and of inquiring into the trade practices of big-scale retail and wholesale buying and selling organizations. The committee was organized as a result of a report in the New York Times of April 17, 1935, that the Federation was a "superlobby" formed to promote the business of chain stores throughout the United States and to influence members of Congress with reference to legislation affecting chain stores; it was also charged that the Federation was "designed to prevent small business from securing competitive opportunities equal to those enjoyed by corporations representing vast aggregations of capital" and that it was "attempting to force and coerce thousands of small retail merchants, dealing in the necessities of life, into the ranks of this superlobby, so that it may thereafter hold out . . . that it represents a completely centralized and authentic voice for all retailers of the nation."^{124b}

The evidence produced before the Patman Committee showed many efforts on the part of the chains to "gain friends and influence people." Not only did the chains retain attorneys in the various states to represent their interests in legislative matters, but appeals to the public were stressed, because "chain store operators only control a few votes" and legislators "will swing their decision in favor of those who have the largest voting power." Therefore, it was essential "to educate all our customers, and all outside our regular trade, as to the value of the chain store; its savings to the people due to the system under which it operates, its help to the community in the form of the large amount of taxes which it pays and the amount the chains are giving to local charities." This was to be done through pamphlets, signs in the stores, newspaper articles and advertisements, and contact by employees with the public.¹²⁵

"Undue influence and propaganda," however, could have been found not only on the side of "powerful groups representing vast aggregations of corporations and capital."^{125a} For example, in 1934 a motion picture, *Forward America*, was produced by anti-chain store forces which proclaimed that the chains were responsible for the impoverishment of America, that restrictions on chains would increase property values, and that chains brought about social and economic

124b. H.R. REP. NO. 2373, 74th Cong., 2d Sess. (1936); Report by the Special Committee on that part of House Resolution 203 Relating to the Organization and Lobbying Activities of the American Retail Federation.

125. Letter to Food and Grocery Chain Stores of America, Inc., from Market Basket Stores, Olean, N. Y. relating to campaign against anti-chain store bills pending in New York Legislature. *Hearings, op. cit. supra* note 40, v. II, 10, 11. When the chain store tax laws were submitted to a referendum of the voters the chains incurred "political expenses" to organize the voters and bring their friends to the polls. *Id.*, v. IV, 108.

125a. H.R. REP. NO. 2373, *supra* note 124b, at 8.

ruin.^{125b} In any event, ten years before the enactment of the Federal Regulation of Lobbying Act of 1946, the battle between independents and chain stores provoked a suggestion for such regulation.^{125c}

V. THE ROBINSON-PATMAN ACT

The Robinson-Patman Act of 1936, amended Section 2 of the Clayton Act of 1914. The original provision forbade economically unjustified price discrimination which threatened competition.¹²⁶ It was designed to correct

“ . . . a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country * * *.”¹²⁷

The purpose of the amendatory act of 1936, on the other hand, was quite different. It was stated to the House Judiciary Committee by Representative Patman, the Act's principal sponsor, to be,

“ . . . to give all of the independent merchants of this country the same rights, privileges, benefits, and opportunities as the larger chains or concerns receive, and no more. In other words, it is a bill . . . to deny special privileges and benefits to a few, and to give equal rights to all and special privileges to none.”¹²⁸

The “privileges” referred to were the benefits derived by the chains from “special discounts and secret rebates and bonuses that give one retailer an advantage over the other retailer.”¹²⁹

Mr. Patman introduced to the Committee the attorney for the United States Wholesale Grocers' Association who had drafted the bill¹³⁰ and who explained that so long as the chains “have this large-

125b. *Hearings, supra* note 40, v. II, 133. The picture was described by a chain store official as being full of misleading statistics and as showing “a general parading of such people as Barbara Hutton and others.” A picture of President Roosevelt was used in such a way as to create the idea that the Federal Government had embarked on an anti-chain store drive. *Id.* at 132.

125c. See note 124b *supra*.

126. 38 STAT. 730 (1914).

127. H.R. REP. No. 627, 63rd Cong., 2d Sess. (1914). See Freer, *Introduction to Section 2, ROBINSON-PATMAN ACT SYMPOSIUM* 5 (N.Y. State Bar Assn. 1946).

128. *Hearings, supra* note 3, at 4.

129. *Id.* at 8.

130. *Id.* at 13. The president of the same Association told the Committee that the bill was designed “to curb that mighty force of potential monopoly in American merchandising that is today casting its scourging influence throughout the length and breadth of the Nation.” *Id.* at 29, 30. The Association was said to represent only 20% of all wholesale grocers. See *Hearings, supra* note 4, at 139. See also *United States v. Southern Wholesale Grocers Ass'n* 207 Fed. 434 (N.D. Ala. 1913).

quantity purchasing power, they remain free to exercise that buying power and to abuse it until they are properly restrained.”¹³¹ He submitted a memorandum containing specific questions and answers with respect to the purposes of the proposed legislation. The crucial parts of this memorandum were as follows:

“Why is the bill aimed at abuses of buying power rather than of selling power?

Answer: Because buying power is the source of the evil. The seller is merely an innocent victim compelled usually in self-defense to grant the concessions demanded. The greater his selling power the less is his compulsion to do so, for the less does he then depend upon the particular business of the buyer demanding the concession.

“Would the bill destroy the chain stores?

Answer: It would not destroy them unless they depend for their existence upon these unfair concessions and discriminations. So far as they are able to perform the sound economic function of bringing the necessities . . . of life from the producer to the consumer on a basis of equality with independent merchants, it leaves them with the same freedom as independent merchants to pursue that legitimate occupation; but it aims to deprive them of any advantage of position to which their ability to serve does not entitle them.

“Why does the bill pick out quantity prices, brokerage and advertising allowances for suppression?

Answer: Because these are the three favorite disguises under which large buyers wring their exactions.

“Is it sufficient to prohibit discriminations?

Answer: . . . The evil at which this bill is aimed has arisen by virtue of concentration of power in the buying field and its ability to compel the seller to grant a few of his customers profitable favors at the cost of the rest. So long as each seller is compelled to treat all customers alike he can safely be left free to adjust the other details of his business. . . . He must not, however, be permitted to bleed part of his customers for the benefit of the others, and if any of his customers have the power to compel him to do so, that power constitutes the evil against which this bill is directed.

“Why does the bill visit its prohibitions upon the manufacturer or other seller if the evil arises principally on the buying side?

Answer: Because the law must help the manufacturer to resist the unfair demands of the large buyer. Every price is made

131. *Hearings, supra* note 3, at 15.

upon the balancing of the gains against the losses which it entails. If in weighing such demands the manufacturer must add on to the loss side his liability for violation of this law, he is so much the less likely to grant what is unfair and what he could not afford to grant all of his customers alike."¹³²

A majority of the witnesses who appeared at the hearings were representatives of the food industry. It is clear that the relationship between the food chains as purchasers and their suppliers and the alleged unfair advantages obtained by the chains through "the duress of their buying power"¹³³ are at the heart of this legislation. These "advantages," each dealt with specifically by the Act,¹³⁴ must now be considered.

1. Advertising Allowances

In 1944 the Federal Trade Commission examined in detail the problem of "Advertising as a Factor in Distribution." The Commission found that in order "to obtain greater local advertising of their brands or to control its character, many manufacturers enter into agreements with their dealers under which they share with the dealer the cost of approved local advertising."¹³⁵ This cooperative arrangement frequently takes the form of a payment by the manufacturer to the distributor which is known as an "advertising allowance." Such allowances, together with the selling services sometimes rendered to buyers for resale by sellers, are dealt with in sections 2(e) and 2(f) of the Act.

As far as the food industry is concerned, advertising is an important factor in the distribution expense of both manufacturers and retailers.¹³⁶ In addition to direct advertising in national magazines,

132. *Id.* at 30, 31. Section 2(f) of the Robinson-Patman Act makes it unlawful for any person "knowingly to induce or receive a discrimination in price which is prohibited by this section." Obviously, this provision applies to the buyer. See Howrey, *The Buyer and a Prima Facie Case*, and Forkner, *The Significance of Section 2(f)*, ROBINSON-PATMAN ACT SYMPOSIUM (1948) at 87 and 66. Section 2(f) has been criticized on the ground that the buyer has no access to the proof. *Ibid.*

133. *Hearings, supra* note 3, at 71. The quoted phrase was coined by the Secretary of the National League of Wholesale Fresh Fruit and Vegetable Distributors.

134. 49 STAT. 1526, 15 U.S.C. 13a-13f, 13a-13c.

135. FTC, *op. cit. supra* note 9, pt. V, 2.

136. The percentage of advertising to total distribution costs of representative groups of manufacturers of various food commodities in 1939 was as follows: Cereals 25.98%, coffee 25.44%, biscuits and crackers 15.96%, flour 34.49%, canned fruits and vegetables 18.53%, meats 8.32%, sugar 5.28%. *Id.* at 8. The Commission also found advertising expenditures per dollar of net sales and per dollar of total operating expenses by 43 grocery chains amounting to 0.66 cents and 3.20 cents, respectively; the corresponding figures for a group of 156 independent grocery retailers were 0.73 cents and 3.24 cents. *Id.* at 18.

on the radio, and in the newspapers,¹³⁷ many food manufacturers, such as canners, flour millers, meat packers, and cereal and cracker manufacturers, furnish the retail trade with booklets and leaflets or demonstrators for their products, aid in the preparation of window and store displays, and share or assume the cost of dealer advertising.¹³⁸ The business reasons for such assistance were explained by the Federal Trade Commission in the following terms:

"In *dealer* advertising, interest in permanently increasing the sale of a particular manufacturer-owned brand often is secondary to attracting trade to the advertiser's own place of business. Therefore, dealer advertising of particular well-known brands often takes the form of using the brand as a price leader, the featuring of which will be discontinued as soon as it has served its leader purpose. Advertising by retailers, especially, which features any one manufacturer's well-known brand or brands is likely to be sporadic and determined by the dealer's interest rather than the manufacturer's interest in a continuous and consistently followed plan to keep his product before the consuming public.

"To meet this situation, the manufacturers of many nationally advertised products have developed numerous plans under which they share the cost of local advertising of their products by distributors. The purpose of these plans is to obtain closer coordination of the manufacturer's national advertising with that of distributors, to increase the continuity of dealer advertising, to influence and control the nature of dealer advertising, to increase the space devoted to advertising the manufacturer's product directly to consumers, and to take advantage of the low space rates offered by advertising media to local merchants. These cooperative advertising plans are directed particularly to joint or cooperative advertising with retailers who are in direct contact with consumers." ¹³⁹

137. The Commission reported that national magazines absorb the largest percentage of advertising expenditures of meat packers and canners; manufacturers of cereal and flour prefer radio advertising; and makers of biscuits, crackers, and coffee concentrate on newspaper advertising. *Id.* at 10.

138. *Id.* at 26, 27.

139. *Id.* at 16. Since these plans are designed to swell the advertising funds of the retailers, wholesalers usually do not participate. *Id.* at 17. There are also cooperative advertising plans among the members of voluntary grocery chains. *Id.* at 19. On p. 40 the Commission states: "Consumer advertising at the point of sale, backed by a close tie-up between the advertising done and the local dealer's effort, gives the largest results in sales of products. Advertising in cooperation with dealers stocking the goods has the advantage from the manufacturer's viewpoint of giving a closer tie-up than is attainable by national advertising by the manufacturer alone. It also has the further advantage of obtaining greater space and more frequent featuring of the manufacturer's brands at minimum cost, because in any newspaper local space rates offered to retailers are lower than space rates for national * * * advertising which include provision for the advertising agency's commission. Newspapers also give local advertisers preference over national advertisers in the location of space in their pages. Thus, by augmenting the dealer's advertising fund the manufacturer benefits through obtaining closer dealer relations, better location and visibility for his advertising retailer's good will."

The practice of paying such "advertising allowances" to retailers raises at least two difficult problems. First, there is the problem of checking whether the manufacturer actually receives value for the money expended;¹⁴⁰ without actual performance of specific services by the retailer the allowance would be an indirect secret rebate. Second, there is the likelihood that manufacturers may discriminate in granting such allowances in favor of large buyers, either voluntarily or because of the power of these buyers.¹⁴¹ Complaints of unfair discrimination have been voiced persistently by smaller retailers who claim to be unable to obtain such allowances,¹⁴² and, by reason of such inability, to suffer in the competitive struggle. Significantly, the Code of Fair Competition for the Retail Food and Grocery Trade, which was adopted by the industry pursuant to the National Industrial Recovery Act of 1933, contained, in addition to a general prohibition of discrimination in selling price,¹⁴³ a provision designed to prevent acceptance of unfair advertising allowances, as follows:

"[N]o food and grocery retailers shall accept payment from a wholesaler or manufacturer for a special advertising or other distribution service (a) except in pursuance of a written contract explicitly defining the service to be rendered and payment for it; and (b) unless such service is rendered and such payment is reasonable and not excessive in amount; and (c) unless such contract is separate and distinct from any sales price and is not designed to or used to reduce a sales price; and (d) *unless such payment is equally available for the same service to all competitive retailers in the same competitive market*; and (e) unless a copy of each such contract is retained on file for a period of one year. In order to investigate alleged violations of this Code the Administrator may require a food and grocery retailer to report such contracts made by him and/or to produce a copy thereof for inspection."¹⁴⁴

140. *Id.* at 38.

141. *Id.* at 19, 20, 39.

142. FTC, *op. cit. supra* note 9, pt. V, 41: The Commission found that complaints of unfair discrimination "are based on the claim that any gain in volume of business accomplished through the advertising cooperatively done by manufacturers and large stores consists of two parts; namely, sales to new users of the cooperating manufacturer's product and sales to old users whose purchases are shifted from stores with which users customarily had dealt, to stores which are able to carry on more extensive display advertising because of allowances granted by manufacturers."

143. NRA CODES OF FAIR COMPETITION, v. IV, 457 *et seq.* (1934). A similar provision was contained in art. VII, § 2 of the Code of Fair Competition for the Wholesale Food and Grocery Trade, approved January 4, 1934 (NRA CODES OF FAIR COMPETITION, v. V, 1, 10): "Discrimination in prices or terms of sale against purchasers of the same quantity under the same conditions of delivery and credit services for the same class of buyers * * * is prohibited. Locality or sectional price discrimination which is designed or effective to unduly injure competitors is further prohibited."

144. *Id.*, art. IX, § 1(f) (1934). Emphasis added.

This provision did not satisfy those who charged that chains received enormous sums of money as advertising allowances, while similar benefits were denied to the competitors of the chains. The business considerations which induce manufacturers to make such payments to the chains were explained to the Patman Committee by Mr. Traver Smith, then vice-president in charge of grocery operations of Standard Brands, Inc. That company does business in every state of the Union; it manufactures such well-known brands as Fleischmann's Yeast, Chase & Sanborn Coffee, Royal Baking Powder, and others. The company has bought "cooperation service" from those customers whom it considered capable of rendering a worthwhile promotional service.¹⁴⁵ In 1935 it had such cooperation contracts with A & P, Kroger, First National, American Stores, and National Tea Company, covering several of its products. Payments made to A & P under these contracts amounted to \$299,892, while Kroger received \$44,468; payments to the other three chains were considerably smaller.¹⁴⁶ The Company also made such contracts with independent stores,¹⁴⁷ but these seem to have been of decidedly minor significance. With respect to one of the Company's principal products, Fleischmann's yeast, sold then at 2.5 cents per cake, the Company paid advertising allowances only to A & P and Kroger. The testimony explaining the reasons for limiting allowances on this product to those two out of a total of 250,000 customers is so enlightening with respect to the problem of discrimination between large and small buyers as to require close scrutiny.

Mr. Smith stated that with a 2.5-cent item advertising allowances could not be given throughout the trade and that such allowances could be considered only "on a large-scale operation." Since A & P and Kroger commanded the largest market in promoting the sale of yeast, \$12,000 was paid monthly to A & P and \$6,000 per year to Kroger

145. *Hearings, supra* note 40, v. IV, 7, 10. Mr. Smith insisted that this was not discrimination but payment for a service. He described the usual practice as follows: "Our agent would go to a certain customer that is selling our coffee, for example, and he does not believe that that customer is selling as much coffee as he should. . . . He will say to that customer: Why don't you give us a little feature here? We might mean mention in the newspaper advertising, mention in his handbills, a poster on his window . . . a counter display; an island, possibly mention in his store, or some other cooperation. . . . The customer says, Well, I will do that, but it will cost you \$5.00 or whatever the case may be. If our agent thinks it is worth \$5.00, he will write out a contract and agree to pay \$5.00 for that service. . . . If that service is not given—you see we have our own men going into these stores every four days, and if that service is not given, no payment is made. If the service is given, then the payment is made on the basis of this contract." *Id.* at 11.

146. *Id.* at 34. First National Stores received \$3,400, American Stores \$11,600, and National Tea Co. \$9,135.

147. *Id.* at 24. No figures were given.

for advertising, in addition to quantity discounts. No other chain or independent received similar treatment.¹⁴⁸ Mr. Smith denied that this was discriminatory,

“ . . . because if there were any other account that could give us the same sort of service, we would do the same thing for them. They [A & P and Kroger] give us distribution in 14,000 or more stores; they allow us to put up package displays, as we call them, with little signs; because yeast is usually tucked away in a refrigerator where nobody can see it. I have seen large posters that they have gotten out, about . . . 6 feet by 2 to 3. They have mentioned it at frequent intervals in their newspaper advertising, and they have really given us a very comprehensive service to try to promote the sale of our yeast.

“*Mr. Patman:* . . . Now if it is worth a dollar a month from A & P, why is it not worth a dollar a month a store to the independent merchant; and if it is worth that to A & P to render that service, why is it not worth that to any other chain, and why do you not offer them the same contract?

“*Mr. Smith:* I do not know what account other than those two could advertise our yeast in the newspapers. I do not know any other account in the United States, or any other two accounts in the United States, that could give us the distribution that we get from them. . . . I do not think there is another account in the country that could give us the service that A & P gives us. . . . We could not afford to make any payment to the individual grocer for cooperation on yeast, because the payment would probably be more than we got for the entire transaction on the yeast.”¹⁴⁹

The witness then explained that on deliveries to A & P stores “our man picks up a ticket . . . and the tickets are all sent to the central office and turned over to A & P and they give us the money for it.” Thus Standard Brands does not have to issue statements to each store, but collects its accounts from one place only, the headquarters office. This results in a “tremendous” saving in the cost of doing business with A & P,¹⁵⁰ as compared to the cost of doing business with independents; such savings represent an additional inducement toward the buying of cooperation services from mass volume distributors.

The testimony quoted above shows clearly that, at least from the point of view of the large manufacturer, payment of advertising allowances is considered worthwhile only when made to a buyer who controls very large markets.¹⁵¹ Smaller buyers could not give to the manu-

148. *Id.* at 15.

149. *Id.* at 16, 17

150. *Id.* at 30.

151. See *Hearings before Subcommittee of House Judiciary Committee on H.R. 4995, 74th Cong., 2d sess. pt. 2, 322 (1936)*: “There are some organizations that believe

facturers the "same service" in advertising. Hence, it is obvious why the Code provision insisting only on equal availability of advertising payments "for the same service" to be rendered by distributors was attacked as ambiguous and unsatisfactory. Was a display or promotion service in 10 stores the "same service" as a display in 1,000 stores? If not, a manufacturer might be permitted to share the advertising costs of his large chain buyers, and leave his independent customers to pay theirs out of their own pockets without assistance.¹⁵² Inevitably, those independent retailers who could not obtain advertising allowances considered themselves as victims of unfair discrimination.¹⁵³ This feeling was shared by old-line wholesalers, who were generally considered ineligible to receive advertising allowances because they did not control retail distribution outlets.¹⁵⁴ Consequently, they insisted on the requirement now to be found in Sections 2(d) and (e) of the Robinson-Patman Act that such payments must be made available "on proportionately equal terms" to all customers. Thus, "if one man buys \$100,000 in goods and should be allowed \$1,000 for advertising purposes, and another buys \$10,000 in goods, he ought to be allowed \$100 for advertising."¹⁵⁵

Grocery manufacturers were opposed to this provision. Their representative contended that some reasonable advertising relationship with his retailer customers was vital for the small manufacturer and that the provisions of the NRA Code were sufficient to prevent subterfuge; he argued that, "from a practical business aspect," it was "crazy" to compel a small manufacturer who makes an advertising payment to A & P to make proportionate payments to all his other customers, because he may go bankrupt in the process.¹⁵⁶ Moreover, many retailers are not able to contribute enough to the promotion of the manufacturer's product to qualify for advertising allowances;¹⁵⁷ giving them a

that a counter display in every one of the A & P stores * * * maintained for one week at a certain spot near the cash register is worth so much money to them." Chairman Summers commented: "A man goes into a store and sees an attractive soap display and he thinks he has to buy a cake and take a bath."

152. Memorandum submitted by the attorney for the U.S. Wholesale Grocers Association, *Hearings, supra* note 3, at 226, 227. See also *Hearings, supra* note 151 at 464.

153. See *Hearings, supra* note 40, v. IV, 36, 37: In reply to a questionnaire sent by the Jellico Grocery Company of Jellico, Tenn., to 200 independent retailers in Kentucky, Tennessee, and Florida listing the advertising allowances paid to A & P, each addressee answered that he had received no allowance.

154. *Hearings, supra* note 40, v. 3, no. 1, pp. 73, 74 (Testimony by A.S. Iglehart, vice-president of General Foods, president of General Foods Sales Co.).

155. Senator Logan, 80 CONG. REC. 3231 (1936).

156. *Hearings, supra* note 151, at 442.

157. Dr. Nathan Isaacs, Professor of Business Law, Harvard Graduate School of Business Administration, commented: "The rule assumes that all advertising allowances are subterfuges. Some of them may be. But may not a company that spends

claim to "proportionate" payments might thus, in effect, induce manufacturers to discontinue the practice of cooperative advertising or to try to keep such agreements secret.¹⁵⁸

Evidently the authors of the Robinson-Patman Act intended a solution which should reflect the "central purpose" of the Act, "to preserve equality of opportunity."¹⁵⁹ The solution, however, does not in terms reach the problem of actual performance of advertising services by merchants who receive allowances for them. Prior to the Act neither those who paid nor those who received advertising allowances attempted, for example, to check as to whether or not the newspaper space paid for by the distributor was equivalent to the allowance paid to the distributor.¹⁶⁰ Since this is a "quick moving, high-pressure business," such checking is often impracticable.¹⁶¹ Hence some chains expended more for advertising than they received by way of allowances from their manufacturers¹⁶² and others spent less, leaving a substantial surplus resulting from such advertising contracts.¹⁶³

At this point, the problem is affected by the basis upon which payments for advertising are calculated. Counsel for A & P prepared in 1940 a "Manual on the Robinson-Patman Act" which was intended "to provide Company officials throughout the country with general information" about the Act;¹⁶⁴ in that Manual they took the seemingly correct position that it would be proper for a manufacturer to

millions for advertising its products enter in good faith into an agreement for window space for its display in a store? Window space costs money and has a rental value. Not all windows are equally well placed for advertising. Some may be worthless and others worse—in other words actually detrimental to the goodwill of the product occupying a "proportional" space in them. By no means all the persons who become interested in a product through an advertisement conspicuously placed buy the product where they first see it. Now it may be that the danger of subterfuge is so great that advertising in which the manufacturer and retailer cooperate should be abolished, but the proportioning scheme, unless it works as a prohibition, is a compromise that has no merits at all." *Hearings, supra* note 4, at 31.

158. Mr. Smith of Standard Brands, Inc. told the Patman Committee: "We try to plug every single hole in our office so that information regarding one customer will not . . . be passed to some other customer." *Hearings, supra* note 40, v. IV, 22. See also Govt. Br. (D.C.), 340-343, as to A & P's policy of keeping advertising allowances confidential. On pp. 232, 233 of the same brief is set forth a letter from A & P headquarters describing the effect of the public disclosure of advertising allowances granted to A & P before the Patman Committee. Several companies called A & P and stated that they had "some tall explaining to do in trying to pacify their other customers because of giving us so much."

159. *Hearings, supra* note 151, at 454.

160. Testimony of A.S. Iglehart, General Foods Co., *Hearings, supra* note 40, v. III, no. 1, p. 59.

161. Testimony of the president of Kroger Co., *id.*, at 13.

162. Testimony of Charles F. Adams, Treasurer, First National Stores, *id.*, v. IV, 133: "In 1934 we received \$342,000 from manufacturers for advertising services, but we spent \$797,683 for advertising."

163. *Id.*, v. III, 59. A & P received \$2,000,000 more for advertising than it paid for advertising.

164. A & P Tr., v. 79, following p. 18,065.

pay \$100 for advertising services which are worth that much to him, even though it would cost the retailer only \$75.00 to perform such services, provided only that the same arrangement was available to all customers of the manufacturer.¹⁶⁵ Certainly, the fact that advertising rates to local stores are generally lower than to outside advertisers is a powerful incentive for manufacturers to buy promotional services from A & P and other retailers whose services are considered advantageous.¹⁶⁶ A & P considers any profits accruing to it from advertising allowances as "a part of the net profit from store operations" which it allocates to its units and individual stores.¹⁶⁷ Such profits, however, are not available exclusively to the chains; even before the Robinson-Patman Act was passed, many voluntary chains received advertising allowances and there were at least some manufacturers who had sales promotion contracts with independents.¹⁶⁸

The theory of "equality of opportunity" for large and small buyers expressed in sections 2(d) and (e) of the Act does not touch directly the problem of vague, indefinite and ambiguous advertising contracts; in this respect the provision of the NRA Code which required an explicit definition of the service to be rendered was much more realistic. Actually some of the "sales promotion service plan contracts" examined by the Patman Committee omitted specific statements defining the duties of the advertiser.¹⁶⁹ Similarly the A & P standard advertising

165. *Id.*, at EEE (question No. 90 of the Manual).

166. *Hearings, supra* note 40, v. III, 73.

167. A & P Br. App., v. I, 96, 97: "Advertising allowances are payment for the point of sale services" and as such are "merchandising profits attributable to the operation of the Units and the individual stores."

168. Mr. Iglehart told the Patman Committee that, in 1935, General Foods had 1714 sales promotion service contracts in effect; of these 324 were with corporate chains, 547 were with cooperative chains, and 843 were with independents. *Hearings, supra* note 40, v. III, 71. See also *id.*, v. IV, 207-211, 299-302.

169. The contract used by General Foods stated: "The distributor agrees to promote and give full support to the above listed features by the specific use of prominent newspaper space in papers regularly used, prominent handbill space, floor displays, window displays, counter displays, window posters. Distributor shall provide preferred merchandise listing in all stores, adequate shelf stocks, and prominent shelf display at all times of all products named above; and shall prohibit store personnel from placing obstacles in the way of the purchase of any of said products which a customer orders by brand name by substituting, or urging the acceptance of, any other brand. The distributor agrees to perform the foregoing advertising and merchandising program, and the advertiser agrees to pay the distributor therefor the sum of \$_____ . . ." *Id.*, v. III, 68. The vice-president of General Foods testified that his company had a record of the services rendered by every distributor, including A & P, with whom such a contract had been entered into. *Id.* at 83, 84. But when asked why no specific obligation of the customer was put into the contract, he answered: "I could not answer why we do not do that." *Id.* at 79.

The contract between General Foods and Kroger, dated Jan. 15, 1935, was, by contrast, much more specific:

Kroger agrees to give the following advertising service to the company: Eight advertising services as follows in 4300 stores: One 2-column inch newspaper advertisement, one window sign, one counter or table display and sign. (1) Each of

allowance form which was used for several years after the Robinson-Patman Act became law reads as follows:

"The Distributor obliges itself to render certain Special Advertising and Special Distribution Service supplementing the National, Sectional and Local Advertising of the Advertiser, which special service includes periodic newspaper advertising, handbill advertising, periodic store displays with Advertiser's merchandise in a prominent position readily accessible to consumers, and periodic notifications to branches of support to be rendered Advertiser's products at point of sale, for which the Advertiser agrees to pay the following advertising allowance for such service between the period commencing on 19 and expiring on 19 . . ."¹⁷⁰

A & P consistently refused to "be pinned down to any specific sized ad," or to permit its suppliers to "dictate the details of our merchandising job."¹⁷¹ There were, however, certain rare contracts marked "special" which carried a definite and exact performance on the part of A & P,¹⁷² but the great majority of all contracts were not so marked and were "drawn broadly, with no definite performance required," although "some general support is a legal requisite to justify our acceptance of the allowances."¹⁷³

At the trial of A & P for violation of the Sherman Act, defendant Bofinger, a vice-president, expressed his personal opposition to advertising allowances in the following terms, "Well, personally, I never felt they were offered on an equitable basis. I don't think we have yet devised a yardstick by which you can measure advertising allowances. It is almost impossible." He contended, however, that A & P "cannot give up these advertising allowances, or promotional allowances, if the

the 8 advertising services to include 2 products at feature prices. (2) Products to be featured to be mutually agreed upon 60 days in advance of the particular advertising service in which they are to be featured; 4300 stores to receive necessary instructions for complete store and advertising tie-up. * * * It is understood by Kroger that the above consideration (\$34,400) is equally available for same service to all competitive retailers in the same competitive market." *Id.* at 88. Safeway Stores used a form which in terms gave it wide discretion as to the advertising services it was to perform and provided that, "Safeway agrees that it . . . will treat the consideration paid to it by virtue of this agreement as income from advertising and not as a reduction in the cost of said merchandise and that it will not permit its retail or wholesale organizations . . . to reflect said consideration in their retail or wholesale price structures." *Id.*, v. IV, 346, 347. (Emphasis added)

170. Quoted in Govt. Br. (D.C.), p. 344, and in A & P Br. App., v. II, pp. 167, 168.

171. A & P Br., pp. 96, 97.

172. *Id.* at 97. Such contracts were concluded only after A & P had "exhausted all possibilities of effecting a deal otherwise." See Govt. Br. (D.C.), p. 352.

173. *Ibid.* In a circular letter in 1937 the Company said: "We are primarily concerned with showing where, when and that a performance was given, rather than the extent of such services. . . ." A & P Br. App., v. II, p. 163.

trade doesn't do the same thing," because A & P must maintain its "competitive position."¹⁷⁴ In the meantime, the Company tried to get its suppliers "to raise the ante"¹⁷⁵ for advertising, while reserving to itself the right to determine how much advertising it would do.¹⁷⁶

The Robinson-Patman Act thus did not come clearly to grips with certain of the practical problems presented by advertising allowances.¹⁷⁷ It has been said that the Act impliedly requires that the services to be rendered should be defined and agreed upon rather than left to the unfettered discretion of the advertising agent.¹⁷⁸ In so far as the value of advertising services under varying circumstances cannot be measured accurately in money, as Mr. Bofinger of A & P thought, it is possible to conclude that all payments of advertising allowances are inherently inequitable and should be prohibited.¹⁷⁹ Other forms of

174. A & P Tr., v. 88, pp. 20,335-6, 20,342. Judge Lindley added that he felt the same way and that this was "a practice which is full of temptations, full of snares and traps. . . ."

175. Govt. Br. (D.C.), p. 351.

176. It should be noted that A & P's advertising allowances were negotiated through headquarters and through local units. The latter arrangement was apparently considered less favorable to A & P; in 1937 the Director of Central Purchases issued the following instructions to buyers:

"Advertising arrangements, especially with the larger companies when accomplished by Headquarters, result in the local representative visiting the units, and exhibiting advertising forms on which detail of advertising is published, such as window displays, store displays, advertising, etc., and it appears that the local representatives take it upon themselves to get as much advertising as they can.

"The point that I want to bring out is, that unless you have something definite from this office, in the way of prescribed advertising, displays, etc. *you are to use your own judgment, based on the popularity of the product in your territory, as to just how much advertising you will do. Let it be understood that making an advertising arrangement means that we will advertise the product in keeping with the support we feel it is entitled to, in the interest of our business*, but under no circumstances are we to be misled by what may be presented to you by local representatives." Emphasis added. A & P Br. App., v. II, p. 207.

Some of the contract forms used for local advertising arrangements were more specific than the standard form quoted in the text. *Id.* at 199-206, particularly the "Floor Space" and "Sign Space Rental" agreements.

177. One question, whether income from advertising allowances is treated as income from retail store operations (A & P method, see note 167 *supra*), or as separate income from advertising (Safeway method, see note 169 *supra*) would seem to matter little. Safeway, however, asserted a self-imposed obligation not to use its advertising revenues for the purpose of price cutting. A & P expected "a reasonable profit from advertising over and above the cost of printing and distribution of materials." A & P Br. App., v. II, p. 211.

178. Dunn, *Sections 2(d) and (e)*, ROBINSON-PATMAN ACT SYMPOSIUM, *op. cit. supra* note 127, at 65.

179. Apparently the draftsman of the Robinson-Patman Act (see text at note 130 *supra*) contemplated such an outcome under some circumstances. He said: "Now, if he (the seller) wants to pick out particular customers, which he may legitimately want to do sometimes—he may have an advertising appropriation limited in size, not large enough to spread among all his customers, yet which he wants to spread among selected communities over the country for the purchase of newspaper advertising, bill board posters, or any other form of local advertising—what are his alternatives? He must either hire someone locally to do that, or pay a salaried representative and send him into the community from without." *Hearings, supra* note 3, at 218.

cooperative advertising such as the furnishing of leaflets and of assistance in the preparation of window displays unaccompanied by any payments of money may not give rise to the same objections; where the manufacturer renders the service, instead of paying money, the principle of proportionate equality may be more practicable.¹⁸⁰ Moreover, the rendering of specific services instead of the payment of money by manufacturers would not allow large buyers to exact payments for promises of undefined "general support." Presumably, the buyer's purpose of giving "general support" is implicit in any purchase of merchandise for resale.

2. Brokerage

Section 2(c) of the Robinson-Patman Act,¹⁸¹ prohibiting the payment of brokerage by a seller or buyer in interstate commerce to the other party or his representative, is again directed against large buyers of merchandise. Its purpose was described by the House Committee report in the following terms:

"The true broker serves either as representative of the seller to find him market outlets, or as representative of the buyer to find him sources of supply. In either case he discharges functions which must otherwise be performed by the parties themselves through their own selling or buying departments, with their respective attendant costs. . . . Whichever method is chosen, its cost is the necessary and natural cost of a business function which cannot be escaped. It is for this reason that, when free of the coercive influence of mass buying power, discounts in lieu of brokerage are not usually accorded to buyers who deal with the seller direct since such sales must bear instead their appropriate share of the seller's own selling cost.

"Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. But the positions of buyer and seller are by nature adverse. . . . The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume."¹⁸²

180. Expensive services or those requiring a large store, such as the furnishing of a demonstrator, present problems, however.

181. 15 U.S.C. §13c (1946).

182. H.R. REP. No. 2287 (1936) 74th Cong., 2d Sess. 14, 15. SEN. REP. No. 1502, 74th Cong., 2d. Sess. 7 (1936) stated that a brokerage payment would lead

Here again the Robinson-Patman Act continued what the NRA Codes had started. The Code of Fair Competition for the Wholesale Fresh Fruit and Vegetable Distribution Industry¹⁸³ provided that "no person shall accept compensation from both buyer and seller nor represent buyer and seller in the same transaction . . . without the knowledge and consent of both buyer and seller"; the Code also prohibited the payment of brokerage by the seller to an agent of the buyer. The Secretary of the National League of Wholesale Fresh Fruit and Vegetable Distributors urged the House Committee which considered the Robinson-Patman Act to revive and perpetuate this Code provision. Said he:

"During the present depression by virtue of the large volume required for chain outlets, it has been an easy matter to get hard-pressed shippers and producers to acquiesce in an arrangement which imposed on them a brokerage fee on cars bought for the chain retail stores. This has been an exploitation of the shippers' and producers' necessities, the more insidious because, on the face of the transaction, it carries the consent of the seller. This is, as we see it, exactly the type of unfair trade practice which . . . ought to be eliminated. It presents a case wherein an agency primarily interested in retail selling exacts tribute from producers in the first instance, and by virtue of the revenues obtained through these exactions is, in the second instance, able to reduce retail prices when and where such a reduction gives it a competitive advantage.

"To carry the chain of effects a step further, the low retail price of the chain store must be met by the independent competitor. The competitor puts pressure on the wholesaler and insists on buying at a wholesale price that will enable him to sell at retail prices as low as his chain competitor. The result is a depression of wholesale prices, with the tendency of all wholesale prices in the competitive market to drop at least the margin of the tribute exacted by the chain-interest buyer in the first instance when he required the shipper or producer to pay a selling brokerage."¹⁸⁴

to corruption of the brokers' function and should not be permitted "where in fact, if a 'broker', so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller." As to the section and its operation see Austern, *Section 2(c)*, ROBINSON-PATMAN ACT SYMPOSIUM, *op. cit. supra* note 127, at 37, 38. See also 54 HARV. L. REV. 670, 673 (1941); 47 YALE L.J. 1207 (1938).

183. NRA CODES OF FAIR COMPETITION, art. VII, § 2 (1934).

184. *Hearings, supra* note 3, at 77, 78. The same witness also explained the problems of the fresh fruit and vegetable field as follows: "(a) Wholesale handlers in a given market, either individually or collectively, may set up a brokerage agency through which they do their buying. The shipper or producer finds that in order to sell in this market or to these wholesalers they must deal through the brokerage agency and pay a selling brokerage fee. (b) Wholesale handlers, having an interest in retail outlets for which they in fact buy, interpose a brokerage agency between the

For obvious reasons, the National Food Brokers' Association was even more emphatic in its demand for what is now Section 2(c). Its members feared that if manufacturers were permitted to continue their practice of paying brokerage to buyers or to agents of buyers, the independent food broker would be "starved out of existence" and with him would go thousands of small manufacturers who depend on the independent broker as their only sales organization.¹⁸⁵ The Association specifically opposed the suggestion that brokerage should be defined on a "functional basis." Such a treatment of the problem would presumably sanction the payment of brokerage to wholly owned subsidiaries of corporate chain buyers. Since the parent would get the benefit of the brokerage payment, the functional approach would defeat the very purpose of prohibiting the payment of brokerage to the buyer, directly or indirectly.¹⁸⁶ The Association argued that

" . . . when a creature of the buyer disguised in a broker's clothing approaches the seller, the seller knows who he is. This creature has back of him the coercive power of mass buying. The rebate, called brokerage, is merely a poor attempt to make it look legitimate because it is called by a legitimate name. A deceptive practice such as this should be stamped out whether practiced by the small or the large. It is our conviction that this form of unfair discrimination lends itself more than any other to rackets . . . and any law which does not prohibit it . . . would be the loophole through which all price discrimination could pass."¹⁸⁷

shipper or seller and the wholesale agency. The brokerage agency collects from the shipper or seller a selling brokerage fee. (c) Large retail interests organize a subsidiary brokerage agency, which in fact buys for the parent retail interest but charges the shipper or seller a brokerage fee.—Each of these arrangements is calculated to exploit the producer and shipper by exacting tribute under the guise of a selling brokerage and to give the beneficiaries of this revenue a competitive price advantage by the amount of the brokerage fee." *Id.* at 76.

185. *Id.* at 65. The Association declared that the payment of brokerage to the buyer is "particularly vicious and insidious" because the concession to the buyer is usually given secretly; ostensibly the buyer pays the full list price.

186. *Hearings, supra* note 151, at 511, 512.

187. *Id.* at 513. The draftsman of the Act, Mr. Teegarden, emphasized that the bill leaves anyone free to select his broker or to dispense with his services, but that "it would meet the evil were large buyers to let it be known to manufacturers that they will not purchase except through their own subsidiary brokerage concerns. Brokerage . . . is a distinct economic function in itself. Every seller faces the problem of finding a market. Every buyer faces the problem of finding a source of supply. Either of them can do it by maintaining their own selling or their own buying departments with a consequent cost; or, if they find it more economical, they can engage a private independent contractor who makes it a business to keep his contracts with various sources of supply in various markets. And where that function is performed, brokerage is proper. But where A & P or another firm comes up to a manufacturer's door and says, 'Here I am, a large buyer,' that manufacturer does not need to engage a broker to find him a market. The brokerage function is not present there. And when A & P says 'I will buy from you if you sell me through my brokerage concern and pay the brokerage which I will drain off in dividends,' the brokerage function is being prostituted for the reaping of an unfair price concession. . . . That is the evil which this brokerage clause would prohibit." *Hearings, supra* note 3, at 217, 218.

The legislative history clearly indicates that A & P was deemed to be the principal target of the brokerage provision. A & P had since 1923 operated brokerage offices through salaried purchasing agents who, prior to 1936, were often called "brokers"; these offices were located "in the center of the sources of supply of processed foods—mostly canned goods that were customarily sold through brokers."¹⁸⁸ They collected large brokerage fees from their suppliers on articles not sold on a list price basis, that is, merchandise which does not bear some nationally known and advertised brand.¹⁸⁹ These brokerage fees, which in the year preceding the enactment of the Robinson-Patman Act amounted to \$2,500,000,¹⁹⁰ were collected by A & P on the theory that its agents rendered substantial services to the sellers—such as exchange of information as to market conditions, advice as to improvement of quality and sizes of containers, furnishing of traffic information as to the routing of commodities, and assistance in relieving threatened gluts of commodities, which were similar to the services customarily rendered by brokers.¹⁹¹

A & P encountered its first difficulty in 1932 when the Institute of American Meat Packers objected to the collection of 1% brokerage on meat products by an A & P buyer. The Institute's Committee on Interpretation and Appeal declared in an opinion that this practice was a violation of the Code of Trade Practices of the American Meat Packing Industry¹⁹² and the Secretary of Agriculture, pursuant to the Packers and Stockyards Act,¹⁹³ issued a cease and desist order against the seller who had paid the brokerage to A & P's agent.¹⁹⁴

188. A & P Br. App., v. II, p. 38.

189. *Id.* at 38, 39.

190. *Id.* at 38.

191. *Great A & P Tea Co. v. FTC*, 106 F.2d 667, 670 (3rd Cir. 1939).

192. The Committee said: "The payment of an allowance by a packer to a buyer, either secretly or without making the same payment to all other buyers of similar quantities under similar conditions is a violation of Rules A and C of the Code. The calling of such special allowance a 'brokerage' would not prevent the special allowance from being a violation of the Code, but on the contrary where the subterfuge of 'brokerage' was used as a means of obscuring the price, the payment may also be brought under Rule B of the Code. . . . The real test of whether a special allowance is in fact a brokerage or is a disguised form of rebate and concession to the buyer depends upon the fact of whether the payment is retained by an independent broker or directly or indirectly reaches the buyer himself. The creation of any agency to receive the so-called 'brokerage', or even the organization of an independent company for that purpose, would not alter the situation if the agent actually received the money for the buyer as his principal, or if the corporation were owned and controlled by the buyer." A & P Br. App., v. II, pp. 42, 43.

193. 7 U.S.C. § 181 *et seq.* (1946). Section 192 makes it unlawful for any packer or live poultry dealer to "engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce." Section 193 establishes the procedure before the Secretary of Agriculture for suppressing violations of the Act.

194. The order was upheld in *Trunz Pork Stores, Inc. v. Wallace*, 70 F.2d 688 (2d Cir. 1934).

With respect to all products other than meat A & P continued its practice of collecting brokerage until the enactment of the Robinson-Patman Act in June 1936. At that time the Company's brokerage offices were notified by Headquarters "in an informal sort of way" that "hereafter they would remain in operation, but they would be known as the company's field buying offices. They would remain as buyer, but not as broker."¹⁹⁵ Simultaneously, the Company decided to switch to what it called "net buying." Mr. Charles W. Parr, in charge of all field buying offices, explained that

" . . . when the Robinson-Patman Act became effective, . . . we discontinued the entire brokerage set-up and changed our whole system of bookkeeping, but we told the field buyers, who had been operating on the brokerage basis that it would be satisfactory for them to buy merchandise at the lowest possible price; that they must not accept any brokerage. As far as we know, they have dealt with the suppliers on that basis. *We had no access to the suppliers' books, so we don't know what they sold others—we didn't know what they were paying; . . .*"¹⁹⁶

In a letter to the field personnel dated July 7, 1936 Mr. Parr advised:

"Pending a more definite interpretation of the brokerage clause . . . it has been felt advisable on purchases where it has been customary for us to receive brokerage, to put these on a net basis. . . . We find in practically all cases . . . that the seller is willing to reflect the amount of brokerage in the price. Therefore, it becomes important to notify the Sales Department in each unit to take this into consideration in making retail prices and arriving at gross profit rates, and point out that instead of the usual brokerage credits which are distributed from Headquarters it will be necessary to maintain a correspondingly higher gross profit rate. . . . Take Feed for instance. Assume that we have been buying this at \$40.00 per ton on which we receive 5% brokerage. The new price will come through at \$38.00 per ton, but the warehouse will not get a brokerage credit. . . ."¹⁹⁷

One of the Field Office heads replied:

"This is going to be quite a problem as many of the canners are of the opinion that they cannot quote us a price taking into consideration the brokerage. However, a great many of the accounts . . . agreed upon this method, while others were of the opposite opinion. . . . *Where canners or processors refuse to*

195. A & P Tr., v. 2, p. 270. Strict instructions were given not to use the term "broker" under any circumstances. A & P Br. App., v. II, p. 66.

196. A & P Tr., v. 3, pp. 285, 286; A & P Br. App., v. II, p. 62. Emphasis added.

197. A & P Tr., v. 3, pp. 288, 289; A & P Br. App., v. II, p. 63.

*deduct the amount of the brokerage from his unit price we will just have to pay the market until such time as we can get around this phase of the bill in some other method.*¹⁹⁸

The Defendant Vogt, in charge of the Milwaukee buying office, reported to Headquarters on August 21, 1936:

*"Now taking the canned goods line, there are no small number of sellers doing business with us on a net basis and not a few times this net basis is even lower than the brokerage where the order has favorable terms and a fair sized quantity. Most important, they are not making the sales to other people and as you might surmise in not a few cases they are not inclined and often do not have the time to offer the same proposition to our competitors. However, they do feel if ever they are called upon to substantiate their position they will have no trouble in doing it by using the excuse of market fluctuations and difference in quality and on both these points quite sure you will concur with us it is going to take half the population of the United States to police anything of this kind."*¹⁹⁹

Apparently in accordance with this suggestion, all orders to suppliers were to be stamped with the following notation:

*"This order is given and to be accepted with the understanding that the prices herein named, having in mind market fluctuations and conditions, will be accorded to all purchasers on proportionately equal terms."*²⁰⁰

This notation was recommended by counsel as assuring "prima facie protection . . . in the event of an unwitting violation of the Robinson-Patman Act."²⁰¹ Some sellers who refused the discount in lieu of brokerage were subjected to considerable pressure. For instance, in September, 1936, Vogt instructed his staff in the Milwaukee Field Buying Office that suppliers who refused to sell on a net basis should not be given any business except with his approval;²⁰² when Phillips

198. A & P Tr., v. 11, p. 2053; Govt. Br. (D.C.), p. 236. Emphasis added. Some suppliers agreed to hold the brokerage for A & P "until our Headquarters officials figure out a practical method for this to be paid legally." A & P Br. App., v. II, p. 69.

199. A & P Tr., v. 11, pp. 2096, 2097; Govt. Br. (D.C.), pp. 236, 237. Emphasis added. In another letter Defendant Vogt stated: "The list price and trade discounts [on powdered summer drinks] are well established, therefore, these manufacturers are unwilling to change this. Therefore, we are issuing contracts and sellers in turn billing at the list price less the trade discount and then less 5% without saying what it is, although seller, buyer, and ourselves know it is the former brokerage." Emphasis supplied. A & P Tr., v. 11, pp. 2070, 2071; Govt. Br. (D.C.), p. 238.

200. A & P Br. App., v II, p 76; Govt. Br. (D.C.), p. 242.

201. A & P Br. App., v. II, p. 76.

202. A & P Br. App., v. II, p. 69.

Packing Company agreed to net pricing after refusing any allowances for several weeks, Headquarters commented that this change of mind was due to the fact that Phillips Packing had been cut out entirely and that "there is nothing which brings the manufacturer around like putting him on the bench."²⁰³ When Stokely Brothers, a prominent canner, announced that it would cease paying any brokerage, Parr wrote to Vogt that any canner who declines either to work on a net basis or to pay brokerage in escrow into a neutral depository pending clarification of the brokerage provision should "be placed on the Unsatisfactory List."²⁰⁴

Several important economic arguments were asserted in justification of A & P's position. Perhaps the strongest of these is well expressed in a letter written from Headquarters in September, 1936, to the Rochester buying office regarding the relationship with a supplier of oysters; in that letter Mr. Parr stated that, until clarification of the brokerage clause, brokerage could not be accepted even though the seller might agree to allow it, but

" . . . it does seem to us . . . that since they are in a position to sell these oysters direct to you without having to employ an outside broker, they actually save the amount of brokerage in their selling expense, and they should be willing to reflect this brokerage rate in the billing price of the merchandise."²⁰⁵

In other words, the Company contended that since sellers who use brokers must pay them commissions, the seller saves the cost of brokerage when dealing with A & P after its agents have sought him out; and this saving should properly be reflected in the price charged to A & P. The proviso in Section 2(a) specifically allowing price differentials making due allowance for differences in selling cost should thus be read into Section 2(c). The same argument was vigorously presented in the House hearings on the Robinson-Patman bill by a representative of American Stores, fourth largest food chain on the basis of its 1948 sales, who opposed the bill on the ground that it would interfere with the policy of purchasing directly from the producer and of "eliminating all possible and unnecessary intermediate ex-

203. A & P Tr., v. 11, pp. 2123, 2124; Govt. Br. (D.C.), p. 244.

204. A & P Tr., v. 12, p. 2159; Govt. Br. (D.C.), p. 245. Defendant Bofinger denied on the witness stand that any supplier ever was put on an unsatisfactory list for refusing to grant allowances, discounts, or preferences of any kind. A & P Tr., v. 88, p. 20335; A & P Br. App., v. II, p. 70. A considerable amount of brokerage was actually deposited in escrow accounts and refunded to the suppliers after a cease-and-desist order by the Federal Trade Commission had been sustained by the Courts note 209 *infra*). *Id.*, v. II, pp. 76, 77.

205. A & P Br. App., v. II, p. 75.

pense.”²⁰⁶ To the same effect was the testimony of a vegetable grower in Pennsylvania whose direct sales to chains amounted to 2/5 of his total sales. He said that the chains performed exactly the same service for him as independent brokers, and that even with the deduction of brokerage the net prices paid to him by the chains were higher than his net returns obtained from sales to independents.²⁰⁷

A & P's interpretation of the brokerage clause was rejected by the Federal Trade Commission, which issued in January, 1938, a cease and desist order requiring the Company to cease making purchases of commodities “at a so-called net price, and every other price, which . . . is arrived at . . . by deducting from the prices at which sellers are selling said commodities to other purchasers thereof any amount representing . . . brokerage currently being paid by sellers to their brokers on sales of said commodities made for said sellers by . . . their said brokers.”²⁰⁸ On appeal the courts sustained the Commission's interpretation that Section 2(c) was intended as a separate and absolute prohibition of an inherently unfair practice and that the other provisions of the Act were not applicable to the situation covered by that Section.²⁰⁹ As a result of this holding, not only are brokerage allowances intended as camouflage for rebates prohibited, but all such allowances are illegal per se, regardless of the rendition of services to the seller equivalent to those customarily performed by brokers and regardless of the saving of the customary compensation to independent brokers. In this respect the Act designed to eliminate discrimination in favor of chain buyers forces them to pay prices which often include an element of selling costs not in fact incurred by their suppliers. By the same token, the provision secures a higher net return to sellers on direct sales to chains than on sales to other customers where the seller must rely on brokers.²¹⁰ While the provision affords some protection to the business of the independent broker and the merchant who buys through him by prohibiting the collection of brokerage by chain buyers and the consequent lowering of their costs,²¹¹ it also tends to impose on the consumer the cost of marketing through brokers even when brokers are not needed and to make more difficult the lowering

206. *Hearings, supra* note 3, at 148, 149, 152.

207. *Id.* at 123.

208. Great A & P Tea Co., 26 FTC 486, 513 (1938).

209. Great A & P Tea Co. v. FTC, 106 F.2d 667 (3rd Cir. 1939), *cert. denied*, 308 U.S. 525 (1940).

210. See McNair, *Marketing Functions and Costs under the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334, 344, 345, (1937).

211. According to *Business Week*, August 10, 1940, p. 36, col. 1, enforcement of the Robinson-Patman Act has improved the position of brokers; the National Food Brokers Association estimated an increase in gross earnings of members in 1939 ranging from 2% to 25% over 1938.

of consumer prices.²¹² It would seem that this was precisely what its sponsors desired.²¹³

Although the brokerage provision was intended as a weapon against corporate chains, its terms are, of course, not limited to such chains.²¹⁴ It has, in fact, been repeatedly invoked against voluntary and cooperative chains which, as we have seen, were organized by independents for the purpose of meeting the competition of the corporate chains.²¹⁵ One of the leaders among these cooperatives, the Red & White Corporation, described in some detail in Chapter II of this study, formerly furnished advertising and promotional services to its stockholders and their affiliated retail stores; the cost of such services was defrayed from funds derived from brokerage fees paid by sellers upon purchases made by Red & White for the account of its stockholders. These funds helped to increase consumer demand for products sold under the Red & White label and, to that extent, benefited the manufacturers who regularly supplied the Red & White Corporation. Red & White was directed by the Federal Trade Commission to cease and desist from accepting brokerage fees from its suppliers.²¹⁶ Thus the Act's protection to the food broker as an independent business-

212. Austern, *supra* note 182, at 46, comments: "One may wonder whether the ultimate economic results will be sound; whether the forced election between being a broker or a buyer was necessary; whether driving sellers to elect entirely to use brokers or entirely to sell direct promotes competition; whether the ultimate effect may not be to divert large buyers into their own manufacturing operations; and whether, since any discount is an element in price, the consumer is not bearing the cost of protecting one type of distribution." See also Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 GEO. WASH. L. REV. 511, 536-538 (1940).

213. See text at notes 184-187 *supra*.

214. Although the Robinson-Patman Act was enacted for the sole purpose of curbing the abuses of buying power by the chains, the term "chain" does not appear in the Act which is so framed as to apply to all business in interstate commerce.

215. Section 4 of the Robinson-Patman Act provides that "nothing in this Act shall prevent a cooperative association from returning to its members, producers or consumers the whole, or in any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the Association." It was held in *Quality Bakers of America v. FTC*, 114 F.2d 393, 400 (1st Cir. 1940) that § 4 does not authorize a cooperative association of 70 wholesale bakers to accept for the benefit of its members brokerage fees and allowances from sellers of flour; § 2(c) was said to be "a distinct and complete provision in itself making illegal the giving or taking of commissions or their equivalent."

216. *Red & White Corp. v. FTC, Modern Marketing Service v. FTC*, 149 F.2d 970 (7th Cir. 1945). For criticism of Section 2(c) of the Act see Oppenheim, *Should the Robinson-Patman Act be Amended?* ROBINSON-PATMAN ACT SYMPOSIUM *op. cit. supra* note 132, at 141, 145-147. Professor Oppenheim says on p. 145: "In retrospect, it seems clear that Congress intended to strike at the evils of rebates in prices through bogus brokerage, special discounts disguised as advertising allowances, and fictitious services and facilities. Congress should have drafted subsections (c), (d) and (e) in terms of clear-cut negative prohibitions of these specific abuses which all sides agreed should be eliminated. Instead, Congress ineptly used language of such scope and vague tenor as to create the danger that the baby will be thrown out with the bathwater."

man and as an integral part of the old-line "multiple middlemen system" was emphasized.²¹⁷

After A & P had lost its legal battle against the Federal Trade Commission concerning Section 2(c),²¹⁸ it devised a new scheme to assure for itself the lowest possible buying prices from its suppliers. It decided "to move in an orderly fashion toward procuring our supplies of merchandise through sellers who do not employ brokers. This would remove the hazards of the Federal Trade Commission, or any other body, interpreting a lower legal price which we might pay for an article as one in which was reflected the customary brokerage . . ." ²¹⁹ Accordingly, each field buyer and purchasing director was required to send to his suppliers a letter outlining the Company's program of compliance with the decree enforcing the cease and desist order in the following terms:

"The decree provides, in substance, that the Company may not purchase at any price, nor receive any discount or allowance, which reflects in whole or in part brokerage concurrently being paid by sellers on their sales to other buyers through brokers. *It does not prohibit the Company from receiving from sellers prices, discounts or allowances reflecting savings OTHER THAN BROKERAGE.* Thus, savings resulting from the large quantities which this Company purchases may still legitimately be passed along by sellers to the Company, as may also savings in the cost of handling, billing, labelling, shipping, credit, rejections, delivery, manufacture, telephone, telegraph, salesmen's commissions, salaries and travel, samples, and similar items. . . .

"Because the . . . decree applies solely to brokerage savings, it does not affect the Company's dealings with exclusively direct sellers who use no brokers. A number of sellers, for exam-

217. Business Week, Aug. 10, 1940, p. 34, col. 2, said with respect to §2(c) that "food brokers thought that provision of the law would be the salvation of their business, and they hailed with particular satisfaction the . . . ruling which finally compelled the A & P to forego brokerage kickbacks."

218. See note 209 *supra*; the cease and desist order became effective in January, 1940, when the Supreme Court denied A & P's petition for certiorari.

219. From memorandum of staff conference in New York, Jan. 31 and Feb. 1, 1940, A & P Br. App., v. II, pp. 81, 82. A & P's "Manual on the Robinson-Patman Act" stated that "in order to minimize the possibility of violating the decree the Company will endeavor to purchase as much as possible from sellers who use no brokers at all in preference to sellers who use brokers." *Id.* at 85. The Manual also stated that savings in salesmen's commissions, unlike savings in brokers' commissions, may still be passed along to the buyer; the difference between a broker and a salesman was defined as follows: "The chief difference is that a salesman is an employee of the seller while a broker is an independent businessman. The details of a salesman's activities would be subject to the control of the seller while those of a broker would not. Social security and applicable unemployment compensation taxes would be paid by the seller on the income of a salesman but not on that of a broker. A salesman would share in any sickness, accident or retirement benefits offered generally by the seller to his employees, while a broker would not . . ." A & P Tr., v. 79, pp. N and O following p. 18,065.

ple, sell to their small accounts entirely through their own staffs of salesmen. On sales to this company through its field buying offices where no salesmen are needed, such sellers realize substantial savings in cost which they are free to pass along to the Company. Sellers who handle their small accounts through brokers, however, are prevented from giving the Company one of the most important savings in cost which they experience in using the Company's field offices, namely, the saving in brokerage. . . .

"Since this Company's interest is to purchase its goods at the lowest price permitted by law, so that it may in turn sell at reasonable prices to the consumer, it will purchase as much as possible from sellers who use no brokers in preference to sellers who use them. The Company will *not*, however, enter into any express or implied contract with any seller binding the seller directly or indirectly to cease dealing through brokers, or agreeing to deal or refrain from dealing with any seller depending upon whether or not he uses brokers. The Company simply takes this occasion to announce its purchasing preference, leaving each seller free to conduct his business as he pleases."²²⁰

The last paragraph of this circular letter was designed to avoid "trouble with the Department of Justice" and "triple damage suits by brokers"²²¹ under the Sherman Act.

We shall see later that, in spite of the advice of caution from its lawyers, A & P was not successful in avoiding the charge of boycott, coercion, and restraint of trade in connection with its policy of switching to direct-selling suppliers. In any event, A & P was aware that, by embarking on that policy, it moved away from the Scylla of the Robinson-Patman Act only to approach the Charybdis of the Sherman Act. Regardless of its legality under the circumstances, the Company's course of action suggests weaknesses in the Robinson-Patman Act as an instrument for the protection of small business. Foreseeing the precise tendencies thus evidenced, a minority of the House Judiciary Committee had opposed adoption of the Act on the ground that the result "would absolutely be a development of a few manufacturers specializing in quantity orders and thereby growing into a position to

220. A & P Br. App., v. II, pp. 91, 92. The Company's legal department laid down the following rules: "(1) Under no circumstances enter into any agreement or contract, either oral or in writing, with any seller whereby he agrees to eliminate brokers from his distributing set-up. (2) Send immediately to Headquarters any letter received from a seller relating to the question of eliminating brokers, so that the same can be checked by the Legal Department. If the seller makes any statements such as 'I promise to eliminate brokers, provided the A & P will assure me of its business' or statements of similar import, we must take immediate steps to tell him that we are not entering into contracts on this subject with anyone. (3) In talking to sellers about going on an exclusively direct-selling basis, confine your statements to a simple explanation of the Company's policy. . . ." *Id.* at 104.

221. *Id.* at 105.

be able to deliver to mass distributors their products constantly more cheaply. Not only would their competitors fall by the wayside by the score, but the small merchant would be faced by stiffer and stiffer competition until he too might be driven out of business, because he would have to place his orders with those manufacturers who had elected to handle small-lot business, and who would accordingly have higher operating costs. . . .”²²² Four years later, after its defeat in its legal battle with the Federal Trade Commission, A & P voiced the similar expectation that “with exclusively direct selling and selling through brokers, two price levels will develop of which the direct will average lower. . . . Therefore, apart from any interest our company may have, it seems obvious that all capable buyers will seek the lower level.”²²³ Another Company official predicted that “the difference between the two [price levels] will be considerably more than the brokerage rate itself, because the direct sellers are going to save and be able to pass on to their customers a great deal more than mere brokerage. *In addition to the brokerage differential, exclusively direct sellers will have for their customers only large concerns* who buy in quantity lots, pay promptly, and immediately put the merchandise into consumption.”²²⁴ Although the accuracy of this prediction is doubtful,²²⁵ it would seem that Section 2(c) could not eliminate all bargaining advantages of large buyers, especially their ability to enter into processing for themselves.

3. Price Discrimination Generally

As noted above, the general prohibition in Section 2(a) of the Robinson-Patman Act against price discrimination which threatens competition was deemed necessary by the sponsors of the Act to enable independent buyers to compete with large chain buyers on a basis of equal opportunities. At the beginning of the hearings before the House Judiciary Committee Representative Patman stated that, while he was in favor of competition “on services and prices,” the manufacturer should not be allowed “to sell to the corporate chain at a loss and make the independent pay such a price that he has to pay that loss and at the same time meet the competition with the chain.”²²⁶ This has

222. H.R. REP. No. 2287, 74th Cong., 2d Sess., pt. 2, 17 (1936).

223. Govt. Br. (D.C.), p. 261; A & P Tr., v. 28, pp. 5848, 5849.

224. Govt. Br. (D.C.), p. 261; A & P Tr., v. 28, p. 5850.

225. See Business Week, *supra* note 211. At that time the National Food Brokers Association reported that less than 50 of the 3,500 fruit and vegetable canners of the country had shifted to some form of direct selling as a result of A & P's policy.

226. *Hearings, supra* note 3, at 11. Mr. Patman also stated that manufacturers are “coerced, intimidated” into giving special prices to A & P and Kroger and “independents have got to make it up by paying higher prices.” *Id.* at 194.

been called the theory of "necessary recoupment"; in brief, that selling to Buyer A at a lower price than to Buyer B requires the seller to raise the price to the latter in order to recoup the loss or the reduction in profits which is incurred in selling to the former *unless* the difference in price reflects only actual cost savings. Although the theory is questionable,²²⁷ the Government's successful prosecution of A & P for violation of the Sherman Act and its pending civil suit against that company are, in part, based on this very same charge of recoupment;²²⁸ in launching the civil suit aimed at the break-up of A & P the Attorney-General stated that such a break-up would benefit the public by lowering prices because A & P's practices "increase the cost of groceries in competing stores and in other areas, since such grocers must pay a higher price than would be the case if A & P did not buy on discriminatory terms."²²⁹

By permitting price differentials based on actual cost savings Section 2(a) makes cost one of the standards by which the legality of prices is to be determined.²³⁰ The tremendous difficulties of determining "cost" for any given transaction will be discussed later in Chapter VI of this study.²³¹ It should be noted, moreover, that, especially over short periods, prices are determined by factors of supply and demand which have little relation to cost. It has been said that in a buyer's market, for instance, prevention of discriminatory price reductions may impair "the entire process of price competition."²³² Hence, en-

227. For criticism of the theory see Adelman, *Effective Competition and the Anti-Trust Laws*, 61 HARV. L. REV. 1289, 1331 (1948). The basic question is whether a supplier of a chain at reduced prices can actually raise prices to other buyers in a competitive market.

228. "A & P not only benefits by discriminatory lower purchase price, but the supplier giving the preference must charge A & P's retail competitor a price sufficiently higher than would otherwise be the case to absorb the loss or reduction in profit incident to his sales to A & P." Govt. Br. (D.C.), p. 1075. See Adelman, "The A & P Case, A Study in Applied Economic Theory," 63 Q.J. ECON. 238, 251, 252 (1949). The Court of Appeals for the Seventh Circuit, in affirming the conviction of A & P said: ". . . [T]he supplier had to make his profit out of his other customers at higher prices, which were passed on to the competition A & P met in the retail field." A & P case, 173 F.2d at 83.

229. Department of Justice Press Release, September 15, 1949.

230. See Hamilton, *Cost as a Standard for Price*, 4 LAW & CONTEMP. PROB. 321 (1937). The provisions against price discrimination which cannot be justified by cost differences first appeared in the NRA Codes for the wholesale and retail grocery trades. See note 143 *supra*.

231. See Hamilton, *supra* note 230; Camman, *Relation of Costs to the Determination of Selling Prices*, 66 J. ACCOUNTANCY 7, 14 (1938): "The cost of a specific transaction involving a particular lot of a certain manufactured product cannot be computed with precision, because too many elements of cost remain fixed and do not vary with volume. Even assuming a reasonable presumption as to volume, there would remain debatable questions about the allocation of indirect costs as between different products or different ventures."

232. EDWARDS, MAINTAINING COMPETITION, REQUISITES OF A GOVERNMENTAL POLICY 162 (1949).

actment of the Robinson-Patman law was opposed by many who feared that it would lead to rigid and higher, instead of lower, prices;²³³ indeed, Representative Celler of New York, in the minority Committee report, objected to the bill on the ground that "it would try to make equals of unequals" and that it was "as natural as the setting sun . . . to sell more cheaply to the large buyer than to the smaller one." He contended that this saving, commonly called "quantity discount," would be so restricted as to become valueless and favored legislation directed only at unfair or predatory practices "so long as the consumer is not made the victim."²³⁴

The business advantage of selling to large-scale buyers was said, from the seller's point of view, to be obvious even without regard to specific cost savings, because "a steady, large order, particularly an advance order, often pays the freight for thousands of small orders."²³⁵ For instance, the president of a Pennsylvania farmers' cooperative serving both chains and independents told the House Committee during the Hearings on the Robinson-Patman bill:

"I might say that of the two systems of marketing, the independent stores and the chain stores . . . there is no question but what the chain-store system . . . is the best for us. We sell through one organization. We send our bill in there for all of their stores, into one office, and we get a check from them six days after we send the bill in there. It is a cash business. And it is a real market for our milk products."²³⁶

When asked whether he was not interested in preserving the independent dealer, the same witness replied that he was interested in "the system that will provide the lowest cost of distribution and move the most farm products."²³⁷

Another advantage of supplying large-scale buyers which is particularly pertinent to the food chain store problem was described by

233. See, for instance, testimony by Professor McNair of the Harvard Business School, *Hearings, supra* note 4, at 2-15, and Charles G. Daughters, Institute of Distribution, *id.* at 75-84. Professor Isaacs of the same School observed that "this is an act to check competition—the competition of the stronger buyer. . . ." *Id.* at 29. Mr. Wheeler Sammons, Institute of Distribution, declared that "the tremendous ground swell of animosity toward large business regardless of whether or not it was serving by supplying sadly needed price economies," originated in the depression; when the NRA "suggested that by law something could be done to put up prices, instead of letting the free flow of competition fix them, the seed was sown from which has germinated the pressure" for this law. *Id.* at 23. As to the NRA Codes see note 143 *supra*. Professor Nystrom of Columbia University testified that "the purpose of the lobby behind this bill is . . . to subsidize a small group of middlemen at the expense of the consumer." *Id.* at 139.

234. H.R. REP. No. 2287, 74th Cong. 2d Sess. 5, 12 (1936).

235. *Hearings, supra* note 3, pt. 2, 408 (testimony by a representative of the Institute of Distribution).

236. *Hearings, supra* note 3, at 126.

237. *Id.* at 127. See also *Hearings, supra* note 40, v. II, 145.

Dr. Julius Klein, Business Consultant, in his testimony before the Patman Committee, as follows:

"One of the important elements from the point of view of the manufacturer, is not simply that he can make arrangements, for instance, with his bank for a much larger volume of credit if he can show an order for a million dollars; but more particularly it assures him of an evenness of operation over a long period of time, because he does not have to worry about getting the next order and the next order from a hundred little stores. He has this one order, so that he can continue his operations very steadily; and one of the important things in business is to be relieved of these violent gyrations . . . that make business seasick."²³⁸

The advantage of this "evenness of operation" can probably not be translated into dollars and cents with any degree of accuracy;²³⁹ nevertheless, it is substantial. On the other hand, reliance on a large-scale customer makes the supplier vulnerable because such a customer may abuse the exclusive relationship by extorting price concessions under the threat of withdrawal of patronage.²⁴⁰ This tactic, coupled with the threat of starting manufacture of the supplier's article, was one of the charges on which A & P was convicted under the Sherman Act.²⁴¹ The possibility of such abuse was discussed in the hearings before the Patman Committee investigating the trade practices of big-scale retail and wholesale buying and selling organizations in the following colloquy between the late Representative Bloom and an officer of the National Chain Store Association:

"*Mr. Bloom:* Suppose you have this . . . factory where they are producing two-thirds of their capacity and the chain store comes along and says, 'I will take one-third of your entire output at a special price,' at which the manufacturer can make some profit. The next year the chain store says to the manufacturer, 'you have got to sell to me at a certain price.' The fellow has got the factory and the overhead, and if he loses that one-third, he cannot then run his factory.

"*Witness:* Mr. Bloom, where the equation is as you have just stated it, I know nothing in the world that is so despicable . . .

238. *Hearings, supra* note 40, v. IV, 255. See also a statement by the National Association of Manufacturers, *Hearings, supra* note 3, at 236, that "a company with large orders can better anticipate its own demands and make purchases of its own raw materials to greater advantage, thus justifying a lower price to its large customers."

239. It has been said that under the Robinson-Patman Act "trial is to proceed by the ordeal of cost accounting." Hamilton, *supra* note 230, at 323.

240. See testimony by Dr. Klein, *Hearings, supra* note 40 at 256. See also *Hearings, supra* note 3, at 60 (testimony on behalf of National Food Brokers Association).

241. A & P case, 173 F.2d at 82.

as . . . where the . . . large purchaser attempts to drive the manufacturer to the wall in such a manner.”²⁴²

Such actions may be distinguished at least in degree, from ordinary higgling and shopping around by sellers and buyers. This process was described by a grower of vegetables in the hearings on the Robinson-Patman Act; he said that his price “can vary within fifteen minutes, depending upon the reaction that I get from our responses from the markets. . . . We may deliberately at the same time quote an f.o.b. price in selling beans at our place, with a different price to a Chicago dealer, a Detroit dealer, or a Cincinnati dealer, *my price being governed by my own judgment of how high I think we can sell in those individual markets.*”²⁴³ Surely, this is price discrimination which may not be justifiable in terms of cost savings; but it does not seem to involve any recoupment of the type described above. Conceivably, large-scale buyers may proceed similarly.

Perhaps the crucial problem of discrimination under the Robinson-Patman Act is presented by the provision of Section 2(a) which makes discrimination illegal only “where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.” The interests supporting the Act wish this to be interpreted as including injury to a particular competitor,²⁴⁴ and this has evoked the criticism that the Act safeguards competitors but not competition.²⁴⁵ Under such an interpretation any price variation not based on demonstrable cost differences may be illegal; and the greatest possible limitation is placed on the bargaining advantages of large buyers.²⁴⁶ Again, this is precisely the result which the sponsors of the Act intended to accomplish.

242. *Hearings supra* note 40, v. II, 145.

243. *Hearings, supra* note 3, at 119. Emphasis added. The witness added that “it would be utterly impossible . . . to handle our negotiations with all of our various buyers or chain stores, and others, on a regulation which necessitates the same price to all . . . because we have more to move than the high priced buyer could possibly take. Yet it is to our interest to get the high price from that particular buyer and sell the remainder for what we can get.”

244. EDWARDS, *op. cit. supra* note 232 at 167, 168. See *Hearings, supra* note 3, pt. 2, p. 461.

245. Adelman, *supra* note 227, at 1334-1337, quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 49 (1948).

246. EDWARDS, *op. cit. supra* note 232, at 167. Edwards suggests (p. 168) that “injury to competition should be defined as injury to the vitality of competition in the market, not as injury to . . . a particular competitor, even though the power of large buyers is somewhat less drastically reduced by such an interpretation.” The criticism of the Act on this score perhaps oversimplifies the issue, since there can be no competition without competitors.

VI. STATUTORY PROHIBITIONS OF SALES BELOW COST

Under the Robinson-Patman Act price reductions to some but not to all buyers must be justified by cost savings; otherwise—so runs the theory—the loss of income from sales accompanied by price concessions to favored buyers would have to be recouped from those buyers who are not favored; or, if not this, the favored buyers would at least enjoy an unjustified advantage over others.²⁴⁷ The problem of sales below cost lurks in the background, although it is only an extreme form of the evil aimed at. The NRA Codes for the retail and wholesale food and grocery trades attacked it directly by a “loss limitation provision” which declared the use of the so-called “loss-leader” to be an unfair trade practice.²⁴⁸ “Loss-leaders” were defined as “articles often sold below cost to the merchant for the purpose of attracting trade.” The Retail Code declared specifically that “this practice results . . . either in efforts by the merchant to make up the loss by charging more than a reasonable profit for other articles, or else in driving the small merchant with little capital out of legitimate business. It works back against the producer of raw materials on farms and in industry and against the labor so employed.” The Retail Code defined cost as “invoice or replacement cost, whichever is lower, after deduction of all legitimate trade discounts exclusive of cash discount for prompt payment.” It also expressly permitted the retailer to sell an article “without any profit to himself.”

The last quoted provision indicates that the “loss-leader” is merely one of a broader group of goods sold at marked-down prices. Chain store people sometimes speak simply about “leaders” which are particularly attractive because of their low price.²⁴⁹ The Federal Trade Commission had defined “leaders” as “merchandise featured or sold at reduced prices to attract buyers and thereby stimulate sales not only of these leaders but also of other goods”; it explains that there are thus two classes of leaders, those sold at less than the usual price but still at a profit, and those which are sold at a loss; the “loss-leaders,” in turn, are to be divided into those sold at less than net purchase cost

247. Professor Adelman has criticized the theory of necessary recoupment as “illiterate” and pointed out that price reductions may come out of profits. Adelman, *supra* note 227. But selling at different net profits would also be discriminatory under the act.

248. NRA Codes of Fair Competition, v. IV, p. 466 (1934), and *id.*, v. V, p. 11.

249. “The most desirable method of attracting sufficient attention to put the store on a paying basis quickly is to have constant ‘leaders’ at savings to the housewife, that are sure to make the new arrival talked about.” BAXTER, CHAIN STORE DISTRIBUTION AND MANAGEMENT 189 (1928). The FTC quoted the president of a grocery and meat chain as follows “The extent to which prices are cut depends on competition, the necessity of introducing a commodity, the need for moving a line of goods, and the desire to bring customers into the store.” SEN. DOC. NO. 4, 74th Cong., 1st Sess. 39 (1936).

and those sold "below net purchase cost plus average cost of doing business."²⁵⁰

The agitation for "loss limitation provisions" which scored its first victory in the NRA Codes originated with independents who feared price cutting by the chains. The Federal Trade Commission had reported "extensive use" by the chains of "loss-leader merchandise sold at prices which are below the average cost of doing business plus the cost of the merchandise and which are sometimes below the latter" and had concluded that the ability of the chains to use loss leaders was materially aided by their practice of averaging profits from stores in various localities, "the low prices obtained in one or more areas being offset by the higher prices obtained at one or more other points."²⁵¹

Subsequently, after the demise of the NRA, spokesmen for manufacturers and independent distributors discussed the problem of loss leaders in the hearings on the Robinson-Patman bill. Mr. Charles W. Dunn, counsel for the Associated Grocery Manufacturers of America, urging that the death of the Blue Eagle had made a revision of the Clayton Act imperative, pointed out that "the problem of unfair price discrimination by sellers and of unfair 'loss-leader' selling by buyers is a single and related problem in both its practical and legal conception." He favored "an effective statutory prohibition of the latter unfair practice along with the prohibition of the former," and he recommended that the prohibition of loss leaders "should be confined to sales below cost defined (in a distribution sense) to mean net invoice or replacement cost, whichever is lower." Mr. Dunn felt that such a measure "will practically enjoin unfair resale price cutting which is most hurtful."²⁵² The business practices of the chains which provoked these demands were described by a representative of the National League of Wholesale Fresh Fruit and Vegetable Distributors, who told the following story:

"They [the chains] come into this market on strawberries, a highly perishable commodity, and at the beginning of the season you will understand it starts out with the luxury prices of 25 cents a box. We will say there are enough consumers willing to pay 25 cents a box that will take fifty cars. When you get above fifty cars in your supply, the 20 cents people will come in, and the price will drop to 20 cents, and so on down until you get to the full movement. Here is what happens: The chain-stores buy a couple of cars of strawberries—it does not make any difference what they pay for them—at the beginning of the season, and put them out as leaders, or loss leaders, whatever you want to call them, we

250. *Id.* at 38-40.

251. *Id.* at 85, 86. See also *id.* at 40.

252. *Hearings, supra* note 3, at 145.

will say, just to make the example startling, at two boxes for 25 cents. The independents in Washington have bought for that day's supply on the wholesale market at a price that will require, we will say, 20 cents a box to let them out. They go back to the wholesale market the very next morning . . . it has happened time and again—and there is a terrible howl. 'We took an awful licking yesterday on strawberries. The chains sold two boxes for 25 cents; and you folks held up on the price where we had to sell for 20 cents a box.' . . . The effect is there will immediately be a telegram sent and that reduction is reflected right back to the grower. Our interest in this thing is not altogether an unselfish one at all; we are in a way, as the middleman, taking the gaff from both ends."²⁵³

This witness advocated a curb on sales "at or below actual cost with no consideration for the expense of handling,"²⁵⁴ thus enlarging the application of the term "loss-leader" beyond that proposed by Mr. Dunn and even beyond the NRA Code provisions. This, he said, was necessary to avoid depression of wholesale prices and proportionate reduction of cash returns to producers. In fact, he charged that the chains and particularly A & P were deliberately depressing the market. Apparently referring to the Atlantic Commission Company, A & P's subsidiary in charge of buying fruits and vegetables, he stated that "they buy the stuff for the A & P and then, instead of throwing it to the A & P outlets, they throw it back on the market."²⁵⁵ However, the Robinson-Patman Act as adopted did not deal directly with the "loss-leader" problem except in a vague and practically ineffective provision.²⁵⁶

After the NRA was held unconstitutional, the National American Wholesale Grocers' Association prepared uniform legislation for submission to the States, which was sponsored by the Food and Grocery Conference Commission, an organization consisting of six wholesale and retail groups.²⁵⁷ The authors of this bill agreed that loss leaders should be curbed, particularly because they permit "giant" concerns with "many chain outlets" to "subsidize a price cutting campaign in one locality or at one time and, after forcing rivals to the wall, recoup

253. *Id.* at 73.

254. *Id.* at 76.

255. *Id.* at 72, 76, 79.

256. Section 3 of the Act (15 U.S.C. §13a) prohibits the selling of goods "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." In *A. J. Goodman & Son v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (Mass. 1949) the Court found that there was an unreasonably low price but that there was no showing of injury. The finding as to the price is not substantiated in the opinion.

257. Comment, *The State Unfair Practices Acts*, 32 ILL. L. REV. 816, 846 (1938).

from another territory or at another time.”²⁵⁸ The bill was enacted with some variations in thirty-one states.²⁵⁹

Two aspects of this legislation deserve emphasis: First, the enormous difficulty in determining cost.²⁶⁰ This problem has been exhaustively treated by Professor Tannenbaum in a masterful study on *Costs under the Unfair Practices Acts*; he observes that the dictionary definition of cost as “the amount or equivalent paid . . . for anything” would be comparatively easy to apply “if all costs were direct costs, i. e., costs which were incurred directly for and chargeable directly to specific cost units,” but that even in the case of direct costs the question arises as to whether raw materials or merchandise should be valued “at cost, at market, at the lower of the preceding two, or in some other manner.” The real problem arises with respect to indirect costs “which are incurred for the productive and for the distributive processes as a whole, and which must be spread over the cost units involved on some more or less arbitrary basis.”²⁶¹

The statutes approach these problems in a variety of ways. As to merchandise costs some specify the manufacturer’s wholesale list price as the cost base; others refer to cost of the commodity bought in the open market plus freight to point of destination, invoice cost, or replacement cost.²⁶² As to indirect costs, one statute simply requires “the overhead expense of the distributor or vendor” to be added to the cost base; others define “cost of doing business” or “overhead expense” as “all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.”²⁶³ Some statutes add to this catalogue such further items as maintenance of equipment and light, heat, power and water.²⁶⁴

The job of allocating all these items to every loaf of bread or can of tomato soup sold in a store appears to be rather gigantic. As to

258. *Hearings, supra* note 56, at 423. Such price wars were, of course, already illegal under the Sherman and Federal Trade Commission Acts. *Standard Oil Co. v. United States*, 221 U.S. 1, 43 (1911); *Handler, Unfair Competition and the FTC*, 8 GEO. WASH. L. REV. 399, 422 (1940).

259. Lovell, *Sales Below Cost Prohibitions: Private Price Fixing under State Law*, 57 YALE L.J. 391 (1948); Annotations, 118 A.L.R. 506, 128 A.L.R. 1126.

260. See note 231 *supra*.

261. 9 *Studies in Business Administration No. 2*, 12 J. OF BUS. following p. 412, at 3, 4, 15 (1939).

262. *Id.* at 19-26.

263. *Id.* at 30.

264. *Id.* at 34, 36.

the chains, it is further complicated by the fact that different types of stores which they operate have different overhead costs, the overhead of supermarkets being lower per unit of goods than that of other stores because of the large volume sold and the lesser service rendered.²⁶⁵ In order to obviate these difficulties, some statutes provide for specific mark-ups; for instance, the Oregon law defines overhead as "6% of replacement cost or . . . the average monthly cost incurred in the conduct of such business during the twelve months immediately preceding any alleged violation of this Act."²⁶⁶ Tennessee and Nebraska also provide for a 6% markup to be added to the cost base unless a lower cost increment can be proven.²⁶⁷ In addition, a considerable number of the statutes refer to established "cost surveys" of particular trades or industries "for the locality and vicinity in which the offense is committed," and provide that such surveys "shall be deemed competent evidence" in the determination of costs.²⁶⁸

These vague and indefinite provisions as to cost surveys²⁶⁹ focus attention on the second major aspect of these statutes: the opportunity they provide for private price-fixing. For instance, the Food and Grocery Bureau of Southern California, a private group which was a direct successor to the Code Authority that administered the NRA Codes,²⁷⁰ from time to time circulated questionnaires among its members eliciting cost data and, on the basis of replies received, fixed mark-ups first at 6% and later at 8%. It accepted complaints, admonished offenders to refrain from selling below the prices fixed by it, and, pursuant to statutory authority for enforcement by injunction, sought injunctions against violators.²⁷¹ It required proceedings by the Anti-Trust Division of the Department of Justice to stop these activities.²⁷²

A similar conflict between the use made of these state laws and the Sherman Act developed in New England, where private organizations known as Food Councils undertook to enforce the statutes. The only difference from the California situation was the absence of statutory provisions authorizing cost surveys; the New England statutes

265. This problem was specifically considered in *Great A & P Tea Co. v. Erwin*, 23 F. Supp. 70, 77 (Minn. 1938), where the Company obtained a decree restraining enforcement of the Minnesota statute.

266. Tannenbaum, *supra* note 261, at 43.

267. *Id.* at 44, 45.

268. *Id.* at 48.

269. See *Great A & P Tea Co. v. Erwin*, 23 F. Supp. 70, 83 (Minn. 1938).

270. Tannenbaum, *supra* note 261, at 50.

271. *Id.* at 50, 51.

272. *United States v. Food and Grocery Bur. of So. Calif., Inc.*, 43 F. Supp. 974 (S.D. Cal. 1942), *aff'd*, 139 F.2d 973 (9th Cir. 1943); as to preliminary motions in the same case see 41 F. Supp. 884 and 43 F. Supp. 966. See also *Cal. Retail Grocers and Merchants Assn. v. United States*, 139 F.2d 978 (9th Cir. 1943), *cert. denied*, 322 U.S. 729 (1944), and, generally Lovell, *supra* note 259, at 418-424.

required instead a fixed mark-up unless the seller proved a lower cost.²⁷³ A & P was a member of these Councils. Indeed, one of the incidental and minor charges against A & P in the Sherman Act prosecution was based on price fixing in cooperation with competitors and suppliers under cover of these state laws.²⁷⁴ Although this charge is of little importance in that case, the nature of A & P's connection with these activities reveals awareness of the danger of inconsistency of such activity with both the Sherman Act and the company's general sales policy. The following excerpts from a form-report to the president of the New England Division of A & P on the effects of the Connecticut law and the Company's activity thereunder tell this story:

"a. The effect of these laws on the Company's pricing policies in your Division.

The principal effect of the Connecticut Unfair Trade Practice Act is that our grocery price structure in the state must be marked up the equivalent of 8% over cost; this markup equalling a minimum of 1% higher grocery department gross profit than that enjoyed in the New York State stores. . . .²⁷⁵

"e. The extent, if any, to which your Units have cooperated with those who are sponsoring and policing these laws.

The extent to which we have cooperated in respecting the law is principally on adhering to the markup requirement in all respects. In addition to this, we have contributed financially to the council on the basis of \$10.00 per year per supermarket . . . and \$5.00 per year per straight grocery store . . .

"g. What would be the effect in your division from a trade relation or public relations standpoint, if the company took a public decision either for or against any of these laws.

It is felt that from a public relations standpoint that we would not only be able to gain more good will but likewise additional business if we took a public position in the direction of selling merchandise under the markup or in other words, based on our New York price structure. From a trade relations standpoint we would be fearful that if we reduced our price structure to conform with New York State that it would undoubtedly brand us as a voluntary violator of the Act and thereby put us in an unfavorable light as far as the industry is concerned, not because we were the originator of such a move²⁷⁶ but because of our size and business ethics in the industry."²⁷⁷

273. *Id.* at 419, 420, listing the court decrees dissolving the New England Councils.

274. See A & P case, 67 F. Supp. at 671-673.

275. No such statute existed in New York.

276. The writer referred in the same letter to consistent violations of the Act by an independent competitor. Loss-leader selling has been extensively practiced by some independents since the collapse of the NRA. See testimony by a chain store representative, *Hearings, supra* note 3, at 188.

277. A & P Br. App., v. I, pp. 575-577.

At the same time, the president of the New England Division was advised that there was "considerable doubt as to whether or not these laws will stand the test" of compatibility with the Sherman Act.²⁷⁸ In fact, the Company's General Counsel wrote to John Hartford in March, 1941:

"I have always been afraid of these Associations and Councils, however well intended. We are a member of the New England Food Council. . . . Some two years ago George Feldman heard that the Council was fixing prices and that we were adopting them. He then wrote to the New England Division on the subject and went so far as to say that if it was doing so and we were adopting those prices, we had better resign. . . . *Naturally I was much disturbed over the A & P at this particular time being indicted as a conspirator with others in restraint of trade and for the purpose of increasing cost of the necessities of life.. I was worried like hell over the mere fact of an indictment . . .*"²⁷⁹

The danger threatening A & P at that time contrasts almost ironically with the actual indictment and conviction a few years later when one of the major charges against the company was, not the raising of prices, but their undue reduction to the point where, the Court of Appeals found, "sometimes the gross profit rate is fixed so low that the store runs below the cost of operations."²⁸⁰ Here the gist of the Government's contention was that A & P had abused its integrated position through "elimination of competition by sales in selected areas below cost of doing business."²⁸¹

VII. RESALE PRICE MAINTENANCE

The so-called Fair Trade acts, state laws which permit resale price maintenance on commodities sold under a trade-mark, trade-name, or brand, are in some respects closely related to the statutes prohibiting sales below cost. Both "were urged by those engaged in various lines of trade as measures needed to safeguard the existence of the small retailer" and "were described as being directed against price wars in general and against leader merchandising practices, es-

278. *Id.* at 578.

279. *Id.* at 580. Emphasis added. The letter continued in part as follows: "He . . . told me that the Council would send out a price list on which they could base the mark-up and that he sold certain articles at the prices fixed by the Council. . . . A comparison of prices with a circular fixing prices will in every instance show . . . an advance rather than a reduction . . . if indicted, I would hate like hell to plead guilty, but on the facts stated to me I have not as yet been able to figure out a defense. . . ." *Id.* at 582.

280. A & P case, 173 F.2d at 87.

281. Govt. Br. (D.C.), pp. 628 *et seq.* Emphasis added.

pecially of chain stores.”²⁸² Thus a representative of the National Association of Retail Grocers urged the enactment of the Miller-Tydings Amendment to the Sherman Act, which eliminates the illegality under that Act of resale price contracts in interstate commerce when authorized by statute in the state to which goods are to be shipped for resale, on the ground that “the retail grocers of this country have suffered intensely for years on account of these loss leaders.”²⁸³

Resale price maintenance is applicable to food products which are sold in identifiable form under brands or labels;²⁸⁴ but its success in the food industry has been limited by “the practical realities of competition as found in the food trade.”²⁸⁵ First, the portion of food items not covered by the fair trade laws far exceeds those items which are covered.²⁸⁶ Hence the relatively small number of trade-marked or branded food items under resale price maintenance contracts must compete with the great mass of food items to which resale price maintenance cannot be applied, and this is all the more difficult because the latter group contains many products available for use as leaders.²⁸⁷ Consequently many independent retail grocers were skeptical as to the usefulness of the fair trade laws but enthusiastic about the unfair sales acts prohibiting sales below cost, since the applicability of the latter in the food industry is unlimited.²⁸⁸

282. FTC, REPORT ON RESELL PRICE MAINTENANCE, 848, 849 (1945). On p. 274 the Commission states: “Examination of a mass of material indicates that one of the major objectives of retail grocers in supporting resale price maintenance is to eliminate, or at least curb the loss-leader merchandising of branded or trade-marked grocery products, and thus improve the profit position of independent retail grocers.” On p. 275 the Commission adds: “Although protection of the consumer, the manufacturer, and the farmer is given prominence in the argument justifying resale price maintenance, it is apparent that one of the prime objectives of the food-trade proponents of such legislation is self-protection in a many-sided struggle for the consumers’ food business in which, by the nature of their complaints, they admit their inability or unwillingness to compete actively.” See also Marketing Laws Survey, State Price Control Legislation xxxvii-lix (U.S. W.P.A. 1940).

283. FTC, *op. cit. supra* note 282, at 277.

284. *Id.* at 283. On pp. 291-293 the Commission tabulated the following grocery products as subject to some resale price maintenance contracts in June 1939: Toilet soaps, eggs, salad dressings, cheese, beverages (coffee, tea, milk, soft drinks), meat products, dog foods, crackers and cookies, fruit juices and jellies, canned milk, baby foods, cereals, soups, vegetable shortening, flour, baking powder, desserts, candy bars, yeast, honey, potato chips, macaroni and spaghetti.

285. *Id.* at 290.

286. In January 1939 the Massachusetts Food Council advised retail grocers that the Massachusetts statute prohibiting sales below cost (Unfair Sales Act) “covers 100% of all retail and wholesale food sales whereas the fair-trade law cannot possibly control more than 20% of such sales if every manufacturer marketing trademarked merchandise took advantage of the voluntary provisions of the Fair Trade Act. Eighty percent of retail food store sales are on meats, poultry, fish, fruits and vegetables which cannot be placed under fair-trade law price regulation. In this list are most of the troublesome loss leaders. . . .” *Id.* at 283.

287. *Id.* at 289.

288. *Id.* at 295. The Commission quoted the secretary of the California Retail Grocers and Merchants Association as having said in 1939: “. . . while I definitely

Second, resale price maintenance under the fair trade laws has not been tried extensively in the food industry, even when applicable, because of fear of loss of business.²⁸⁹ For instance, the secretary of the National Association of Retail Grocers explained that "food is the most highly competitive of all industries, and profits depend on turn-over rather than margin. Accordingly, there would be a tendency upon the part of the distributor to push free items that would insure turn-over by reason of their cheapness rather than price-fixed items that carried a good margin."²⁹⁰ The National Grocers Bulletin reported in May 1938 that "many dealers seemed to welcome establishment of a resale price, but manufacturers who established these prices found, presently, that their products were nicely price fixed on the shelf while competitive products were actively price featured." The same writer also observed that "there are many well established brands of almost every product, all competing with one another, and there are dealers' own brands"; since the Miller-Tydings Amendment and the state laws do not permit horizontal price agreements between manufacturers and dealers, price fixing on one brand alone was not deemed practical.²⁹¹ For this reason many manufacturers and canners were vigorous in their opposition to the fair trade laws; they feared that resale price maintenance under those laws would hamper a system of distribution which encourages selling to the consumer at low prices and at the same time "leaves the wholesaler or retailer free to fix his own resale prices according to conditions prevailing from time to time in his market area."²⁹²

Perhaps the most emphatic and determined opposition to resale price maintenance came from the large chains, particularly A & P. As early as April 1927, more than six years before the enactment of the

appreciate . . . the value and merits of the Fair Trade Act, we still believe that the Unfair Practices Act is the finest law ever enacted on the Statute books of any state, as far as our industry is concerned. . . . [We] tried to operate under the Fair Trade Act but have found it practicable in certain instances only, but could not extend it far enough to satisfy ourselves. On the other hand, the Unfair Practices Act makes a definite and general coverage of the industry. . . ."

289. *Id.* at 286.

290. *Id.* at 284, 285.

291. *Id.* at 285.

292. The following comments were received by the Federal Trade Commission, *id.* at 286, 287: From a fruit and vegetable canner—"There are so many canned foods of all kinds on the market that this company could not maintain a price for anything it packs in competition with a similar product sold at a lower price." From a manufacturer of cereals—"If the consumer eats a couple of eggs and some bacon, the chances are she does not eat . . . cereal. If she eats bran muffins, some toast, and some orange juice, she doesn't eat cereal. Therefore from our selfish standpoint, we feel that we would not care to have the grocer maintain a price on . . . cereal . . . so long as he is not maintaining prices on bacon, oranges, rhubarb, eggs, sausage, etc." Another canner stated that "different territories vary greatly as to the spread between operating costs of, and thus resale prices which may profitably be used by, the different classes of retail distributors therein."

first fair trade law in California²⁹³ and two and one-half years before the stock market crash which ushered in the great depression, one of the Messrs. Hartford of A & P, in an address to the company's purchasing directors expressed his hostility toward price maintenance in the following terms:

"Our entire plan of doing business is dependent upon our being able to pass on to the customer a part of the savings we are able to effect through our large scale purchases, method of warehousing, and the cash and carry system in our stores. Contrasted with our system of distributing food to the consumer is that of the individual retailer where the goods pass through several additional hands such as the jobber and wholesaler and where customers are extended credit and goods are delivered for them. *If manufacturers are able to enforce their maintenance-of-retail price policy we will have no advantage over the individually owned corner grocery store.*

"Manufacturers have very little or no sales expense in connection with our business and we are entitled to some of this saving. In order to continue expanding our business it is essential that we be in a position to pass on part of this saving . . . to the consumer. *I feel very strongly that it is necessary for us to do something to impress upon these manufacturers that they cannot force their price maintenance policy upon us.*"²⁹⁴

Similarly, the minutes of a sales directors' meeting held in March 1927 recorded the following discussion on maintenance of retail prices:

"Mr. Wall stated that he did not believe we had as yet solved this problem of retail price maintenance. He feared that more manufacturers would be demanding that we do not sell below a certain retail all the time and that this would greatly handicap us.

"Mr. Bofinger said that he did not believe it was a case of more manufacturers taking this attitude but that it was due to our more drastic price cuts to increase volume. He said that there were only about a dozen manufacturers who insisted on a certain retail. He mentioned that the Canada Dry People had just announced that we had gotten our last car of their products in Indianapolis because of our cutting the price there to 15¢.

293. Cal. Stat. 1931, c. 278, was the first statute permitting resale price maintenance contracts and making such contracts binding between the parties. Cal. Stat. 1933, c. 260, made all those in the same competitive area, who knowingly sell below the prices fixed by such contracts between other parties, subject to suit by any person aggrieved thereby. Subsequently, statutes of this type were enacted by 45 States (all except Missouri, Texas and Vermont). See WEIGEL, *THE FAIR TRADE ACTS* 33-44 (1938); OPPENHEIM, *CASES ON UNFAIR TRADE PRACTICES* 900-907 (1950).

294. *A & P Br. App. v. II*, p. 26. See also *Great A & P Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915), where the Court refused to restrain Cream of Wheat from continuing a policy of selling only to wholesalers who agreed to sell to the retail trade at prices fixed by Cream of Wheat Co. A & P contended unsuccessfully that refusal to sell to it was a restraint of trade.

"Mr. Hartford said that this situation is rapidly approaching the point where something will have to be done about it . . . We are too big to be dictated to by any manufacturer to that extent. . . . Perhaps the solution of this problem will be brought about by our selecting one of our products, such as White House Milk, advertising it extensively, and pricing it attractively enough to induce independent grocers and competing chains to stock it."²⁹⁵

In short, A & P's hostility to resale price maintenance even prior to the enactment of the so-called fair trade laws was based on its incompatibility with the company's low-price policy and its desire to enjoy freedom to set such retail prices as it chose²⁹⁶ and to adapt its prices to changing conditions. In buying operations, a sharp distinction was made between "trading items" and "list price items." The latter term was used to denote nationally advertised merchandise sold under a trade-mark or brand, while the former term applied to all other supplies.²⁹⁷ With respect to list-price items A & P's hands were largely tied, both as to purchase price and, where resale price maintenance prevailed, as to retail price. Hence there was a strong tendency for A & P to place greater reliance on products bearing its own trade-marks, frequently known as "house brands" or "private brands." Some of the reasons for this practice are set forth in the minutes of an informal board meeting of the Company's middle Western Division held January, 1939:

295. A & P Br. App., v. I, p. 399. Apparently the suggestion of selling A & P's own products to competitors has never been carried out. It may be noted, incidentally, that subsequently A & P restocked Canada Dry Ginger Ale on Canada Dry's own terms (A & P Br. App., v. I, p. 401).

296. A & P Br., p. 216.

297. Mr. Charles W. Parr, in charge of field buying operations for A & P, testified as follows (A & P Tr., v. 3, pp. 407, 408):

"Q. . . . What is meant by trade items in this business?"

A. Well, they are well known in the food industry and the grocery trade, as bulk merchandise, and any other merchandise, even though it is in packages, which does not bear some nationally known or semi-nationally known brand, and which is sold on an open trading or 'horse trading' basis, rather than on a list price basis.

Q. . . . What does 'list-price' mean?"

A. It means the so-called nationally advertised price of grocery items, such as Ivory Soap, Crisco, Del Monte goods.

Q. Is there any difference in the conduct of buying . . . food merchandise, or things that are sold in the A & P stores, between 'trading items' and 'list price items'?"

A. A wide difference. . . . On dealing in trading items, we want a buyer,—a real buyer—a fellow who is shrewd—a fellow who can hold his own in dealing with the shipper. On a list price item, all they need is an order clerk . . .

Q. Is there any market fluctuation in price in the one or the other?"

A. Oh, yes. . . . Take a trading item,—like flour, for instance. The price of flour is based on the wheat market, and might change twenty times a day.

Q. What about the list price?"

A. Some of them never change."

“ . . . it is obvious that the greater the concentration of the volume in a few locations, the greater the vulnerability of the business. A number of reasons have contributed to the fact that competition on brands which are available to our competitors has leveled off and in a number of instances it is difficult for A & P supermarkets to meet many of the prices that the competitors have established on nationally-known brands. . . . The leveling off in prices on advertised brands has reduced the profits on these brands, so that in effect both volume and profit are being reduced on these recognized brands.

“It becomes apparent that A & P cannot hold customers in supermarkets by reliance upon brands beyond its control where such conditions prevail, and therefore A & P brands which we control loom up as a distinct advantage in obtaining and holding volume and providing profits for our operations.

“The advantages in this direction are clear. A & P products are exclusive to A & P stores. Other retailers do not have these brands. . . . Promoted on a quality and value basis, our brands are competitive with any similar outside brand sold in our stores or in any other food stores. That they attract and hold a large number of customers is evident in our experience with A & P coffees. We know that we have many customers who deal with us exclusively for coffee and we enjoy a higher percentage of the coffee business than we do of the grocery business. We have had similar experiences on such items as White House Milk and Ann Page Salad Dressing. The development of sales in these brands should create a larger consumer following for our stores, and increased sales of A & P products enables the stores to earn sufficient profits to keep prices on outside brands in a strong competitive position. A & P products are the largest single source of profit that A & P has.

“The possibilities in profit are clearly seen when an increase in Quaker Maid distribution from 4% to 5% would result in an additional factory profit of nearly \$1,000,000 a year.”²⁹⁸

Ironically enough, in consequence, the fair trade laws which were designed to protect independent distributors from the encroachment of the chains contributed, at least in the food field, to strengthening the chains by increasing their tendency to handle goods under their own brands, including those they manufactured themselves. Providing large-scale distributors with a strong incentive to expand their vertical integration was, to put it mildly, not the purpose of the advocates of the Fair Trade laws.

298. A & P Br. App., v. IV, pp. 37, 38.

VIII. THE FOOD CHAINS AND THE SHERMAN ACT:
THE A & P CASE

Up to this point four weapons used by the independents in their struggle against the chains have been discussed: special taxation, the Robinson-Patman Act, the unfair sales acts, and the fair trade laws. Practically all of these weapons were forged in the 1930's, although the anti-chain store movement had begun earlier.²⁹⁹ During that entire period the Sherman Anti-Trust Law of 1890 remained unused in the closet so far as food distributors were concerned; apparently no one considered using it. However, in the early forties the Department of Justice took the Sherman Act out of its closet. Thus began the fifth round of the fight against the food chains or, at least, certain of their practices.

The Department secured indictments against Safeway and Kroger in January, 1943, in the United States District Court in Kansas City, Kansas.³⁰⁰ Both chains were charged with "engaging in various unlawful methods of doing business for the purpose of injuring or destroying independent competition. These methods included the obtaining of domination in selected areas by subsidized underselling activities which were discontinued following the disappearance of independent competitors."³⁰¹ Both companies pleaded *nolo contendere* and fines totaling \$40,000 in the Safeway case and \$20,000 in the Kroger case were imposed by the District Court. At the conclusion of the case the Government announced that the elimination of the practices complained of "should be beneficial to the business of the independent grocers."³⁰²

A similar indictment charging a continuing conspiracy to unreasonably restrain and monopolize trade in food products had been returned in November, 1942, against the New York Great Atlantic & Pacific Tea Company and its affiliated corporations in the United States District Court in Dallas, Texas. That court sustained A & P's demurrer because of defective pleadings but the judgment was reversed on appeal and the case remanded to the District Court.³⁰³ The District Court then ordered the Government to strike out certain ob-

299. The Indiana chain store tax which was sustained in *State Bd. of Tax Comm'rs. v. Jackson*, 283 U.S. 527 (1931), was enacted in 1929. The Senate resolution directing the FTC to investigate the chain stores was adopted in 1927.

300. *United States v. Safeway Stores*, Cr. No. 7196, and *United States v. The Kroger Grocery & Baking Co.*, Cr. No. 7197, D. Kans., Jan. 1943.

301. Statement by Assistant Attorney-General John Sonnett, CCH 1948-1951 TRADE REG. REP. ¶ 61,113, No. 757 and ¶ 61,124, No. 758.

302. *Ibid.*

303. *United States v. Great A & P Tea Co.*, 137 F.2d 459 (5th Cir. 1943), *cert. denied*, 320 U.S. 783 (1943).

jectionable allegations of the indictment and to particularize other allegations;³⁰⁴ the case was set for trial May 22, 1944; but on February 26, 1944, the United States attorney filed a nolle prosequi without prejudice, which, over A & P's objections, was granted by the court.³⁰⁵ On the same day the Government filed a criminal information against A & P in the United States District Court for the Eastern District of Illinois, at Danville, Illinois.³⁰⁶ The trial on the charges contained in that information, without a jury, began on April 16, 1945 and was concluded on April 6, 1946. On September 21, 1946 Judge Lindley found the defendants guilty as charged in the information.³⁰⁷ The judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit on February 24, 1949.³⁰⁸ The Company did not appeal to the Supreme Court of the United States, but paid fines totaling \$175,000. On September 15, 1949, the Attorney General filed in the United States District Court for the Southern District of New York a civil suit against A & P which, among other prayers for relief, asks "the complete and perpetual separation of the business of manufacturing and processing food and food products now conducted by the defendants from the business of buying and selling food" and asks the Court to "order the separation of defendant's retail business into seven separate parts." This civil complaint is based on the same charges on which A & P was convicted in the preceding criminal case.³⁰⁹ At the time of writing the civil trial has not yet begun.

The importance of the decision against A & P in the criminal case is not limited to A & P alone, since the charges against A & P's two largest competitors, Safeway and Kroger, who preferred nolo contendere pleas, were the same as those against A & P.³¹⁰ In spite of the Government's and the court's insistence that the action was not an attack upon the power that accompanies integration or size, but only upon the abusive exercise of such power,³¹¹ the decision has been criticized for penalizing size and competitive efficiency and, above all, for hampering the successful efforts of the chains to lower consumer prices.³¹² After the filing of the civil suit for dissolution A & P un-

304. *United States v. Great A & P Tea Co.*, 52 F. Supp. 681 (N.D. Tex. 1943).

305. *United States v. Great A & P Tea Co.*, 54 F. Supp. 257 (N.D. Tex. 1944). The advertising campaign unleashed by A & P in the fall of 1949 after the Government had filed a civil suit against it, see note 336 *infra*, played up the Dallas case as evidence of persecution by "the anti-trust lawyers."

306. Govt. Br. (C.A.), p. 1.

307. A & P case, 67 F. Supp.

308. *Id.*, 173 F.2d.

309. CCH 1948-51 TRADE REG. REP. ¶ 61,226, No. 990.

310. Govt. Br. (C.A.), p. 447.

311. See note 309 *supra*; A & P case 173 F.2d at 87.

312. A principal critic of the case is Professor M. A. Adelman. See his *The A & P Case*, 39 AM. ECON. REV. SUPP. 280 (1949); *The A & P Case: A Study in*

leased a nation-wide press campaign which has no precedent in the history of Sherman Act enforcement. Posters and advertisements appeared regularly in all A & P stores and in newspapers from coast to coast, condemning the suit as a threat to the standards of living of the American people and as punishment for A & P's low prices.³¹³ Many newspapers throughout the country published editorials in defense of A & P; relatively little was said in favor of the Government's action.³¹⁴

The transcript of the criminal trial against A & P, which contains many of the exhibits introduced by both sides, covers 21,137 pages. The Government's brief in the District Court, which is primarily a digest of the evidence, fills 1,100 printed pages. The Company's brief on appeal, only 351 pages long, was accompanied by six volumes of elaborate excerpts from the exhibits and testimony totaling 3,600 pages. An exhaustive analysis of this enormous record would fill several volumes and would not necessarily help to clarify the issues. In fact, if the case had been handled in a somewhat more streamlined fashion, some of the controversy about it might have been avoided. We shall, therefore, attempt only to lay bare the basic structure of the case and to place it in its proper setting as the most recent move to aid in solving the chain store problem in the food industry.

Applied Economic Theory, 63 Q.J. ECON. 238 (1949); *The Great A & P Muddle*, Fortune, Dec. 1949, p. 122. See also Lebhar, *What The A & P Case Is All About*, 26 J. RETAILING 19 (1950); Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A & P Case*, 58 YALE L.J. 969 (1949). For other comments see 44 ILL. L. REV. 252 (1949); 95 U. OF PA. L. REV. 306 (1947); 15 GEO. WASH. L. REV. 243 (1947); 15 U. OF CHI. L. REV. 392 (1948); for comments favorable to the Government's case see Brecher, *Government v. A. & P.*, Consumer Reports, Jan., 1950, p. 36; Andrews, *U.S. v. A & P: Battle of the Titans*, Harper's, Sept., 1950, p. 64.

313. "What shall we do? We admit that the interests of the owners of A & P are of little importance. Frankly, they could make an enormous amount of money by breaking up A & P, as the anti-trust lawyers wish, and selling off the parts. But is this what the American people want? Do they agree with the anti-trust lawyers that our food prices are too low, and that we should be put out of the picture so other grocers can charge more? Frankly, if this were the case, we would not want to continue in business. But we seriously doubt that this is the case . . . we believe this attack is a threat to millions of consumers who rely on us for quality foods at low prices; to farmers who rely on us for fast, low-cost distribution of their products; and to our loyal employees. We feel that it is our responsibility to all these people to defend, by every legitimate means, this company and the low-price policy on which it was built." (Advertisement published on September 20, 1949).

314. See, e.g., Krock, *Two Policies in the Anti-trust Suits*, N.Y. Times, Sept. 23, 1949, p. 22, col. 5: "There are said to be instances of companies raising their prices to the level of less patronized competitors in the hope that anti-trust litigation might thus be averted." All such articles were reprinted and distributed by A & P under the heading: *What the American Press is Saying about the Suit to Destroy A & P*. The Government's action was defended by the president of the National Association of Retail Grocers (N.Y. Times, September 23, 1949, p. 40, col. 8) and by some journals published by organized labor. According to Labor News Digest, Oct. 13, 1949, p. 2, A & P's advertising campaign was conducted by a highly-paid public relations executive. See also Brecher, Andrews, both cited *supra* note 312. Some newspapers were reported to have refused advertisements by independents in reply to A & P's advertisements; some independents sponsored advertising in support of A & P.

1. General Operating Policies of A & P

It should be emphasized at the outset that prominent in the management of this enormous integrated system, which has been sufficiently described elsewhere,³¹⁵ was the fundamental operating principle: decrease the gross profit rate in retail stores, along with costs, and thereby increase the volume of sales. This is a leitmotiv of A & P's management which recurs throughout the entire record. For instance, the minutes of an Advisory Board meeting in March, 1931, stated:

"If we are to reach our goal of \$2,000,000,000 business for the company [a goal which was reached for the first time in the fiscal year ended February 29, 1948, when, with the aid of a rising price level, the Company's sales amounted to \$2,545,583,840³¹⁶], it is evident that we must work on a lower gross profit rate. The quickest way to effect a reduction in our expense rate is to obtain additional volume. With a lower gross profit policy, this would be accomplished."³¹⁷

In 1937 the super-market program, then in its infancy, was considered essential to bring about a reversal of the downward trend in the volume of sales. The minutes of a Board meeting held in May, 1937, report that "the relatively high gross profit in Chicago during several years has contributed to the loss of volume and net profit in that city" and that "the plan of the large volume stores with low gross and low expense is needed and will be effective in restoring this business. . . ." ³¹⁸ In September 1937 the board of the Middle Western Division observed that "there are territories which need medicine badly and an aggressive campaign of lowering the prices of our shelf commodities should retrieve the volume we have lost."³¹⁹ There were frequent admonitions from headquarters that everyone "must have the courage to reduce gross profit rates in stores which have not produced the predicted volume;" ³²⁰ indeed, high gross profit rates were consistently treated as undesirable and dangerous from the long-range viewpoint.³²¹ Thus, Mr. John Hartford, writing in June, 1940, about the Middle-Western supermarkets, asked for an investigation of recent increases in the gross profit rate in Milwaukee. He added:

315. See chapters II and III *supra*, and the opinion of the District Court, A & P Case, 67 F. Supp. at 629-638.

316. MOODY'S MANUAL OF INVESTORS 1548 (1949). Sales for the year ending February 28, 1947 amounted to \$1,908,979,288.

317. A & P Br. App., v. IV, p. 95. See also *id.*, pp. 97, 98, 100.

318. *Id.* at 131.

319. *Id.* at 132, 133.

320. *Id.* at 145.

321. *Id.* at 151: "We have been inclined to let gross profit in some of these [regular] stores remain high because we are making a profit, but unless the situation is remedied we shall find ourselves in trouble later on."

"For these two weeks we are making a net profit of over 4% when all distributions are included. *I consider this decidedly too much profit and urge that you adjust your gross downward with the hope of increasing the supermarket average in the Milwaukee Territory from its present \$7,500 nearer to our ideal figure of \$10,000.*"³²²

In short, according to A & P a high gross profit rate means higher prices which reduce volume and thereby increase the cost of doing business with the ultimate result of losses; on the other hand a low gross profit rate means low prices to the consumer and increased volume of sales, and this volume drives down the expense rate, thereby producing permanent and satisfactory net profits. The volume which produces such results is the all-important goal. That this is the "pattern" of all A & P operations is well illustrated by the following testimony of the Superintendent of the Dallas Unit:

Question: Was a desired volume set to be attained by a given super-market when it was opened?

Witness: Well, of course, you set your marks when you take any store, any super-market, for a certain volume. You plan on a certain volume and you set your gross accordingly, what you feel would attract that amount of volume. Of course, you have to take into concern your expense, too.

Question: . . . Of course, you knew that in the opening of any new store until you developed a volume you would have no expense rate whatsoever and it depended upon the volume to control your gross profit rate, is that right?

Witness: Well, it would be just about the other way around. It would depend upon the amount of gross developed to produce your volume that would affect the expense rate that you could operate under.

Question: Well, it would operate both ways, wouldn't it? In other words, your control of the gross profit rate would be determined by your volume to a certain extent, wouldn't it?

Witness: No. The volume would be controlled by your gross profit if it worked out the way it was planned.

Question: What about the expense rate?

Witness: The expense rate would be controlled by your volume. With fixed expenses, of course, the greater the volume you secured the more you would reduce your expense rate."³²³

322. *Id.* at 159. Emphasis added. On p. 175 it is stated that "losing stores cannot be put in the black by merely increasing the gross profit rate. The reason is that if the gross profit rate was advanced, business would be lost."

323. A & P Tr., v. 49, pp. 10, 772 and 10,803.

Standing alone, the essential feature of this plan to sell food in large volume at low prices and at small gross profits would be sufficient to canonize A & P as a saint in the anti-trust heaven,³²⁴ since it seems to banish forever the twin devils of scarcity of output and raising of prices. The Government's attack, however, was directed against "the means employed"³²⁵ to achieve the company's purposes.

The crucial problem for A & P was how to secure the desired volume of business. The Company had fairly definite ideas as to the percentage of the available business which it sought. For instance, the directors of the Central Division at a meeting in May 1941 assumed that A & P was striving for "ultimate enjoyment of 20% of the available business in each city below 400,000 in population and 15% in each city above 400,000 in population, except where our present development exceeds these ratios."³²⁶ Other planners for the company took the position "that 25% of the available business is what we are entitled to."³²⁷

With this claim to a substantial share of the market staked out, the program required implementation on both the buying and selling fronts of the business. The core of the entire plan was low selling prices to the consumer. To maintain them it was essential to cut costs as well as profits and, therefore, to exert every effort to buy as cheaply as possible. In doing so, it was desirable to secure a competitive advantage by obtaining better terms from suppliers than competitors could secure and to translate these into similar advantages over competitors in sales to the public. Described in these general and abstract terms, A & P's operations appear to be those of "an outstanding price

324. Govt. Br. (C.A.), p. 25: "With this particular statement of policy the Government has no quarrel."

325. *Ibid.*

326. A & P Tr., v. 68, p. 16,098. The record contains the following figures as to A & P's percentage of available business during the last quarters of 1937 and 1938, the entire year 1939, and the first quarter of 1940 (A & P Tr., v. 6, pp. 999-A through—P.):

City	Population	A & P's share:	Percentage
Pittsfield, Mass.	47,516	"	13.2%
Newport, R. I.	27,612	"	15.9%
Williamsport, Pa.	45,729	"	22.2%
Columbia, S. C.	51,581	"	11.3%
High Point, N. C.	36,745	"	21.7%
Dallas, Texas	260,475	"	20.8%
Wheeling, W. Va.	61,659	"	22.6%
Columbus, Ohio	290,584	"	13.0%
Zanesville, Ohio	36,440	"	18.5%
Johnstown, Pa.	66,993	"	22.7%
Youngstown, Ohio	22,075	"	29.2%
Sharon, Pa.	25,908	"	33.9%
Warren, Ohio	41,062	"	21.1%
Waukegan, Ill.	33,499	"	28.6%
Lansing, Mich.	78,397	"	19.7%

327. *Id.*, v. 7, p. 1240.

competitor" whose prosecution and conviction under the Sherman Act "flouts common-sense economics."³²⁸

But the Government and the Court of Appeals are agreed that the question is how A & P used its power in carrying out its policy. Hence we must inquire into the concrete and specific methods adopted by A & P in the conduct of its business and estimate their net effect. For the sake of clarity this inquiry should consider separately the buying and the selling activities of A & P, although both are part and parcel of one unified scheme.

2. *A & P as a Buyer*

The Robinson-Patman Act of 1936 was, as we have seen, designed to limit the advantages derived from large buying-power in the hands of such chains as A & P. The phase of the Sherman Act case against A & P dealing with its role as a buyer suggests a case under the Robinson-Patman Act; indeed, certain portions of Judge Lindley's long opinion in the District Court dealing with the subject of discriminatory price preferences express doubt "whether we ever needed the Robinson-Patman Act."³²⁹ Section 2(a) of that Act, forbidding sellers to discriminate in price, and Section 2(f) making it unlawful for a buyer "knowingly to induce or receive a discrimination in price," were clearly applicable; but the Government chose simply to contend that A & P's efforts to procure buying preferences violated the Sherman Act, "even though such practices also violate the Robinson-Patman Act."³³⁰

The philosophy which guided A & P's approach to its suppliers is most lucidly explained in a letter from Vice-President Bofinger to the president of the Central Western Division. The writer reviewed possibilities of A & P entering the doughnut flour manufacturing field and concluded that the Company's lowest possible production cost would be considerably above the price A & P was then (August, 1941) paying to its two principal suppliers. The writer then continued:

"You might ask why is it that the company cannot do as good a job as an outside organization? Our answer is just this, the

328. Adelman, *The Great A & P Muddle*, *Fortune*, Dec., 1949, p. 122.

329. 67 F. Supp. at 676. Judge Lindley added: "I have thought that the Sherman Act, properly interpreted and administered, would have remedied all the ills meant to be cured."

330. Govt. Br. (C.A.), p. 30. The company said in its brief on appeal (p. 211): ". . . 'If in a few instances it is plain that A & P received a preferential price, wittingly or unwittingly, and if in a few other instances doubt still remains as to whether in a Robinson-Patman Act proceeding, the proof in this record would suffice as a defense, we submit that such instances . . . are not proof beyond a reasonable doubt in support of the charge in the information that A & P sought 'a systematic discriminatory buying preference over competitors.'"

Joe Lowe and Doughnut Machine Corporations are willing to take tonnage business at an attractive price, thereby reducing overhead, and secure a margin of profit on the remainder of the business done with smaller accounts at a much higher price. This practice holds true of many other commodities we purchase on the outside. If I were in the manufacturing business, I would consider it good principle to take a large attractive volume at cost, thereby reducing my overhead which is virtually a profit, and depend on the remainder of the accounts for the profit on my investment.”³³¹

This letter indicates an expectation that the suppliers of A & P will “recoup” from independent competitors some part of the price concessions granted to A & P.³³² The principal critic of the case, while conceding that “*systematic* patterns of price discrimination so that some buyers (usually small) constantly pay more than others may be a serious monopoly phenomenon,” argues that the Anti-trust Division of the Department of Justice does not understand the difference between such discrimination and “*unsystematic, sporadic* discriminations, which set off and snowball into general price reductions [and] are an essential ingredient of competition in most markets. . . .”³³³ He charges that the Division advocates a “completely inflexible doctrine” which “condemns without exception any system of trade discounts.”³³⁴ The Government’s brief in the District Court, however, under the heading “Abuse of combined vertical and horizontal integration,” devotes more

331. A & P Tr., v. 24, pp. 4830, 4831. The letter also contains this significant passage: “We are vitally interested in cutting corners wherever possible to bring about the lowest cost on merchandise whether for our manufacturing purposes or resale in our stores, and if we thought for a moment it would be advantageous for us to manufacture, we would be the first to advocate entering the field.”

332. The record contains a cost analysis made for Olney & Carpenter, supplier of potato sticks, who granted quantity discounts to A & P on a sliding scale arrangement. In the test year the firm produced 225,000 cases of potato sticks. Of these, 140,000 (or 62% of the total) were sold to purchasers who bought quantities throughout the year below the minimum discount contract bracket (5% discount on 25,000 cases or more). Of the remaining 85,000 cases, 60,000 went to A & P (at a discount of 8%) and 25,000 to another chain at a 5% discount. The accountant proceeded on the basis of 140,000 cases as the volume which the company would have had “if no inducements by way of volume discounts would have been offered.” A & P Tr., v. 26, p. 5288. Then he allocated to each of the 140,000 cases its pro rata share of totals of factory and general overhead costs. He thus purported to show how per-case costs are decreased by the addition of the 85,000 cases sold subject to quantity discounts. All of the decrease in cost is credited to the quantity discount purchases of 85,000 cases. See Govt. Br. (D.C.), pp. 274, 275; A & P Tr., v. 26, pp. 5284-5293. The accountant stated generally that the advantages flowing from the increased volume brought about by the 85,000 cases sold subject to quantity discounts were “(1) Absorption of overhead and saving of sales expense as indicated in the above analyses. (2) More economical use of direct labor in manufacturing, including less labor turnover. (3) Economy through purchase of larger quantities of raw materials.” *Id.* at 5292. The reader might well ask: Why was this study based on the assumption of a “normal” production of 140,000 cases, with the extra 85,000 thrown in as a cost reducing windfall?

333. Adelman, *The Great A & P Muddle*, Fortune, Dec., 1949, p. 125.

334. *Ibid.*

than 400 pages to the task of describing what it calls "Coercing *systematic* discriminatory buying preferences,"³³⁵ and the civil complaint now pending alleges "a continuing agreement and concert of action . . . to obtain . . . under the dual threat to withdraw their patronage or to manufacture for themselves, *systematic* discriminatory price preference over . . . retail competitors in the purchase of manufactured and processed foods and food products."³³⁶ Whether the efforts to obtain such preferences can be continuously successful in a competitive industry is, of course, another question.

The systematic nature of A & P's effort to secure price preferences for itself is emphasized by the desire, previously discussed, to bring about two price levels, one for A & P and a higher one for all competitors.³³⁷ Two of the means to secure a lower price level for A & P as a buyer, advertising allowances and brokerage, have already been discussed. But these were not the only methods. There were, for instance, a great number of "Quantity Discount Agreements" between A & P and its suppliers. The form of these agreements, which was prepared by A & P, revised as of July, 1940, read as follows:

"THE PURCHASER [A & P] HAS OBLIGATED ITSELF TO BUY FROM THE SELLER a *Large Quantity* OF MERCHANDISE AND, IN VIEW OF THE PURCHASES IN LARGE QUANTITY, PRESENT AND PROSPECTIVE, THE SELLER AGREES TO ALLOW THE FOLLOWING QUANTITY DISCOUNT ON AMOUNTS BOUGHT BY THE PURCHASER, BETWEEN THE PERIOD COMMENCING ON . . . 19 AND EXPIRING . . . 19 :

"The seller warrants that the quantity discount specified herein does not reflect any brokerage or brokerage savings whatsoever and is available on proportionately equal terms to all other buyers after making due allowance for differences in the seller's costs (other than brokerage) and for the seller's right to select his customers and/or to change his prices in response to market conditions and/or to meet competitors' prices.

"This agreement may be cancelled by either the seller or the purchaser upon notice."³³⁸

Attention should be called to the words "a large quantity." Here, as in its agreements for advertising allowances, A & P's intentional vagueness was based on the ground that "we cannot commit the company for any definite quantity nor should we book any firm orders in

335. Govt. Br. (D.C.), pp. 221-627. Emphasis added.

336. Civil Complaint, *United States v. Great A & P Tea Co.*, ¶ 22. (Emphasis added.)

337. See text at notes 223 and 224 *supra*.

338. A & P Br. App., v. II, p. 177. Emphasis added.

order to obtain a quantity price.”³³⁹ Indeed, almost a year before the revised form set forth above was circulated among field buyers, one of A & P’s attorneys submitted a memorandum to headquarters in which he said:

“There has been some discussion, as you know, over the propriety of the Company’s present form of so-called ‘Quantity Discount’ agreement with manufacturers in which the basis of the discount is stated to be the purchase by the company of ‘a large quantity’ of the manufacturer’s goods.

“A number of these agreements were introduced as exhibits by the F. T. C. in their brokerage case, and, in view of testimony that these contracts did not obligate the company to purchase anything at all, made a somewhat unfavorable impression.

“Of course, the legality of discounts received by the Company, in the final analysis, depends not upon what is stated in any contract, but upon the facts. If it can be proved that the manufacturer saved as much as or more than the amount of the discount in selling to the company as compared with other buyers, the discount is legal. Such savings may have been due to the company’s more efficient and direct methods of buying rather than to the quantity bought. The statement in the present contracts that the discount is given because of ‘large quantities’ thus is definitely misleading.”³⁴⁰

The language objected to was nevertheless retained in subsequent quantity discount agreements.³⁴¹ However, the memorandum persuaded the Company to introduce a new form which was called “Cost Savings Agreements.” Here the seller agreed “to pass along to the Purchaser the . . . savings in the Seller’s costs of manufacture, sale and delivery, other than brokerage, in the form of a discount or allowance of . . . percent from the . . . regular price . . .” The discount was to be paid to the purchaser (A & P) quarterly or yearly, at termination of the contract, or as a discount shown on the invoice. The seller warranted that the same discount was available to all other buyers on proportionately equal terms and that it did not reflect any brokerage. The preamble to the agreement recited that “the Purchaser normally buys . . . in large volume” and its “methods of buying . . . are more efficient, more direct, and generally different than the methods employed by other buyers . . .” which results “in savings in the Seller’s costs of manufacturing, selling and delivering

339. Letter from Charles W. Parr, in charge of field buying offices, to Baltimore buying office, April 3, 1939. *Id.* at 173.

340. A & P Tr., v. 12, pp. 2265-6.

341. *Id.*, v. 14, p. 2773 (agreement with Consolidated Biscuit Company for the year 1941).

the . . . commodity to the Purchaser, which said savings, excluding any and all savings in brokerage, can be proved by the Seller to be equal to or greater than the amount of the discount" prescribed in this agreement.³⁴² This form avoided the objections against the quantity discount agreements by throwing the burden of proof with respect to cost savings on the seller. In addition, this new contract like the quantity discount contract also placed the burden on the seller to make the discount available on proportionately equal terms to all other purchasers. Counsel for A & P insisted on this, because "in the absence of actual knowledge on the Company's part, this clause would protect it from liability under Section 2(f) of the Robinson-Patman Act in the event that the manufacturer failed to accord the discount to some deserving buyer. A & P would be entitled to presume that the manufacturer would live up to his contractual obligations, and would not be called upon to inquire further."³⁴³ Counsel's additional recommendation that A & P itself should establish a small "permanent staff to check manufacturers' costs" which would be able "to eliminate the guesswork as to savings in many cases (or at least put it on a sound accounting basis) and thus eliminate the possibility of excessive discounts which could cause trouble under the law,"³⁴⁴ was apparently not adopted.

In June, 1940, Headquarters became disturbed by rumors that all buying agreements were sent out to sellers with the discount figure or advertising allowance filled in by the A & P buyer, thus creating the impression that the seller was asked to sign on the dotted line. Accordingly instructions were issued to buyers "that in the future, the details of such agreements should be filled in by the seller himself, and should not be done by buyers' assistants or stenographers."³⁴⁵

A & P's awareness of the preferences which it sought and received and its desire to enjoy them to the exclusion of other buyers were frequently in evidence. For instance, in May 1939 a deal on pineapple juice at prices from 15% to 20% off regular lists was announced to the Units of the Atlantic Division with this comment:

"It is most important that this deal be kept confidential and we request that you caution your buyers accordingly. You can well realize the effect this might have on the pineapple juice market in general. If the prices got out, undoubtedly other packers would probably meet them and we would thereby lose all advantage. Furthermore, if such arrangements as this are not kept confidential we will have difficulty in securing such concessions."³⁴⁶

342. A & P Br. App., v. II, pp. 184, 185.

343. A & P Tr., v. 12, p. 2272.

344. *Id.* at 2269-70.

345. *Id.*, v. 14, p. 2651.

346. *Id.*, v. 15, p. 2915.

In May, 1941 the Director of Purchases for the Southern Division received the following instructions:

"It has been our definite understanding that the Headquarters Buying Department has always endeavored to keep our price arrangements with manufacturers strictly confidential. Certainly this policy is defeated if we supply our store personnel with these prices. It would be an easy matter for this information to become general. Inasmuch as in the attached list they are shown the retail prices at which the merchandise is to be sold, we fail to see why it is necessary for them to know the cost price."³⁴⁷

A few months earlier the same Southern Division Director of Purchases wrote to one of the units in his division that Headquarters had received complaints from some of the packers who claimed that when a price quotation is passed along to the field buying office, the information "gets out to the concession market managers, who in turn evidently have a few friends in the trade to whom they evidently have been advising our paying prices." He added: "This naturally works to a great disadvantage to the packers and the Company as well, because it forces the packers to either offer these small independent buyers the same prices enjoyed by us or become involved in a controversy."³⁴⁸

The desire for secrecy of price concessions sometimes led to odd arrangements.³⁴⁹ The secrecy indicates awareness of the fact that the preferences sought by and granted to A & P were often in excess of cost savings by A & P suppliers. We have already noted A & P's admission that it was impossible to devise an equitable yardstick by which the monetary value of advertising allowances could be measured. Nevertheless, A & P continued to seek and to receive such allowances without letting itself be pinned down to any specific advertising performance. Similarly, as has been stated, many of the quantity discount or cost savings agreements could not be shown to reflect actual savings.³⁵⁰ For this reason a supplier of A & P was warned by its counsel not to sign A & P's "Cost Savings Agreement," because that contract form "seems on its face to indicate an attempt on the part of

347. *Id.* at 2957.

348. *Id.* at 2940.

349. In 1937 Weber Baking Company and Langendorf Bread Company gave A & P 10% rebates in cash which A & P entered on its books as receipts from John Doe. In explaining this unorthodox accounting procedure, the Los Angeles Unit advised Headquarters Treasurer Carlton on June 15, 1937: "Their reason for paying us in cash and requesting us to make entries as John Doe, is that they are afraid that either someone in their office or ours might leave and go with a competitor and the information would become known." *Id.*, v. 15, p. 2985; Govt. Br. (C.A.), p. 161.

350. H. C. Brill Company, 26 F.T.C. 666, 678 (1938), was a proceeding in which the FTC found no justification for volume discounts allowed to A & P on sales of ice cream powder.

the purchaser to secure a discount on commodities sold by the Hills Brothers Company to it and seeks to justify the discount upon the basis of cost savings which are probably non-existent.”³⁵¹ Another supplier, Cranberry Cannery, also refused to sign the cost savings form on the ground that it could not show a manufacturing economy; but it was willing to continue quantity discounts in the vague hope that if ever called upon to justify them, it could “just meet the situation when and if it arises with whatever conditions at that time will prove the most effective.”³⁵²

A & P's ability to buy cheaper than anyone else as a result of unique price concessions,³⁵³ often apparently without justification of cost savings,³⁵⁴ was maintained by the use of threats to withdraw patronage and sometimes to enter into manufacturing.³⁵⁵ A few examples will illustrate.

In October, 1939, counsel to A & P wrote to the company with reference to Cost Savings Agreements. Observing that many meat packers refused to give discounts to A & P on the ground that they were not giving any to other large buyers, he said:

“If the packers do not give the discount to other buyers who are also entitled to it, the giving of it to A & P would, of course, be discriminatory. The only solution is for A & P to rely on its purchasing power and refuse to deal with packers who are not willing to give the discount even if it means giving it to other large buyers. This is a perfectly legitimate use of the company's bar-

351. A & P Tr., v. 12, pp. 2293-4. The letter also stated “that the A & P is doing its best to find a form of contract which will justify it in accepting discounts not granted to others, even though unjustifiable, by placing the entire burden of justification on the seller. . . . Until such time as you can prove to your satisfaction that cost savings do result from your sales to A & P, we would counsel strongly against signing any such agreement.” *Id.* at 2299, 2300. As a result of this advice Hills Brothers refused to sign the “Cost Savings Agreement” but did execute a “Quantity Discount Agreement” *Id.*, v. 23, pp. 4610-1.

352. A & P Tr., v. 12, p. 2366-2367.

353. The following are additional examples: The representative of a company manufacturing fruit jar caps answered “yes” to the question whether A & P could buy its caps “cheaper than any wholesaler in the country.” *Id.*, v. 15, p. 2851. The representative of the Walker-Austex Chile Company answered “No” to the question whether “any other company or customer [than A & P] ever received that quantity discount.” *Id.*, v. 16, p. 3037. The representative of Hunter Packing Company answered “No” to the question whether he had “ever entered into a cost savings agreement or any general discount agreement with any other customer.” *Id.*, v. 27, p. 5591.

354. A particularly illuminating example is Government Exhibit No. 4443, A & P Tr., v. 60, pp. 14,882-1 through-3, containing a comparison of prices per bale received by the Quaker Oats Company of Chicago during the second half of 1943. The exhibit shows that the bales purchased by A & P always contained 10 five pound bags, while the majority of purchases by others were in bales containing only 9 such bags; nevertheless, the prices charged to A & P for 10-bag bales were lower than those charged to others for 9-bag bales and lower than the prices charged to those other customers who also purchased 10 bag bales. Govt. Br. (D.C.), p. 299.

355. Govt. Br. (C.A.), pp. 214-227.

gaining power. If the threat of loss of sales convinces the packer that he should sign the agreement, the company can rely on the seller's statement in the contract that the same discount is given on proportionately equal terms to other buyers who can qualify for it. It is impossible for the company to ascertain whether all buyers are being treated equally. The avowal clause in the contract should protect us." ³⁵⁶

In 1932 Swift & Co. refused to pay brokerage to A & P. The officer in charge of the national meat department then suggested to Headquarters that Mr. Swift should be advised that "unless his Eastern plants were prepared to allow . . . a brokerage . . . we would be obliged to consider their attitude unsatisfactory, and to place not only their Eastern plants, but all Swift outlets, on our unsatisfactory list. It would certainly give the Swift executives plenty to think about in losing twenty-five million dollars worth of sales, especially at this time." He added that "Swift & Co. will be the ones to suffer if they refuse to meet our views." ³⁵⁷ After A & P's defeat in the brokerage case brought against it by the Federal Trade Commission, the company, as noted above, attempted to exercise similar pressure to induce its suppliers to abandon all sales to brokers and to sell exclusively direct. This was not an easy problem; although many complied with A & P's wishes, ³⁵⁸ others proved recalcitrant. Among the latter was a supplier of potato salad who was told that A & P would not deal with him if he had any brokers on this product, "regardless of the broker's location." ³⁵⁹ Similarly, successful efforts to overcome the resistance of a packer of Brandywine mushrooms were described in the following letter to Headquarters:

"In Chicago where he has a large business he could sell his broker without brokerage or put him on a salary. If he does not elect to come direct with us we should spread our business around a little more than we have been doing. We are not rubbing it in, but we made Brandywine." ³⁶⁰

With reference to another company a field buyer reported "that regardless of what set-up they have they simply must have our business." ³⁶¹

356. A & P Tr., v. 12, p. 2309.

357. *Id.*, v. 4, pp. 496, 497.

358. "It is not an easy problem for some of these canners to decide to give up as high as 50 brokers selling quite a proportion of their products, but they did so decide. They are inclined to increase equipment to enable them to supply more of the articles they are packing and to put up products which are now being bought from indirect sellers in their territory." Letter from Zoller to the Director of Purchases in Pittsburgh, March 1, 1940. A & P Tr., v. 28, pp. 5883-4.

359. *Id.*, v. 26, p. 5405.

360. *Id.*, v. 28, p. 5861.

361. *Id.* at 5907.

A & P thus tried not merely to secure unique price concessions, but also to restrain the freedom of its suppliers to do business with others as they pleased with resulting curtailment of the business opportunities of independent brokers. Interference with the relationship between suppliers and others was also manifest in a "crusade" by A & P³⁶² to move "in a united front against manufacturers offering premium deals" so that "they would all eventually become discouraged and refrain from offering premiums to the trade at large."³⁶³ The "discouragement" was to be accomplished by the threat of refusing to restock their products.³⁶⁴ Similar threats were used against suppliers who made store-door deliveries to A & P competitors.³⁶⁵

With respect to the threat of expanding A & P's manufacturing activities, Mr. John Hartford in 1927 asked the purchasing directors how they felt about a plan to advertise extensively the products manufactured by A & P and its subsidiaries. They answered that such a demonstration was needed "in order to safeguard the arrangements which we now have with national manufacturers. They felt that with the success of such a plan it would be much easier to get national manufacturers to recognize us and that they will be anxious to keep their arrangements with us attractive so that we would not consider it necessary to go into their lines."³⁶⁶

The most effective application of these measures is shown by A & P's negotiations with the Ralston-Purina Company. A & P took more than 60% of the cornflakes produced by that company at discounts of 7½¢ per case.³⁶⁷ In 1939 A & P informed Ralston that it could save 21 cents a case by manufacturing flakes itself and that it would start production accordingly, unless Ralston could change its ideas on quantity discounts.³⁶⁸ Six months of negotiations followed

362. *Id.*, v. 24, p. 4943.

363. *Id.* at 4941, 4992. The language quoted in the text is from an Atlantic Division circular to its sales managers, dated November 13, 1940. The circular continues as follows: "there is not to be any agreement entered into by chain competitors and ourselves as to do so might be considered an act of Restraint of Trade. However, if there is a Food Distributor's Association in your territory such as we know there is in Philadelphia and Baltimore, the Association's Secretary or Managing Director might easily upon behalf of all members, lodge his protest against premium deals."

364. One manufacturer advised the New Orleans purchasing office that "they would make every effort to change their merchandising ideas as far as premiums are concerned to agree with ours, as they feel that we are one of their best outlets, and by our not stocking their products, it would handicap them considerably in their merchandising efforts." *Id.* at 4988.

365. See A & P case, 173 F.2d at 83.

366. A & P Tr., v. 16, p. 3164.

367. A & P Tr., v. 28, pp. 5797, 5701. Red and White and National Tea Company received a discount of 5¢. *Id.* at 5702. Ralston-Purina produced one brand of flakes, Sunnyfield, only for A & P. *Id.* at 5797.

368. *Id.* at 5729, 5735-6.

which resulted in an increase of the discount for the major part of the cornflakes sold to A & P from $7\frac{1}{2}$ to $17\frac{1}{2}\phi$ per case.³⁶⁹ The granting of such an increase of 125% in the quantity discount is explained by testimony on behalf of Ralston-Purina that all the flakes and shredded Ralston purchased by A & P were manufactured in one plant at Battle Creek, Michigan, and that they "would have had difficulty operating it without a loss" if A & P had suddenly removed its volume purchases; if such withdrawal had occurred, Ralston "might have had to change the plant over to some other kind of a plant to make use of it."³⁷⁰ Ralston-Purina suggested the insertion of the following clause in the new contract with A & P:

"The discounts allowed in this contract are not made in lieu of brokerage, but represent an arbitrary reduction from our list prices which it was necessary to make to hold the flake cereal business of the Great Atlantic & Pacific Tea Company and to secure from them an agreement not to enter into the business of manufacturing flakes for five years."³⁷¹

A & P refused to accept this clause.³⁷² The discounts to other customers of Ralston-Purina remained five cents per case or less.³⁷³

3. *The Atlantic Commission Company*

The activities of the Atlantic Commission Company, A & P's wholly-owned subsidiary charged with buying fruits, vegetables and produce, are described at great length in Judge Lindley's opinion in the District Court³⁷⁴ and more briefly in Judge Minton's opinion in the Court of Appeals.³⁷⁵ This company, generally known as ACCO, acted not only as buyer for A & P, but was also engaged in "trade sales," i.e., buying and selling for others than A & P, which constituted about 25% of its business.³⁷⁶ Judge Lindley indicated that ACCO's methods tainted the whole fabric of A & P's operations³⁷⁷ and violated the Sherman Act even if in other respects the practices of A & P could be assumed to be within the law.³⁷⁸ This assumption was not shared by the Court of Appeals, which referred to ACCO's activities as ex-

369. *Id.* at 5766, 5735.

370. *Id.* at 5827, 5828.

371. *Id.* at 5785.

372. *Id.* at 5786.

373. *Id.* at 5792.

374. A & P case, 67 F. Supp. at 655-664.

375. A & P case, 173 F.2d at 84-86.

376. A & P Br. App., v. III, p. 62; A & P case, 173 F.2d at 84.

377. A & P case, 67 F. Supp. at 658.

378. *Id.* at 678. In an advertisement published by A & P on May 11, 1950 A & P quoted Judge Lindley as having stated in a letter: "I have condemned their practices through the Atlantic Commission Company."

amples of a general "conspiracy to establish a two-price level at the buying level, which enables A & P to meet its competitors with an enormous advantage at the retail level."³⁷⁹ Thus, the Court of Appeals implicitly disapproved Judge Lindley's conclusion that the conviction for violation of the Sherman Act should rest only on ACCO.³⁸⁰

A brief summary of this phase of the case will be sufficient to show that ACCO was only one of several means used by A & P in its systematic drive to secure for itself advantages over other buyers. ACCO was able to do this most effectively because of the dual nature of its position as buying agent for A & P with respect to 75% of its business and as a broker for "the trade" with respect to the remaining 25%. The reasons for the establishment and maintenance of ACCO's "trade sales outlets" were described in the minutes of a meeting of its merchandising committee on May 4, 1940 as follows:

"First, the necessity of such outlets for shippers who prefer to do all of their business with AC. Co. at those times when their supplies exceeded Teaco requirements. Second, to make available to similar shippers trade outlets for merchandise that might be of a quality unsuited for Teaco. Third, to provide an outlet for merchandise purchased by the A. C. Co. which proved on arrival to be unsatisfactory for the Teaco, minimizing the losses on such purchases. Fourth, to obtain a lower A. C. Co. operation expense through the increased volume. Fifth, through the friendly trade contacts to be better posted on market conditions and prices than would be possible in purchasing only for the Teaco. Sixth, unless trade outlets are maintained for shippers, direct contact arrangements with shippers could not be obtained so that when market conditions made purchase of merchandise at shipping point inadvisable such purchases on an arrival basis would not be possible when another intermediate factor was involved."³⁸¹

A year before this meeting ACCO's general manager had written to his staff that "a child can sell merchandise or fill the Teaco requirements with good quality, but it takes salesmanship to sell merchandise of poor quality to regular trade outlets and, of course, a shipper needs this service under adverse conditions and *our organization in order to be able to develop and maintain constant consignment tonnage under all conditions needs to exert effort in selling poor merchandise that has to go through some channel at times. However, of course, not Teaco quality or the use of their outlet for these offerings.*"³⁸²

379. A & P case, 173 F.2d at 87.

380. The advertisement of May 11, 1950 glosses over this fact. It merely mentions that Judge Lindley was upheld on appeal.

381. A & P Br. App., v. III, p. 63.

382. *Id.* at 62. Emphasis added.

Quality preference was thus added to price preference through the duality of ACCO's position which enabled it to carry out directly the policy of creating two quality levels and two price levels by securing all the price preferences previously discussed on its purchases for A & P while at the same time buying at market prices for its trade customers, from whom it also collected a brokerage as compensation for its services. The result is described by Judge Minton: "Suppose an item was selling in the market at 100. ACCO could buy it for A & P and have its choice of the quality at 95. The balance of the trade could buy at 100 and pay ACCO a 5% brokerage. Thus the price to A & P was 95 and to A & P's competitors 105."³⁸³

Judge Lindley emphasized the "inconsistent legal positions" which ACCO occupied "in its predominating position in the produce industry, acting as a buyers' broker, a sales broker, a direct buyer for A & P."³⁸⁴ It is true, as A & P contended, that ACCO's information concerning supply and market conditions everywhere in the country was "unusually complete" and that shippers employing ACCO as a seller's agent and jobbers employing it as a buyer's agent received the benefit of such information.³⁸⁵ Nevertheless, many shippers complained vigorously about ACCO's dual role. For instance, the general manager of the Yakima Fruit Growers Association of Yakima, Washington, at a meeting with ACCO officials, summed up his criticism of ACCO and of the Wesco Foods Company, a subsidiary of Kroger which fulfilled the same functions as ACCO, in the following terms:

"We welcome the Atlantic Commission Company here, and the Wesco, as buyers, and buyers for their respective chain organizations, but I am frank to say that when it comes to the matter of their acting as our agents as sellers at the same time, that this is an entirely different matter, because we do not believe that they can be fish and fowl at the same time. It is our advice and understanding that the Atlantic Commission Company purchase for the Tea Company approximately . . . 67,000 cars a year, and that their outside business with independent jobbers, and buying for them, and acting as agents for shippers, they sell or purchase for the account of others from 35 to 40,000 cars . . . I say that they cannot act efficiently, properly, in both of those capacities, because it is the object of a buyer and properly so, to buy as cheap as he can, to obtain the best possible and the lowest

383. A & P case, 173 F.2d at 85. A & P, however, maintained the ACCO organization that served it, in addition to paying for its purchases. In addition, its competitors who did not engage in direct buying would have had to pay the same commission to some other broker if not to ACCO.

384. A & P case, 67 F. Supp. at 663.

385. A & P Br., p. 320. Possibly these factors account in part for ACCO's continued employment by the trade in the face of its discriminatory practices. See, however, text at note 390 *infra*.

price which he can secure. That is just common, ordinary business. On the other hand, it is the object and purpose of a seller to sell at as high a price as he can get. Therefore, it seems to me the position of the Atlantic Commission Company, the two functions are diametrically opposed.”³⁸⁶

The association represented by this speaker and eighteen other northwestern apple growers in May, 1939, sent a letter to Mr. John Hartford, president of A & P, which, in part, read as follows:

“We . . . believe that chain stores have . . . rendered a distinctly beneficial service to the producers of fruits and vegetables. The chains have . . . , through modern merchandising practices, displayed these items so as to attract consumers and increase the volume of turnover. They have reduced the margin of retailer profit which prevailed prior to the advent of the chains and, through their example, independent grocers have been compelled in many instances to adopt similar practices. Unlike the over-ambitious politicians, we are not condemning the chain stores as such

“The chains, however, through their purchasing agents or purchasing subsidiaries are following certain practices which we believe are definitely harmful

“The Atlantic Commission Company buy at shipping point. They also buy in terminal markets from various jobbers and receivers. At the same time they solicit various jobbers and receivers and other small buyers in terminal markets to secure their business, buying on a brokerage basis.

“In securing such business, the Atlantic Commission Company barter with the trade and exchanges Tea Company spot supplies for trade purchases. The Atlantic Commission Company terminal market offices then wire their field representatives which, in turn, work all shippers, giving the business to the lowest bidder. They have, in effect, a boycott system against shippers who have declined their demand for a \$30.00 brokerage instead of the customary \$25.00 which prevails in trade circles, and only buy from them when the few shippers who, through fear of this boycott have agreed to the increased brokerage are unable to furnish the necessary supplies.

“These practices . . . have a very depressing effect on the market

“We believe the Atlantic Commission Company should confine its purchases to supplies needed by the Atlantic & Pacific Tea Company only and discontinue the practice of serving outside members of the trade. . . .”³⁸⁷

386. *A & P Tr.*, v. 40, pp. 8605-44 and 45. Apparently A & P alleged that the District Court erred in concluding that ACCO had an obligation, as an agent for sellers, to sell high. *Govt. Br. (C.A.)*, p. 249.

387. *A & P Tr.*, v. 40, pp. 8586-8589.

Another shipper, urging Mr. Hartford to confine the purchases of ACCO to A & P requirements, made an additional point. He first pointed out that "the possession of as much power as your volume of business gives to you is not a good thing for you because it gives you the responsibility for the unusually low prices which often occur in any fruit business."³⁸⁸ Up to this point the plight of this shipper may evoke only crocodile tears, since a lowering of prices even on farm products, if passed on to the consumer, may be looked upon as serving the general welfare.³⁸⁹ However, the letter continued:

"Your purchases for the account of terminal jobbers increases the volume of business which you do and, both directly and indirectly, adds to your responsibility in the year's poor prices. The indirect phase of this responsibility is worse than the direct inasmuch as your purchases give you a club over the terminal jobbers which potentially could be used to force them to buy only through your shipping point representatives."³⁹⁰

Here is a clear charge of restraint of trade, and there is evidence in the record to show that ACCO indulged in such restraints. For instance, the Government alleged that when the patronage of certain jobbers could not be obtained by ACCO "in its role as jobbers' buying broker [i.e., when jobbers tried to avoid ACCO brokerage fees by buying direct], ACCO assumed its role as shippers' selling broker and went over their heads to the shippers from whom they sought to buy. In these situations ACCO demanded that such shippers sell only through it on the selling end and thus the jobbers were forced back into ACCO's arms on the buying end and deprived of the opportunity of purchasing directly."³⁹¹ In one case, ACCO discovered that one of its clients, Growers Marketing Service, had sold tangerines in New York through an agency other than ACCO; ACCO complained and secured an apology from Growers' that "this sale is regretted."³⁹² Growers' also assured ACCO that it would "have exclusive handling of any of his fruit which may be shipped to New York City on con-

388. *Id.* at 8594-5.

389. Adelman, *The A & P Case*, 63 Q.J. Econ. 238, 248 (1949). On the controversial question of the exemption of agriculture from the anti-trust laws see EDWARDS, *op. cit. supra* note 232, at 56-66.

390. A & P Tr., v. 40, p. 8595. Emphasis added. ACCO's staff knew that purchasing power may be used as a "club"; the manager of the Houston office referred to his relationship with jobbers in the following terms: "I am after these fellows every day for business, and I do realize that we are not getting the business we did a year ago [1936], but I am afraid we will not get our share this season [1937] as we do not have the axe on them as we did last year since we are operating our own produce warehouse and not buying from them." *Id.*, v. 38, pp. 8144-5.

391. Govt. Br. (C.A.), p. 245.

392. *Ibid.*; A & P Tr., v. 38, p. 8179.

signment.”³⁹³ In another similar case ACCO learned confidentially that a Washington jobber had purchased directly from the shipper Max Cohen a car of cabbage; ACCO’s Miami office reported this to its Southeastern District Manager with the following comment: “We know, of course, on direct buying he [the jobber] can always save brokerage, but it seems with the amount of business we probably do with Cohen he should quote through us. . . .”³⁹⁴ The District Manager then settled the matter with Cohen; he wrote Cohen that he “would appreciate you keeping me posted in the event you run across a similar situation in the future so that we can follow up these cases and possibly impress upon the shipper [purchaser] the fact that we know what is going on and expect the proper treatment.”³⁹⁵

The Government concluded that “this browbeating of shippers caught in the act of selling through channels other than ACCO is based upon ACCO’s belief that it has vested rights in the reciprocal patronage of all shippers and jobbers who themselves obtain any ACCO patronage in any of its numerous roles.”³⁹⁶ A & P and ACCO denied that they had any such philosophy or that they attempted coercion of any kind;³⁹⁷ they pointed out that most of the jobbers bought more than half of their merchandise from the outside trade³⁹⁸ and explained the two cases described above as examples of “the common practice among men throughout the ages of expecting business from those to whom they give it, and following up to find out what is wrong if they do not get it.”³⁹⁹ Perhaps it is hard to draw the line between a philosophy of vested rights and mere expectation of reciprocity; yet, ACCO felt it was “due a big part” of the outside business of any of its customers who serve A & P.⁴⁰⁰

393. *Id.* at 8180-1.

394. *Id.* at 8162.

395. *Id.* at 8164.

396. Govt. Br. (C.A.), p. 246.

397. A & P Reply Br., pt. II, pp. 237, 238, and pt. I pp. 175, 177.

398. *Id.*, pt. II, p. 237.

399. *Id.*, pt. I, p. 177.

400. A & P Tr., v. 38, p. 8143. Compare the following excerpts from a legal memorandum issued by counsel on July 17, 1940 to vice-presidents, divisional managers and unit sales managers with respect to ACCO’s obligations under the Robinson-Patman Act (A & P Br. App., v. III, pp. 214, 215.):

Third: (a) It is charged that we, in endeavoring to sell merchandise to trade customers, have threatened to boycott them by not purchasing any of their merchandise for Teaco requirements unless they bought their fresh fruit and vegetable requirements through us.

This constitutes coercion and may be a violation of the fair practice provision of the Federal Trade Commission Act, and, may be a violation of the Clayton Act. It is however permissible for us in purchasing merchandise for the Teaco to give preference to such merchandise as we have sold to trade buyers, price and quality being at least equal to that offered by other dealers.

In its advertisement published on May 11, 1950, A & P announced that "the Atlantic Commission Company abandoned the dual role to which Judge Lindley objected" and "now only buys for A & P." This action eliminates all of the problems caused by ACCO's inconsistent dual or even multiple positions, but it does not remove any of the objections against ACCO's buying practices as A & P's purchasing agent, with particular reference to price, which were the same as those described in the preceding section of this chapter. A & P as a buyer of fruits and vegetables acted in the same manner as in buying all other supplies, except that the buying of fruits and vegetables was done through a corporate subsidiary.

One particular device adopted by ACCO as a buyer for A & P (apparently not used by the parent company) deserves special reference. This is ACCO's distinction between "cash" and "regular term" purchases. A lower price was deemed justified for the former because it involved "definite savings to the seller by reason of the fact that the buyer (ACCO) will assume responsibility for the merchandise when it leaves the shipping point."⁴⁰¹ In "regular term" purchases, on the other hand, the seller "assumes considerable transit risk, also grants the buyer privilege of inspection of the merchandise at destination and rejection there if it fails to conform with the terms of purchase . . . and payment for the merchandise is not obtained until arrival of the merchandise at destination."⁴⁰² Accordingly, ACCO decided in April, 1940, "to operate to the fullest extent on cash commitments and effect the customary savings in not having the shipper carry the insurance on delivered prices which in reality is a considerable premium on the differentials in cash versus regular terms."⁴⁰³

Three days after this announcement ACCO instructed its buyers that while all merchandise purchased for cash must be inspected by

(b) It is also charged that we use coercion in the following manner: We represent a shipper in one location; an independent represents him in another locality and has there built up a good business; it is charged that we go to the shipper and refuse to handle his account anywhere unless we handle it everywhere. This may violate the law and it is certainly bad business practice and one not in accordance with our policies.

(c) It has been charged that in order to coerce shippers to permit us to represent them in markets where the shipper was already making direct sales, that we threatened to withdraw our representation of the shipper in other markets (or a threat of withdrawal of Teaco's business) unless the shipper gave us his account in the markets where the shipper was already selling direct and needed no broker. The same comment as in (b) applies.

401. Memorandum from Counsel to Vice-President Bofinger, dated January 22, 1940. A & P Tr., v. 33, p. 6866. The memorandum added that ACCO would buy on regular terms for its other customers, thus assuring A & P of lower purchase prices for A & P requirements.

402. Inter-office communication from ACCO to Legal Department, *Id.* at 6852-3.

403. *Id.* at 6911.

ACCO's personnel, "in the absence of such personal inspection merchandise is to be bought for acceptance as to grade and quality upon destination arrival."⁴⁰⁴ These instructions, however, did not authorize payment of the higher price in such cases; on the contrary, ACCO insisted on the lower "cash" price in spite of the fact that in-transit responsibility was left with the shipper, which eliminated much of the justification for the differential. This was accomplished by agreements with some 237 shippers who were willing to protect ACCO's purchases as equivalent to U. S. Grade No. 1 upon arrival at destination in those cases where ACCO could not make inspection at shipping points. These shippers agreed that if such merchandise purchased by ACCO is not equivalent to U. S. Grade 1 on arrival they would reimburse ACCO.⁴⁰⁵ In other words, ACCO paid cash "with a guaranty from the shipper that he will stand behind the grade."⁴⁰⁶ This arrangement would seem to be similar to advertising allowances carrying no specific obligation to advertise and cost savings agreements without provable savings.

Although many shippers agreed to this, many others objected on the ground that "other cash buyers purchase merchandise from them with no guarantees or strings attached"; these shippers demanded a premium over and above the cash price in consideration of the requested guaranty on arrival.⁴⁰⁷

4. *A & P as a Seller*

The theory of the case against A & P was "Abuse of combined vertical and horizontal integration," carried out in two ways: by "coercing systematic discriminatory buying preferences" and by "elimination of competition by sales in selected areas below cost of doing business."⁴⁰⁸ In relation to the latter, it is fairly clear that the company followed a general policy of not selling below replacement cost. The minutes of a board meeting of the Central Western Division in January, 1933, record that the officials of the company "have very generously agreed to permit us to operate on an even break" and that "nothing ruthless will be attempted or countenanced, such as selling below cost. . . ." The same minutes describe this policy as one to "swap dollars,"⁴⁰⁹ which can only mean that all profits should be dis-

404. *Id.* at 6921.

405. *Id.* at 6921, 6922, 6930, 6934, 6935, 6941, 6963-6972.

406. *Id.* at 6955.

407. *Id.* at 7022. Apparently no business was done by ACCO with this group.

408. These are the two major headings in the Government's brief in the District Court. The second heading deals with "price wars" in all the Divisions of A & P. See pp. 628-986 of the same brief.

409. A & P Tr., v. 5, pp. 695, 696, 698.

pensed with ⁴¹⁰ at least until the higher volume expected from sales at lower prices had sufficiently reduced the expense rate.

At about the same time the Middle Western Executive Committee reported that "there will be no merchandise sold below cost and a restriction was placed on each unit as to the limit it may go into red during any particular week."⁴¹¹ Since the basic policy of A & P involved a low gross profit rate, that is to say a small excess of the selling price over the cost of the merchandise, it is clear that the term "cost" in this pronouncement refers either to replacement cost or actual cost of the merchandise sold, without reference to general overhead (selling and administrative expenses).⁴¹² Hence the gross profit could be so low as not to leave sufficient margin for the overhead. Moreover, in those cases where the company merely "swapped dollars," goods would be sold at cost without any gross profit. Thus a low gross profit or the absence of any gross profit would be the equivalent of a net loss for each store and this is precisely what was meant by the statement that each unit could "go into red" only up to a specified limit.

In more recent years there were some deviations from this policy of not selling below actual or replacement cost. For instance in December, 1941, the Sales Director for the Southern Division advised the sales manager of the Charlotte, N. C., unit of a "new super-market gross profit program" calling for a gross profit rate of .1050; he was told that this was "very low" and that "we should be careful not to sell merchandise too much below the replacement cost as to do that may invite sales to dealers which, of course, is something we do not want to happen."⁴¹³ This is an acknowledgment of the danger that competitors might buy their supplies in A & P retail stores cheaper than they could buy from wholesalers⁴¹⁴ and that sales somewhat below replacement costs actually occurred at times.

The fact that there were always numerous stores "in the red" received much attention during the trial. For instance, the president

410. Govt. Br. (D.C.), p. 652.

411. A & P Br. App., v. IV, p. 179. Emphasis added. As to the same policy in all other divisions see *id.* at 183, 235. In 1935 the Middle Western Executive Committee, referring to actions of competitors in setting prices below the N.R.A. mark-up, observed that "we are not to initiate below-code selling and in no event are we to sell below-cost unless authority is secured from the Division Office, who in turn must obtain approval of New York Headquarters. In those instances where prices are set below 3% gross profit and down to cost, it will be necessary for the units to send the Divisional Office the 3% gross profit forms. . . ." *Id.* at 179.

412. For instance, in July 1939 two stores in Allentown, Pa., operating on "very low gross profits" of .0996 and .1037, had expense rates of .1750 and .1480 respectively. A & P Tr., v. 51, p. 11,461. In Easton, Pa., there was a store operated at a gross profit rate of .1219 and an expense rate of .1764. *Id.* at 11,462.

413. A & P Tr., v. 46, pp. 9991, 9992. The same instructions were given to other Units in the Southern Division. *Id.*, v. 47, p. 10,397.

414. Govt. Br. (D.C.), p. 749.

of the Middle Western Division testified that "stores were frequently operated in the red for a period of as much as four years and Division Headquarters was receiving the store operating reports during those four years. Stores in the red were reported on and analyzed and if there seemed to be a reasonable opportunity for improvement during the forthcoming quarter they were authorized to continue operations, sometimes continuing this way for four years. The experience has been that stores in red frequently represented a large percentage of the total stores in a unit."⁴¹⁵ The same witness explained that a store is operating "in the red" when its expense rate is above its gross profit rate, but that there was "never" any purpose or intent to make any store a losing store.⁴¹⁶

This assertion that red figures for individual stores were never planned is refuted by considerable evidence to the contrary. The instruction quoted above that there was a limit up to which stores might go into red ink is a case in point; similarly, on August 30, 1940, the chairman of the board of the Atlantic Division wrote to the president of the Southern Division about a conference with Messrs. John and George Hartford:

" . . . [I]n going over the figures yesterday Mr. John continually hammered on our high gross profits . . . throughout the Southern Division. They spent a lot of time on Dallas . . . Mr. John and Mr. George both expressed themselves as feeling that if we got our gross profit down where it should be we would get some business. They would like to see you operating the stores in the City of Dallas on a 12 percent gross and *no matter how much money you lost there would be no complaint from them*. We went over dozens of stores . . . in other Divisions . . . where the rents were high, sales small and losing substantially, but the gross profit was around 12 percent and Headquarters did not criticize the operation at all—and *they so expressed themselves that they would not care how much money we lost as long as we kept our gross profit down*."⁴¹⁷

The minutes of an Executive Board meeting of the Atlantic Division on May 23, 1939, review the results of the super-market gross volume program in that territory in terms of "proposed" profits and losses in various units and "scheduled weekly losses" for certain cities;⁴¹⁸ also total operating losses for the Division as a whole during

415. Summary in A & P Br. App., v. IV, p. 174; A & P Tr., v. 63, pp. 15,153, 15,156.

416. A & P Br. App., v. IV, pp. 174, 175; A & P Tr., v. 63, pp. 15,174 and 15,203.

417. A & P Tr., v. 47, pp. 10181-2. Emphasis added.

418. "In operating profit it was pointed out that the Baltimore Unit was running \$400 per week accumulated in excess of its \$1000 net profit requirement; Philadelphia

the first quarter of the year were described as "\$500 per week more than the program which was set up at \$5225 per week."⁴¹⁹

The planned losses described above reflect, of course, only retail store operations. They do not take into account profits realized from other sources. There are the "profits" of the manufacturing subsidiaries of A & P; since 1934 these subsidiaries have billed A & P warehouses at cost plus a factory profit, and such profits have been paid as dividends to A & P.⁴²⁰ A certified public accountant called as a defense witness testified that "since 1934 the estimated profits of the manufacturing subsidiaries have been allocated to the units . . . on the basis of the quantities of the products of each shipped to the retail warehouse units."⁴²¹ In addition, there are the profits derived from advertising allowances, quantity discounts, and "cost savings" allowances, which go into a special account at Headquarters where these sums are collected. From that account "headquarters allowances" are "allocated monthly or quarterly to the Units to which the merchandise is delivered on the basis of shipments made, with the fourth quarter allocation made in such manner that the annual statistical reports agree substantially with the accounting reports in that respect."⁴²² Similar allocations were made with respect to allowances paid by suppliers to A & P's field buying offices rather than to Headquarters. Both such "headquarters" and "local allowances" were, from an accounting standpoint, considered as operating profits for the retail stores.⁴²³

about \$1000 per week more than its proposed loss; Richmond a little less than \$550 per week under proposed profits; . . . Washington just about even with its \$4000 scheduled weekly loss." *Id.*, v. 50, p. 11133.

419. *Ibid.* See also the minutes of an Executive Board meeting of the Atlantic Division of April 8, 1940 which approved a policy to exceed the sales of the 1940 program "even though to gain this objective we might experience some little operating loss." *Ibid.*, v. 51, p. 11181. There was also no objection "to the meat department being somewhat in red" because "meat is a splendid leader." *Ibid.*, p. 11,416.

420. A & P Br. App., v. I, p. 39.

421. A & P Tr., v. 62, p. 14,982. Defendants summarized the testimony of the witness, Mr. H. E. Nichols, as follows: "While the annual statistical reports do not include all of such [manufacturing] profit shown by the accounting records, it is possible to reconcile them. Nichols thought such an allocation justifiable because the over-all picture of A & P as a merchandising operation would otherwise not be complete. In his opinion such an allocation is sound and equitable and does not favor a Unit cutting prices. These profits, however, are not allocated in the accounting records and Nichols did not believe that they were properly attributable to the retail store operations because he thought that they are manufacturing operations whose profits are determined in their own accounts." A & P Br. App., v. I, pp. 97, 98. At a Board meeting of the Central Western Division in July, 1938, Mr. John Hartford said: "Subsidiary profits play quite an important part in our total earnings and the point was brought out that it seems unwise to return to the Units too much of the earnings of these companies, coffee being mentioned in particular, as when such returns are made the money is dissipated in lower prices in other commodities." *Id.* at 98.

422. Summary of Nichol's testimony, A & P Br. App., v. I, p. 96.

423. *Id.* at 96, 97. See text to note 167 *supra*.

Under these circumstances it is understandable that red figures produced by the excess of the expense rate over the gross profit rate of retail stores could easily be turned into black figures for a particular store, unit of stores, or even a whole division by the addition of allocated profit distributions. For example, the president of the Atlantic Division advised his first vice-president in April 1939 that a total weekly loss of \$11,000 had been assigned to the Division, which was to be distributed among the five units in the Division as follows: Baltimore, Philadelphia, Richmond, and Washington were to take losses of \$500, 6500, 500 and 6000 respectively, and Scranton was to make a profit of \$2500.⁴²⁴ Since the volume of sales in the Atlantic Division had lagged behind sales elsewhere,

“ . . . it was decided to *subsidize our territory* as far as a profit basis is concerned and allow for a loss . . . of \$11,000 per week during the fiscal year 1939 . . . [T]he \$11,000 loss does not include the . . . Headquarters' interest credit or the profit distribution . . . a *final total result for the Division would be a profit of \$1,467,000*. The Atlantic Division . . . is expected to show about a .0046 loss weekly but inclusive of overages and distributions a profit of .0119 will be realized.”⁴²⁵

This policy of “subsidies” for retail stores or even for particular departments of retail stores⁴²⁶ is the basis for the Government's argument that “the profits from A & P's non-retail operations are credited to their retail operations, including those profits secured by discriminatory buying preferences. These direct subsidies make it difficult, if not impossible, for less strongly integrated, or for non-integrated competitors engaged only in retailing, to compete or survive.”⁴²⁷

The Government also contended that “a disproportionate share of the general profits from retail operations . . . is channeled into specific retail areas for the purpose of permitting A & P in those areas to undersell retail competitors” and that “with the help of this credit-

424. A & P Tr., v. 51, pp. 11,412-3.

425. *Id.* at 11,410-1. Emphasis added.

426. In a memorandum to sales managers with respect to gross profit rates on produce in supermarkets, dated July 10, 1941, it is stated that a gross profit of less than 10% would result in “tremendous loss.” If the gross on produce should be increased, the gross on “selected grocery items” should be reduced “in order to keep our total rate in line with the program.” Generally, “we believe . . . that there should be a limit to the extent to which we may go in subsidizing any one department, although, of course we cannot overlook the sales importance of certain lines of merchandise.” A & P Tr., v. 46, p. 9970. In February 1941 the sales director of the Atlantic Division objected to an immediate increase of the gross profit in self-service stores because this would slow down the steady increase in volume of sales. He suggested that Mr. John Hartford should be asked “to continue the subsidy in Philadelphia so that we can get the weekly volume up to \$950,000 and possibly a million dollars.” *Id.*, v. 51, p. 11,391.

427. Govt. Br. (D.C.), p. 1075.

ing of profits, selected retail areas are operated below their cost of doing business for the purpose of injuring or destroying retail competitors. . . ." According to the Government these are "unlawful practices" which are the heart of the case.⁴²⁸

The critics of the Government's position on this point in the A & P case assert that the Government and the Courts are entangled in "confusion,"⁴²⁹ and in "a direct attack on the competitive process."⁴³⁰ The Government's theory that integration as such is not under attack, but only its abuse, is said to be inconsistent with the Government's charge of illegality of subsidies, because "subsidies" and "integration" are "two names for the same thing;"⁴³¹ transfers of earnings from any stage of the integrated company to another stage are merely bookkeeping entries or accounting fictions, since the manufacturing subsidiaries do not sell and the warehouses do not buy in any real sense of those terms.⁴³² Hence, it is said, there is no sound basis for the charge of "below cost" selling, particularly since advertising allowances and quantity discounts are clearly "reductions in the cost of goods purchased."⁴³³ As far as sales are concerned, "A & P, responding to varying competitive pressures, sold at varying margins in various areas;"⁴³⁴ if all competitive price cutting is to be outlawed, competition itself would have to be "consigned to limbo."⁴³⁵ Finally, according to the critics, there is no evidence that a reduction of prices in one area was accompanied forthwith by an increase somewhere else;⁴³⁶ such a thing would be "inherently absurd."⁴³⁷

This general criticism of the decision convicting A & P of a criminal violation of the Sherman Act reflects sound economic theory. It is, of course, generally true that transfers between the various units of an integrated firm are bookkeeping fictions. Furthermore, prices would usually be raised in any section where the traffic can bear it, regardless of downward pressures operating elsewhere; hence, the theory of "recoupment" does not appear to be acceptable as immutable economic doctrine.

428. *Ibid.*

429. Adelman, *The A & P Case*, 63 Q.J. ECON. 238, 246 (1949).

430. Note, *The Perplexing Story of the A & P Case*, 58 YALE L.J. 969, 977 (1949).

431. Adelman, *supra* note 429, at 246.

432. *Id.* at 245. Note, 58 YALE L.J. 969, 978 (1949).

433. Adelman, *supra* note 429, at 244.

434. Adelman, *The Great A & P Muddle*, *Fortune*, Dec., 1949, pp. 122, 178.

435. Note, 58 YALE L.J. 969, 977 (1949).

436. Adelman, *Integration and Anti-Trust Policy*, 63 HARV. L. REV. 27, 59 (1949) (the A & P case is discussed in this article on pp. 53-60); Note, 58 YALE L.J. 969, 979 (1949).

437. Adelman, *supra* note 436, at 59.

The relevance of this criticism would be undisputable if the case against A & P were based on the company's size and integrated structure as such. But, as previously noted, the Government's attack is directed only against certain abusive practices. The critics of the decision have paid no attention to the evidence pertaining to these specific practices, apparently in the belief that the real issues relate to what appear to be dangerous fallacies of economic theory. Perhaps they feel that if the case were to be understood as condemning merely these abusive practices, it would not be very important from an economic viewpoint and certainly not controversial.

Indeed, one of the critics acknowledges that sales at varying margins in various areas "can . . . be abused for monopolistic purposes" and that "the Government attorneys probably had this point in mind" but were so "preoccupied" with their theory of below cost selling "that they neglected to make it."⁴³⁸ Another commentator concedes that "predatory" and "competitive" price cutting must be distinguished and that possibly "in certain instances A & P's price cutting went beyond what might be considered fair." But he also charges the Government and the court with failure to make "a careful selection" in proving such practices.⁴³⁹

The evidence in the record, however, shows repeated efforts to forestall and prevent competition or to put competitors out of business through price cutting and other predatory practices; in many instances such price-cutting was accompanied by the raising of prices in other areas in order to make it easier to put on full pressure in those places where this was desired. Judge Minton in the Court of Appeals referred to this,⁴⁴⁰ but he did not support it with references to the record. The following instances, among others, bear out his point.

A & P did admonish its staff "not by word or deed [to] let the impression get abroad that we are at any time attempting to put anyone out of business," because such practices are "responsible to a great extent for the efforts of various states and Congress to adopt punitive chain store legislation."⁴⁴¹ However, this policy was frequently disregarded. For instance, in March, 1940, the sales director of the Atlantic Division, writing to an official of the Eastern Division about competition with Food Fair Stores, stated that

438. Adelman, *The Great A & P Muddle*, *Fortune*, Dec., 1949, p. 178.

439. See note 435 *supra*.

440. A & P case, 173 F.2d at 87. See also A & P case, 67 F. Supp. 626, 664-671.

441. Minutes of Executive Committee Meeting, Central Western Division, April 9, 1936, A & P Tr., v. 5, pp. 787-8. The minutes also state that "one or two instances" of attempts to put competitors out of business had come to the Committee's attention.

"The mistake we made in Philadelphia was to let the Food Fair get too far ahead of us before we decided to go after them. In consequence, we had to take the business from them which was twice as hard as it might have been had we protected ourselves in the beginning. . . . [N]o doubt, you . . . have given your supermarkets competitive with those of Food Fair . . . the kind of price ammunition they needed to keep the competitor from doing any damage. Whenever we get wind of the opening of one of their stores now we set up a special program three weeks ahead of time, so that by the time they are ready to open their doors for business there isn't very much they can do to entice trade from us. Maybe we are not living up to the letter of the law with regard to company policy in this respect, but we would much prefer to be criticized for digressing a little from the policy than we would about competitors having taken our business." ⁴⁴²

In its meeting on September 8, 1939, the Executive Board of the Atlantic Division discussed the conversion of service stores to the self-service or semi-self-service plan in towns where supermarkets could not be justified. The minutes state that

". . . the idea behind this thought would be to operate these stores on a gross profit that would be lower than the service store, but not as low as the super-market . . . [W]ith additional volume we can render the public a greater service, forestall competitive development, and at the same time make money on our operations." ⁴⁴³

The purpose of forestalling competition was apparently a guiding principle in many parts of the organization. In February, 1941 there was a meeting of "key men and superintendents" at the warehouse in Richmond, Virginia. The discussion

". . . particularly emphasized the importance of laying our plans for sales promotion in towns where competitors are expected to open. Nothing should be left undone to defeat competitors' plans to share in our business in these towns . . . Particular attention should be given to stores in Roanoke and Waynesboro where Kroger stores are expected to open. This also holds true in towns like Clifton Forge where meat managers left us to go in business for themselves . . . Superintendents are asked to notify the Sales Department sufficiently in advance of such openings in order that competition may have no opportunity to affect our business. In the case of Clifton Forge, special meat prices

442. *Id.*, v. 51, pp. 11, 505-6.

443. *Id.*, v. 7, p. 1211.

have been given and arrangements made to feature these prices in local newspapers. . . .”⁴⁴⁴

Some time before this meeting the manager of the Richmond warehouse had been told with respect to a competitor next door to an A & P store that “the hotter we can make our program the quicker this outfit will realize that they have no place in the supermarket business in Richmond.”⁴⁴⁵

On other occasions too there was an intentional and organized program to prevent competitors from entering the field. It was stated as a matter of general principle that whenever a competitor wished to open “alongside of us . . . we should and have been following the policy here in Philadelphia of reducing our line . . . several weeks prior to the time the competitor plans to open so that people in the community will be impressed with our low prices and will continue to trade with us after the competitor has opened shop.” This will “take the winds out of their [the competitors’] sails” and should, “of course,” be continued for the same number of weeks after the competitor’s opening. “Naturally the program [of reducing our line of prices] would apply only to this store [alongside of which the competitor opens]—not any other.”⁴⁴⁶ Accordingly, when independent merchants planned to open in the vicinity of A & P stores, special retail price programs were advertised and put into effect “to combat this opening”⁴⁴⁷ or “to give them a real welcome.”⁴⁴⁸

A & P contended in the litigation that its price-cutting was only designed to meet competition⁴⁴⁹ and offered to prove that it is “customary in the trade to issue special prices . . . at the time, after, and sometime immediately before the opening of a nearby competitor’s new store, in order to minimize any sudden drop in volume of business which would otherwise be anticipated on account of the opening of such new store,”⁴⁵⁰ and that it is also customary “to watch closely all activities of principal competitors.”⁴⁵¹ The court sustained the Govern-

444. *Id.*, pp. 1297-8.

445. *Id.* v. 51, p. 11322.

446. Letter to the manager of the warehouse in Scranton, Pa., dated January 10, 1939, A & P Tr., v. 51, pp. 11,438-9.

447. *Id.* at 11442-3.

448. *Id.* at 11,448. For similar examples see Govt. Br. (D.C.), pp. 827, 912, 937, 951, 872. When a competitor who had opened in Paris, Texas, planned another store in Hugo, Okla., the Dallas Superintendent commented: “We have got to work out something to stop this fellow as he was greatly elated over the response he got in Paris, and this will cause him to continue if we do not curb him. I will do something regarding Hugo.” Govt. Br. (D.C.), p. 827.

449. See, *e.g.*, A & P Br. App., v. IV, pp. 49, 69, 240, 343.

450. A & P Tr., v. 77, p. 17,645.

451. *Id.* at 17,648.

ment's objection to these offers as immaterial.⁴⁵² The quotations from the evidence set forth above reveal an intention which goes beyond the mere minimizing of a sudden drop of business and contemplates, rather, prevention or exclusion of competition. That this was the real goal in other instances is shown by the following example: in April, 1939, the Sales Manager of the Pittsburgh Unit advised his superintendent that a competitor would move within a few days to a new location in the immediate vicinity of an A & P store, and that all prices in the latter store were to be lowered the day before the competitor opened:⁴⁵³ this A & P store had been a combination service store, but the change put it into the super-market price classification.⁴⁵⁴ This could only mean that the store was placed in the red or near to it, since combination service stores have higher gross profit and expense rates than supermarkets.⁴⁵⁵ These lower prices were put into effect without definite knowledge as to the price structure of the competitor's store;⁴⁵⁶ hence, it could hardly be said that the lowering of prices was merely a move to meet competition.

At about the same time a Pittsburgh law firm, on behalf of a small local chain, wrote to Mr. John Hartford about an incident which they described as follows:

"On Friday . . . Mr. King, Vice President of your company and head of the local unit, called on two executives of the Streamline Markets in one of their new stores that had just been opened and in a loud voice, publicly, before the employees and customers, he threatened to commence a campaign to bring about the financial ruin of Streamline Markets. He illustrated his threat by calling attention to what had happened to P. H. Butler, Kroger and the New Butler Company operating the Thorofare Markets. In order to prove that he had vast resources with which to accomplish this unlawful purpose he made known the handsome profits your company made last year, implying that your company could stand a price cutting campaign whereas our clients could not.

Promptly upon leaving the store he began to make good his threats. He advertised one price for all of his supermarkets in the city, but has established different and exceedingly low prices in the stores near a Streamline store . . .

. . . Your customers at your Highland Super market on Saturday May 13, 1939 were paying 49 cents a pound for tenderloin while at your Homewood Supermarket (near Streamline)

452. Notes 450 and 451 *supra*. See also A & P Br., p. 342.

453. A & P Tr., v. 51, p. 11,579.

454. Testimony of the sales manager, *id.*, v. 68, p. 16,181.

455. Govt. Br. (D.C.), p. 879.

456. Testimony of Pittsburgh Sales Manager upon cross-examination by Government counsel, A & P Tr., v. 69, p. 16213-4.

they were paying 27 cents. In the former store sirloin was being sold for 39 cents, while at the latter it was being sold for 23 cents. This is an example of what is taking place all along the line."⁴⁵⁷

Here again the lowering of prices in all A & P stores situated near Streamline was made without reference to Streamline's price structure; the sales manager in Pittsburgh testified that "we picked the Streamline points regardless of whether he (Streamline) had in those particular stores sold below . . . us."⁴⁵⁸

This incident caused such concern to Headquarters that Mr. King was asked to resign. Mr. John Hartford testified that "later, Mr. Ewing (A & P's counsel) came in to me and interceded for King, and I thought maybe I had been a little harsh and I asked King to withdraw his resignation, which he did, and I tore it up and shook hands with him, and said good-bye, and I said, 'Now, Mr. King, don't you ever go into another competitor's store, not even to look at a piece of equipment.' A little later I had a very nice letter from the firm (lawyers for Streamline), thanking us for the splendid way in which we had handled the matter. . . ." ⁴⁵⁹ On several other occasions during 1939, Mr. Hartford expressed disapproval of the lowering of prices simultaneously with or shortly after the opening of a competitor's store;⁴⁶⁰ yet, startling inconsistencies in the price levels of stores located in the same area were discovered as late as December, 1940,⁴⁶¹ and in June, 1941, a request for the reclassification of an A & P store with respect to produce prices was made on the eve of a competitor's opening in McKees Rocks, Pa.⁴⁶²

Other deviations from the announced policy not to engage in lethal business practices should be added. For instance, a former official of A & P's Southern Division testified before the Grand Jury that the defendant Black, general superintendent of the Dallas Unit, had promised to buy him "the best hat" in the City of Birmingham if he and the Birmingham sales manager "would see that they [meaning several

457. A & P Tr., v. 51, pp. 11,574-5. Mr. King had said: "I am going to start out right now and contact the stores nearest you and cut meat and produce to cost. I will cut enough prices so that you will feel it in a week from now and in a month I expect Levy to come to me. I will put a store . . . in Butler right opposite your store that will finish that store." He also said that he would "reduce his prices so low that it would be impossible for the Streamline stores to make a sufficient profit to stay in business." *Id.* at 11,581-2.

458. A & P Tr., v. 69, p. 16,296.

459. *Id.*, v. 88, p. 20,454.

460. *Id.*, v. 51, p. 11,611 and v. 67, pp. 16,014-5.

461. For instance, A & P had 2 supermarkets and 7 straight grocery stores in McKeesport, Pa.; 4 of the straight grocery stores had a higher price level on groceries than the other three. *Id.*, v. 52, pp. 11,642-3.

462. *Id.*, v. 51, p. 11,623. Govt. Br. (D.C.), p. 895.

stores of a competitor] were not in business a year from that date.”⁴⁶³ The same Birmingham Sales Manager advised stores in his unit of a special low price “Anniversary Sale” featured in March and April 1936 by a competitor during a period of five weeks. On some items A & P personnel was authorized to meet the competitor’s prices, but not with respect to sugar and pure lard; as to these, the stores were requested to “buy as many of these two items from your competitor as possible. I am sure that you know how to handle this, writing same up on your cash voucher.”⁴⁶⁴ This method of buying up merchandise from competitors where A & P considered the competitor’s prices too low was frequently used in the Southern Division. For instance, in November, 1939, the Houston Unit was advised that a competitor was selling Campbell’s Soup at 5 cents per can, that A & P’s cost was above 6 cents, and that “we would profit by buying all that we could at that figure. This would be a good opportunity to put a crew of boys to work buying the limit on soup. . . . A few organized campaigns of this kind would do a great deal to breaking up some of their below cost sales.”⁴⁶⁵ The manager of the A & P store in Indianola, Mississippi, reported in May, 1940, on a similar mission as follows:

“Bought sugar and coffee from Jitney Jungle this week and put it on cash voucher. By 2 P. M. he had stopped selling sugar to anyone. He was tearing his hair—didn’t know customer from competitor.”⁴⁶⁶

He was complimented for his action “in organizing a ‘buying brigade’ to purchase below cost specials.”⁴⁶⁷ In September, 1940, the technique of “buying brigades” had been further improved; the New Orleans office requested superintendents to mail to it competitor’s advertisements each Friday morning; New Orleans would immediately advise the units and stores by wire or air mail as to the items in these advertise-

463. A & P Tr., v. 50, p. 11,043.

464. *Id.*, v. 48, pp. 10,600-1. The Government’s Brief in the District Court, p. 781, comments “Black’s grocery commandos knew perfectly well how to handle this. They understood the system was to buy all the merchandise which the competitor had to sell as specials. The scheme was aimed to have . . . ill effects upon competition: First, they would be deprived of the sale merchandise which they planned to sell as specials to customers. Second, each item sold to A & P above the quantity which he had anticipated selling at such prices constituted a loss transaction . . .”

465. *Id.*, v. 47, pp. 10,447-8. Similar instructions were given by the New Orleans purchasing department in February 1940: “. . . [W]e cannot possibly understand how this retailer can sell at this price, as it is considerably below our cost, and we know that he cannot purchase on any lower basis than we. . . . We believe either you or the manager can have several boys buy enough flour . . . from this competitor, which in addition to giving us a slightly better price will also help discourage him from selling below cost.” *Id.*, v. 48, pp. 10,520-1.

466. A & P Tr., v. 48, p. 10,644.

467. *Id.*, v. 47, p. 10,343.

ments which were below A & P's cost. The "buying crews" would then be ready to go into action on Saturday in accordance with the following instructions:

"We believe the best plan would be to give each purchaser among the wives, sisters and other members of our clerks' families, an amount say \$5.00 with instructions to buy all of the particular specials that we want. To cause more confusion it is suggested that they might converge on one store at about the same hour but without trying to buy a set amount as we did last week as this disclosed immediately what we were doing.

"If you can obtain sufficient merchandise for each store, you could then use those items in the following week's ad as a red hot special of our own, figuring our retail at 3% above the amount we paid for it."⁴⁶⁸

The Government argued that this A & P plan to kill the practice of loss-leader selling is "an illegal usurpation of power over the methods of business employed by competitors and is a restraint upon trade."⁴⁶⁹

Notwithstanding claims to the contrary, there is considerable evidence that A & P's lowering of prices in one area to meet or forestall competition was sometimes accompanied by raising of prices in other areas where competition was weak. This was accomplished through a system of price zones, which a former A & P employee described as follows:

"Well, just in brief, I can tell you what the zone system means, how it is operated; the unit would be five or six zones, like the Rose Zone, the Pearl Zone, the Green Zone, the Grey Zone, the Violet Zone; each of those representing a particular territory, some of the prices were the same in those zones, but if there was a particular zone where the volume of the A & P was low, competition was keen, and they would reduce certain items in that particular zone so that it would not affect the general price change over the entire system. That works both ways. They would advance prices in certain zones where they felt competition was weak, and

468. *Id.*, v. 48, p. 10,531-2. The Government commented (D.C. Brief, p. 756): "Not only did these illegitimate customers succeed in emptying his [the competitor's] store of the merchandise which the competitor had intended to sell to persons who might become future legitimate customers, but defendants' activities of necessity would cause the competitor to suffer tremendous losses. While his treasury might be able to stand the loss of a few cents a pound on the amount of sugar which he might expect to sell at such a sale, it cannot be presumed that the competitor would have reckoned with the huge quantities of merchandise which these illegitimate customers appearing in the guise of legitimate ones, would desire to purchase." Tactics similar to those described in the text were also used in Dallas. A & P Tr., v. 46, p. 10,128.

469. Govt. Br. (D.C.), p. 827. In one case a store manager was asked to buy from a competitor, "because it will be profitable for you to buy your requirements for next week at this price." A & P Tr., v. 47, p. 10340. Here A & P encouraged "wholesaling"; as noted in the text to notes 413 and 414 *supra*, A & P was anxious to prevent this when competitors tried to purchase from A & P.

they hadn't much competition, they would advance prices in that particular locality. That is the way they adjusted the prices up and down in those various zones, (that was the purpose of the zones) to take care of a particular neighborhood."⁴⁷⁰

This general statement is corroborated by evidence showing the practical application of the zone system. For instance, in February, 1941, the retail prices in the Atlantic Division of products manufactured by A & P subsidiaries were examined and it was found that the gross profit over factory billing was below 18% in all of the units except Scranton, Pa., where it was 19.3%. This was passed on with the comment that "we might argue that Scranton is making too much profit, but I know the attitude up there is that they enjoy a very large distribution on our products and that there is not very much competition to interfere with them and, consequently, there is no real necessity for bringing prices down lower."⁴⁷¹ The sales director of the Division was "aware of the higher prices being charged at Scranton" but hesitated "to force any reductions because of the bad situation at Philadelphia. By that I mean Scranton is a very profitable unit and it is their profit which has been helping the Divisional situation."⁴⁷²

Similarly, the Dallas Unit was advised in July, 1940, that Mr. Hartford insisted on further reductions of the gross profit rate in Dallas supermarkets. The president of the Southern Division, writing to the Superintendent at Dallas, stated that he sympathized with the latter's desire "to keep your loss as low as possible," but that Headquarters was dissatisfied with the volume of sales in Dallas. The writer suggested "that it might be possible for you to get a little more gross profit in the Shreveport stores which would enable you to carry some parts of the territory that are losing heavily at the present time, thereby reducing your total unit loss."⁴⁷³ Such taking of profits in one territory to compensate for losses in other territories for the purpose of increasing volume⁴⁷⁴ appears repeatedly as an avowed policy.⁴⁷⁵

470. A & P Tr., v. 50, pp. 11,049, 11,050. The testimony quoted in the text was originally given to the Grand Jury and read to the witness at the trial; the witness said at the trial that he would repeat the same statement.

471. A & P Tr., v. 51, p. 11,542.

472. *Id.* at 11,545-6.

473. A & P Tr., v. 47, pp. 10,167-10,169.

474. Govt. Br. (D.C.), p. 794. The brief (p. 833) characterizes this practice as "fattening the purse of the consumer in Texas with money extracted from the pockets of the consumer in Louisiana, for the purpose of eliminating competitors in Texas."

475. In December, 1936, the Superintendent at Dallas wrote to the president of the Southern Division: "We shall pursue a policy of taking a profit where our sales are showing a good increase over a year ago and where competitors are less active. In other parts of the territory where sales are showing some resistance and competition is active, we shall sacrifice some profit in order to develop sales over last year."

There is considerable evidence that all of these activities had fatal effects on a great number of competitors. Several illustrations may be cited. On April 5, 1939 the sales department of the Eastern Division advised its vice-president:

“[Y]ou will be interested in learning that the Blue Circle, last Wednesday, did not do more than \$100 worth of business in the whole store. We understand that this is typical of their picture throughout the week and I think, in another few weeks, with a special push of prices in Long Branch, we will have taken care of this competition.”⁴⁷⁶

A report about an A & P store in Flushing, New York, stated that the vegetable and meat departments in that store showed a loss because of the very low price structure during the second quarter of 1939 adopted to meet competition; the writer added that an independent market which had opened next door “is just about finished. The Meat Department has been opened and closed twice and the vegetable department is on the verge of closing.”⁴⁷⁷ There were also numerous reports from the units to divisional headquarters listing the closing of competitors’ stores located in the immediate vicinity of A & P stores.⁴⁷⁸ Independent grocers also testified as to their business losses;⁴⁷⁹ one

A & P Tr., v. 48, p. 10,670. In April 1939 the sales manager at New Orleans wrote to his superintendents that “the idea . . . is to allow you to meet competition at those points where flour is being used more as a loss leader and to try to make up the loss in gross at your other points where we can obtain a higher retail than that we have been setting from the office.” *Id.*, v. 47, p. 10,318. In September 1941 a sales manager in the Southern Division told all unit heads that “in most units there are certain towns or territories where, because of competition or unsatisfactory sales progress, lower than average gross profit rates can be beneficially used. In other towns or territories it may be possible to get a little higher. . . . Where stores need special attention because of unusually active competition or some other condition beyond our control, we feel that the stores in those towns should be put into a special zone and given the benefit of lower than average prices. In other towns, where the conditions may not be quite as pressing, a little better gross profit rate can be obtained with the result that the total for the unit will be in line with the program.” *Id.*, v. 46, p. 9983.

476. *Id.*, v. 52, p. 11,845.

477. *Id.* at 11,899. In November, 1940, the New Orleans Unit was warned against too drastic reductions in its gross profit rate which “might disturb the local situation and reflect unfavorably on our public relations program.” *Id.*, v. 47, p. 10,358.

478. A & P Tr., v. 52, pp. 11,702-11,707, referring to closings in the Pittsburgh Unit where A & P enjoyed a virtual monopoly in some towns. See text at note 100 *supra*. See also *id.* at 11,910, 11,911, 11,940, 11,944, 11,946, 11,947, 12,003-12,010, 12,012-12,015, 12,046, 12,047, 12,050 as to stores in New York City, particularly Brooklyn and Long Island. Many of these were in the same block as A & P stores or in adjoining blocks. In one case an A & P sales manager reported that he had learned a competitor had not been able to pay its rent for several months. *Id.* at 11,891. The closing of a Grand Union store in Scranton, Pa., in June 1940, next door to an A & P store was accompanied by the comment that this was the last Grand Union store in Scranton and that “the closing of it must have hurt their pride since the Grand Union originated in Scranton.” *Id.*, v. 51, p. 11,418.

479. See summaries of testimony, Govt. Br. (D.C.), pp. 800, 849, 853.

of these said that after the opening of his store in Birmingham, Alabama, in May, 1938, Defendant Black talked to him "about buying us out or we couldn't make it, we would have to be closed."⁴⁸⁰ In the light of the practices described above, the inference seems almost irresistible that A & P's "price wars" were at least in part responsible for these closings and losses.

IX. CONCLUSION

The foregoing account of the food distribution industry reveals a sprawling conglomeration of enterprises, large and small, which despite their varied character assume places in two parallel systems for getting goods from the producer to the consumer. One of these is the traditional system, involving changes of ownership as different functions are performed by successive business units, with frequent representation of the principals to these purchase-and-sale transactions by independent brokers who receive commissions for their service. The other is the chain-store system, in which a single enterprise under unified ownership performs all of the functions of distribution, except some of the transportation, through its own personnel and frequently reaches back into food processing itself.

Competition is severe and frequently bitter at all levels of distribution and has been intensified by the advent of the chains.⁴⁸¹ As a result

480. A & P Tr., v. 50, p. 10,991. This witness apparently survived. In many cases competitors approached A & P with requests that A & P increase its prices. Govt. Br. (D.C.), pp. 763, 768, 769.

481. Even the ancient specter of cheating the customer has not disappeared from retailing as a result of large-scale corporate proprietorship. Indeed, additional incentives to practice it have persisted, despite such efforts as A & P Headquarters made to discourage it. In the antitrust prosecution the Government heavily emphasized the practice of "stock gains." For instance in 1935 a customer wrote to Mr. John Hartford complaining that "there was a great deal of overcharging and short-weighing being practiced by our managers and clerks." The defendant Black added that he had to call on this customer as a personal representative of Mr. Hartford "and listen to the most pronounced and justified complaint directed on our company and its men. It was one of the worst ordeals that I have ever been subjected to. . . ." A & P Tr., v. 49, p. 10,894. On February 1, 1936 Black concluded his instructions to store managers with the following statement: "We are going to operate this business in the Birmingham Unit on a fair and honorable basis and eliminate forever the fact that our business is operated to gyp the customer." *Id.*, p. 10,906. Four years later Mr. Hartford still found stock gains in various stores in the New Orleans Unit amounting to \$1000 each in five stores and \$2,487 in a store in McComb, Mississippi. *Id.*, v. 47, p. 10,325. The Divisional President realized (July 1939) "that the operation of many stores is favorably affected by the stock gains that are shown," but thought that "we should work toward eliminating those that are higher than they should be legitimately." *Id.*, p. 10,330. The record is replete with evidence of stock gains. Govt. Br. (D.C.), pp. 207-215. As to Headquarters' efforts see A & P Co. Br., pp. 37, 38. Defendants describe stock gains as the results of physical inventories showing more merchandise in stock than shown by the records. When there is less, there is a stock loss. Judge Lindley felt that stock gains "must be eliminated as a factor contributing in any way to violation of the anti-trust laws." A & P case, 67 F. Supp. at 643.

of this and other developments, notably the emergence of the supermarket, the size of the individual business units in the industry has grown; but local enterprise, adapted to new circumstances, continues to enjoy a preponderance of the business done.⁴⁸² Several of the chains, nevertheless, have grown to formidable size, covering the entire country or large portions of it by their operations. Their economic power is impressive and generally recognized. It has been maintained, with significant but not critical fluctuations, since its rapid increase ended a quarter of a century ago. No indication of collusion among the chains has emerged. "Independents," on the other hand, have banded together regionally to improve their methods and secure cooperative performance of services, and have organized both locally and nationally to promote desired legislation.

With the interests of consumers and the maintenance of small enterprise very largely at stake, governmental concern with the industry has been continuous and varied since the chains began to arise. Frequent investigation by Congressional committees and the Federal Trade Commission, state legislation to aid the independents and hamper the chains, the federal Robinson-Patman Act, and finally application of the Sherman Act against the larger chains, have followed one another with debatable wisdom and with doubtful effect except to deny repose to any element in the industry. The food brokers, however, have clearly been strengthened by strict enforcement of section 2(c) of the Robinson-Patman Act.

The currently most controversial aspect of public policy toward the industry relates to the application of the Sherman Act, especially the Government's latest move to break up the A & P organization by an equity suit. On the side of the Company and, by inference, of the other chains is their downward pressure on prices.⁴⁸³ However, the record of the A & P prosecution shows that that Company did not attempt to bring down the *general* level of prices; its efforts were directed in the opposite direction since it tried to have all of its competitors pay higher prices. The regular price advantages over other distributors resulting from this policy were in many instances obtained without any specific quid pro quo⁴⁸⁴ and under threats. There was

482. A recent survey by the National Industrial Conference Board indicated that the independents have been doing as well as the chains for more than a year and that "the major national chains are losing ground, while the smaller regional chains are gaining." *New York Times*, July 17, 1950, p. 26, col. 1. The Bureau of Trade Practice Conferences of the FTC has been engaged since January, 1950, in the preparation of Trade Practice Rules for the Grocery Industry. The National Association of Retail Grocers submitted a tentative draft on Jan. 10, 1950.

483. Note, 58 *YALE L. J.* 969, 975 (1949).

484. Professor T. Beckman, author of the work quoted *supra* note 1, suggested in a conversation with the writer that these were "unearned advantages," unearned in the sense that no value was given in return.

thus secured a war chest for the financing of attempts at forestalling or eliminating competition, characterized by the Government as predatory price wars. Perhaps, the power thus exercised affords a desirable counterfoil to monopolistic competition by the producers of nationally advertised food products. In any event, it is clear that the conviction of A & P for violation of the Sherman Act in the criminal case was based on the theory of abuse of power which threatens competition to a limited extent. In view of the inherently competitive structure of the food distribution industry and the stationary position of the chains as compared to the independents described above⁴⁸⁵ it would seem that effectuation of the policy of the Sherman Act requires only the suppression of unfair practices and that the break-up of the Company into seven independent parts is not necessary to afford relief to the Government. Indeed, the foregoing summary of the record suggests that an injunction prohibiting further abuses might suffice to restore a healthy state of affairs without sacrificing the efficiency of the present large integrated organization, provided that the punishment meted out in the criminal case should prove to be ineffective. Many of the practices condemned in the criminal case under the heading of "price wars" could be abandoned, particularly through more effective supervision of over-zealous local company officials and stricter enforcement of policy directives issued by Headquarters.⁴⁸⁶ On the buying side, discontinuance of the practice of exacting large sums of money from manufacturers as "advertising allowances," concededly an unjustifiable procedure, would be one effective corrective,⁴⁸⁷ because it would eliminate unfair advantages which facilitate the conduct of price wars. In any event, break-up of the Company would seem to be excessive because the present ratio of the division of business between chains and independents in food distribution appears, generally, to be sufficient for the maintenance of competitive opportunities; the criminal case does not prove that preservation of such opportunities could be achieved only by break-up. Since A & P's operations have been generally beneficial

485. See note, 482 and text following note 78 *supra*.

486. See, *e.g.*, text at notes 441, 460, 466, 468 *supra*. Compare text at note 439 *supra* as to the distinction between "predatory" and "competitive" price cutting. Compare EDWARDS, *op. cit. supra* note 232, at 170, for an expression of doubt as to the practicality of injunctions as a remedy against price wars. Mr. Edwards concludes that "in many cases nothing more can be done than to punish the offender for his past actions and stand ready to punish him again if they are repeated." *Id.* at 171. This would be an argument against any civil suit in the A & P case.

487. See text at notes 171-176 *supra*. Observe also the disregard of counsel's advice to abandon misleading quantity discount agreements, text at notes 340, 341 *supra*. See also text at notes 362-364 *supra* for an example of activities which could be enjoined.

to consumers, correction of abuses through punishment or injunctive relief or, if necessary, both, appear as the appropriate remedies.⁴⁸⁸

Beyond this dramatic immediate issue lies the further question, raised by Judge Lindley,⁴⁸⁹ whether the Robinson-Patman Act is really needed or, if it is, whether it might not be revised to make clearer the distinction between abusive discriminatory practices and legitimate price competition.⁴⁹⁰

488. Compare *United States v. Aluminum Corp. of America*, 91 F. Supp. 333, 416 (S.D. N.Y. 1950), for an expression of reluctance to tamper unnecessarily with economic forces from which the public has reaped benefits. See note 482 *supra*. In one of their latest advertisements A & P referred to the fact that the Atlantic Commission Company had abandoned its trade sales (text following note 400 *supra*) and added, "We made additional changes in other methods of operation which Judge Lindley had questioned. . . . We went down to Washington and asked the anti-trust lawyers what else they thought we should do to conform to their new interpretation of the vague anti-trust laws. The only answer we ever got was that we should break up this Company." If this indicated a bona fide offer of correcting the practices condemned in the criminal case, one may wonder why the enormous expense of time and money required by the duplicating civil suit was deemed necessary. Perhaps the advertisement leaves open the possibility of a consent decree.

489. Text at note 329 *supra*.

490. See Oppenheim, *supra* note 216; EDWARDS, *op. cit. supra* note 232, at 159-169. A similar distinction was expressed in Adelman, *Competition and Anti-Trust Laws*, 61 HARV. L. REV. 1289, 1331, 1332 (1948), in terms of

"Sporadic, unsystematic discrimination" as a powerful force of competition, and "precisely ordered systematic discrimination."

He urges the courts to adopt this distinction. See also text to notes 333-336 *supra*.