No. 404

# In the Supreme Court of the United States

OCTOBER TERM, 1965

**UNITED STATES OF AMERICA,**

*Appellant,*

vs.

**PABST BREWING COMPANY, SCHENLEY INDUSTRIES, INC., THE VAL CORPORATION,**

*Appellees.*

On Appeal from the United States District Court for the Eastern District of Wisconsin

## BRIEF FOR PABST BREWING COMPANY

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## BRIEF FOR PABST BREWING COMPANY

### OPINION BELOW

The opinion (R. 422) of the District Court sustaining Pabst's[1] motion to dismiss the complaint pursuant to Rule

[1] Throughout this brief appellee Pabst Brewing Company is referred to as "Pabst"; Blatz Brewing Company, the assets and business of which Pabst acquired from appellee Schenley Industries, Inc, is referred to as "Blatz." References are to the opinion (Op. . ), findings (F. ....), and conclusions (C. .. ) of the trial court and the exhibits introduced by the government at trial (JX .... or GX . . ) as printed in the record (R. . .) and to the government's brief on the merits (G.B. . ) or its Jurisdictional Statement (J.S. ....). Emphasis within quotations has been supplied unless otherwise noted.

41(b) of the Federal Rules of Civil Procedure at the conclusion of the government's case is reported at 233 F. Supp. 475. The final judgment, findings of fact and conclusions of law are reprinted here (R. 481, R. 456 and R. 480).

## QUESTIONS PRESENTED

The ultimate question is whether the trial court erred in holding that the documentary evidence submitted by the government below, without interpretation or explanation by a single live witness, when weighed by the trial court in accordance with Rule 41(h), failed to sustain the government's burden of proving that the Pabst acquisition of Blatz was in violation of Section 7 of the Clayton Act (F. 59, R. 479).

Important subsidiary questions include:

1. Did the trial court err in holding that the government failed to sustain its burden of proving:

   (a) That either Wisconsin or the three-state area, composed of Wisconsin, Illinois, and Michigan, is a relevant geographic market or section of the country in which to determine the probable effect of the merger; and

   (b) That in the continental United States (the stipulated relevant geographic market) the effect of the acquisition might be substantially to lessen competition or to tend to create a monopoly in the production, distribution, and sale of beer?

2. Has the government shown here that the findings by the trial court are "clearly erroneous"?

## RULES INVOLVED

Rules 41(b) and 52(a) of the Federal Rules of Civil Procedure provide in pertinent part:

> "Rule 41(b) . . . After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits."

> "Rule 52(a): . . . In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58 . . . Findings of fact shall not be set aside unless clearly erroneous . . . ."

## STATEMENT

### I. The Issues

Pabst Brewing Company acquired the business and assets of Blatz Brewing Company on July 30, 1958 (F. 3, R. 456). At the time of the acquisition, Pabst ranked 11th in the sale of beer by breweries in the United States, accounting for approximately 2.67% of national beer sales, while Blatz ranked 13th and accounted for 2.04% (F. 16, R. 462; Op. R. 427). The complaint attacking this acquisition was filed October 1, 1959 (F. 4, R. 457). As a result of pretrial procedures, the parties agreed in advance of trial that

"[n]o evidence shall be introduced at trial as to any events occurring after December 31, 1961" (R. 114, 116), "the only line of commerce involved is the beer industry" and that "the continental United States as a whole was a relevant section of the country" (F. 5, R. 457; Op. R. 428). Left open for resolution at trial were issues as to whether the state of Wisconsin and the three states of Illinois, Wisconsin, and Michigan were relevant sections of the country and, if so, whether in these two alleged sections, or in the United States as a whole, the acquisition might substantially lessen competition or tend to monopoly (F. 6, R. 458). Pabst also asserted a "failing firm" defense to which the government took exception (F. 6, R. 458); this issue was not reached at trial (G.B. 3, n. 2).

The government's case consumed less than two trial days and consisted entirely of documents and statistics (F. 12, R. 460). Pabst then moved to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure on the ground that on the facts and the law the government had shown no right to relief, and the motion was granted. The trial judge concluded that the government had failed to meet its burden of proving (1) that Wisconsin, or the three-state area of Illinois, Wisconsin and Michigan combined, is a relevant section of the country, and (2) that in the United States, the only other area alleged by the government to be a relevant section of the country, the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in beer (C. 4, 5, R. 480).

The issues presented by this appeal thus turn entirely upon whether the trial judge was clearly erroneous in reaching these factual conclusions on the issues of relevant market and effect on competition.

## II. The Failure of Proof.

The government refrained from offering at the trial significant evidence in its possession relating to factual matters now argued in its brief. The paramount contention of the government is that a violation should be found as to the state of Wisconsin. While its alternative contentions as to the national market and the alleged three-state market are preserved in footnotes, (G.B. 22, 45) it evidently hopes to sustain this appeal almost exclusively upon the basis of arguing that Wisconsin is a separate relevant market.

To establish this, it contends that significant barriers to entry exist which deprive Wisconsin consumers of the protection of actual and potential competition by out-of-state brewers. At the trial, however, the government introduced no evidence as to such barriers, although it had the best sources of reliable information, not only available to it, but actually on hand in the form of expert trade witnesses and detailed competitive and economic data.

The government subpoenaed for the trial 71 witnesses including 39 brewers, 24 beer distributors, and 8 maltsters from among 404 brewers, distributors, and maltsters interviewed by its representatives (F. 8, R. 459, Op.R. 424-7). These witnesses were represented to the court to be "industry experts" (Op.R. 425), but, on the eve of trial, the government decided to call none of them (Op.R. 426).

About three weeks before trial, in asking for permission to issue subpoenas to those of its brewer, distributor, and maltster witnesses who lived outside the 100 mile witness area, government counsel had told the trial court: "All such witnesses are believed by the plaintiff to have evidence material to the issues of this cause, and that [*sic*] the *testimony of said witnesses is necessary* to establish the

alleged violations of the charges and allegations contained in the complaint filed in the above case'' (R. 123).

In its trial brief, filed two weeks before trial, the government exhorted the court to pay ''close attention'' to the testimony of the brewer witnesses who would ''testify abont the actual competitive situation in the beer industry'' (Op.R. 424). Such testimony would be particularly important in a Section 7 case, the government stated, because, ''The Court is called on in deciding these cases to predict the future and to do so must receive all the help it can get from industry representatives. The best source lies in *industry experts,* men long versed in the problems of breweries'' (Op.R. 425).

On January 20, 1964, one week before trial, an order was entered governing the exchange of lists as to the order of witness appearances (R. 125, Op.R. 426). Three days later, however, perhaps in recognition that its witnesses would not say what government counsel thought they would say, but in any event for reasons which have never been explained satisfactorily (Op.R. 426-7), the government then abruptly changed its course and informed the court and defense counsel that ''this case well lends itself to trial as a purely documentary case with no live witnesses'' (R. 126). The government thus abandoned all of the witnesses who, a few days earlier, were said to be the experts whose testimony would be ''necessary'' to enable the trial judge to deal correctly with the complex issues before him.

In the same manner, the government dropped at the eleventh honr highly material documentary evidence which it had proposed to use. The trial court and the parties had evolved a discovery program from a series of pretrial conferences under which each party advised the other, not only of the names and addresses of those who were to

be called as witnesses together with a brief description of their expected testimony, but also the documentary evidence upon which it would rely (Op.R. 423-4). The government responses to the pretrial orders have been reprinted in the record (R. 55, 64) and Pabst's response is on file with the Clerk of this Court (R. 17).

The government stated that it would introduce documents of its 71 brewer, distributor and maltster witnesses relating to their production and sales, and also to the distributor witness' customers (R. 94). Trial subpoenas duces tecum (R. 98-106) were served on these witnesses, and each of them produced at Milwaukee for examination by counsel for both sides documents, or affidavits in lieu thereof, showing the production and sales of beer or malt for each state for each brewer or maltster and the profit or loss therefrom plus customer lists of distributors (R. 10-17). None of this evidence on actual economic facts of the beer industry was ever offered. The government's case consisted of stipulated statistical data, brief excerpts from Pabst director minutes, Pabst correspondence and memoranda, limited Pabst answers to interrogatories, and a few lines from the depositions of two Pabst officials, plus tables and other excerpts from trade journals and charts or graphs prepared from the statistical exhibits (Op.R. 454).

The government now urges that the trial court committed error in his findings of fact. The factual assertions upon which the government argument depends relate entirely to questions of the nature, geographical scope, and marketing facts of competition in the beer industry. These are questions upon which the facts obviously were available to the government. But the evidence was not offered. On this appeal, the government is seeking to repair the deficiencies in its proof almost entirely by unproven assertions and hypotheses outside the record. Pabst sug-

gests to the Court that to permit the government to prevail in this way would make a virtue of non-disclosure in an area of law in which the need for the best information is of the utmost importance.

For example, in its basic contention that the state of Wisconsin is a relevant market, the government states that high transportation costs are a substantial barrier to sales in Wisconsin by out-of-state brewers (G.B. 42), but admits that there is not an iota of evidence in the record showing the actual cost of beer transportation or its relationship to total costs and sales (G.B. 42). The government can hardly suggest that such evidence was nnavailable, for ohviously the witnesses subpoenaed by the government would have had such information at hand and could also have given it reliable interpretation. Government counsel also assert as of their own knowledge that established consumer preferences for particular brands of beer are a major factor in making entry by out-of-state sellers difficult (G.B. 39). Again, there is no evidence whatever to support this theory. And again, no persons could be better qualified to testify on this subject for or against the government's theory than the expert trade witnesses called, but not produced, by the government.

The government argues that small variations in "producer" prices for beer in different states show that the state of Wisconsin is a separate market (G.B. 38), yet the trial judge called attention in his findings to the limitation of record price information to only Pabst and Blatz prices for a single size and type of package (F. 29, R. 467). The price information was in the government's possession; numerous witnesses were available to interpret it; none were called. The government argues generally that the beer industry is characterized by localized markets. As

will be shown, the record evidence actually shows the contrary. Yet the government excluded all testimony on the subject and refrained from offering complete statistical evidence in its possession with respect to the geographical extent and volume of sales in all parts of the country by the various brewers, large and small, who were ready to testify.

The trial court studiously refrained from indulging in presumptions unfavorable to the government despite the government's broken promise to assist it with live witnesses and its failure to produce other relevant evidence. But the court was entitled to do otherwise under *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939), where this Court said:

> "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character." (306 U.S. at 226)

## III. The Facts

The evidence produced by the government fails to sustain its contentions on any of the disputed issues; actually, what these facts show is that beer is sold in a national market, that competition among brewers is growing, and the intensity of this competition is not jeopardized by either the acquisition of Blatz by Pabst or by any other development shown in the record.

### A. The Brewing Industry

Probably the most important fact about present day competition in the beer industry is that there are many important sellers and no one firm is dominant. In 1961, for example, there were well over 100 firms with over 400

different brands selling beer in this country (F. 47, R. 476; GX 257, R. 406-10) and 25 of these companies each made at least 1% of national sales (F. 45, R. 475). The leader, in fact, had but 9.55% of national sales (F. 45, R. 475). Further evidence of the intensity of competition among the brewers is that between 1957 and 1961 eight of the ten top firms in 1961 changed rank at least once and six of them changed rank two or more times (F. 45, R. 472-5). Furthermore, many other brewing firms are providing increasingly vigorous competition for the industry leaders. Coors, for example, climbed from 19th to 11th rank between 1957 and 1961 while doubling its sales volume to 2,303,000 barrels and Olympia moved from 21st to 15th rank as its sales increased 40% (F. 45, R. 472-5). Conversely, since per capita beer consumption has been declining (GX 264, R. 415) and national heer output was constant prior to 1959 and increased only moderately from 1958 to 1961 (F. 44, R. 472), it is evident that certain firms have suffered sales decreases. Thns, in 1957-61 second-ranked Schlitz lost more than 250,000 harrels in annual sales volume, Stroh lost 500,000 barrels and fell in rank from 9th to 13th and Ruppert slid from 14th to 20th rank on a 22% sales decline (F. 45, R. 472-5). No evidence suggests any diminntion in the vigor of competition. Rather, the picture is one of increasingly intensive competition.

While there has been a decrease, at a declining rate since 1949, in the number of hreweries operating in the United States since the repeal of national prohibition in 1933, the government offered no evidence as to the reasons for such decrease (F. 48, R. 476), but some reasons are suggested by the record. Among these are the failure of national demand to return to the pre-prohibition level until 1943 as sbown by the production statistics (GX 245, R. 357;

F. 44, R. 472)[2], the failnre of national beer demand to increase in the 1947-58 period (F. 44, R. 472); tbe 20% decline in per capita beer consumption between 1945 and 1961 (GX 264, R. 415); the ever increasing importance of package beer at the expense of draft beer so that by 1961 over 80% of all beer was sold in cans and bottles (GX 260-1, R. 411-3); and cost squeezes brought about by high and increasing taxes (GX 256, R. 389-92; GX 265, R. 417-8). Fnrthermore, tbe vast changes in the national economy generally, including improvements in transportation, refrigeration, packaging and marketing obviously increased and enlarged the geographic scope of competition in beer as in other industries after World War II. Everything in the record is as consistent with the conclusion that these changes have increased the vigor of competition in the beer industry as it is with the government's charges.

Tbe trial judge fonnd that "there is no evidence in the record that competition in the beer industry is in any manner localized" (F. 30, R. 467) and this finding is supported by such evidence as the government has introduced.

The map opposite page 12 demonstrates the reason for the nationwide pattern of beer shipments. As is graphically demonstrated there, most states have no breweries at all or do not produce sufficient beer even to satisfy the total requirements of that particular state, assuming that all locally brewed beer was consumed within the state. The facts concerning Wisconsin will demonstrate that even in that excess production state, almost 25% of the beer consumed was imported.[3] In 1961, there were

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[2]All production statistics cited herein refer to tax-paid withdrawals, the output of breweries subject to the federal excise tax (JX 1-11, R. 139-49).

[3] See Statement and Argument, pp. 14, 45, *infra.*

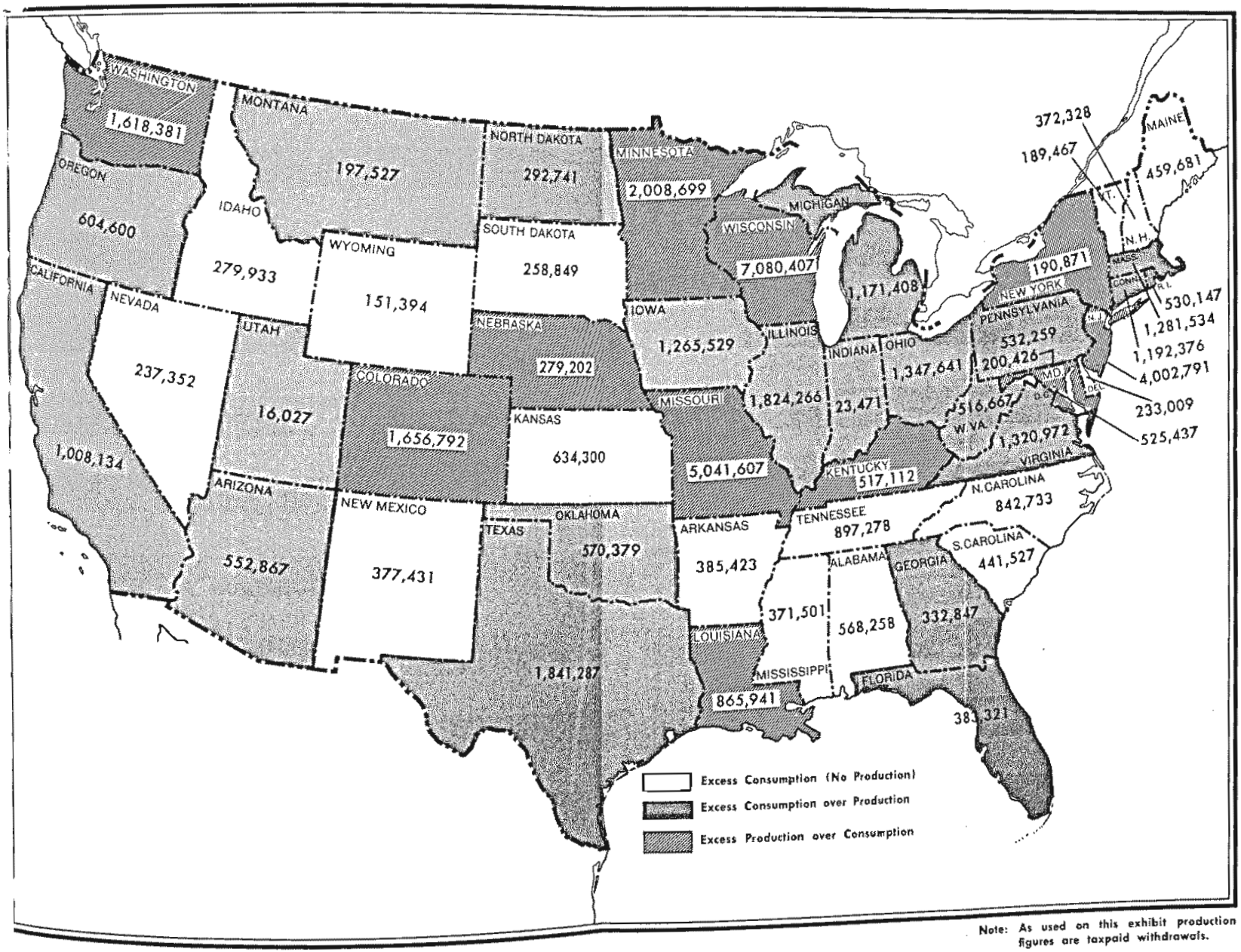
only twelve states which produced more beer than they consumed and five of these which account for roughly two-thirds of the surplus beer are located adjacent to the Mississippi River. These states necessarily had to provide all of the beer demand for the 37 beer deficit states not supplied by their own breweries so that large quantities of beer are shipped substantial distances from the brewery (JX 11, R. 149; JX 21, R. 159).

Further evidence of the nationwide beer shipping patterns shows that until 1959 Blatz was able to serve the entire nation out of its Milwaukee brewery (F. 14, R. 461) and that Pabst served 35 or 40 states from its Milwaukee and Peoria breweries (see GX 110, R. 250-1; JX 55, 56, R. 193-4; GX 115, R. 253-9).

**B. Pabst and Blatz.**

When it acquired Blatz on July 30, 1958, Pabst was one of the companies whose sales had been on a steady decline. From 1949 to 1958 total sales of Pabst fell from 4,336,378 barrels (5.14% of national sales) to only 2,254,001 barrels (2.67%) (F. 15, R. 461; F. 16, R. 462). In fact, the combined sales of Pabst and Blatz in 1958 were less than Pabst sales alone in 1949 and 1952 (F. 15, R. 461; F. 16, R. 462). Nevertheless, in all those years Pabst beer was sold in each of the states in the United States (F. 14, R. 461) and it had not concentrated its sales efforts in any particular geographic area. For example, in 1958 only about 15% of total Pabst sales were made in Wisconsin and in that year it sold more beer in California than in Wisconsin

# PRODUCTION-CONSUMPTION RELATION
## BY STATES 1961
(IN BARRELS)




Note: As used on this exhibit production figures are taxpaid withdrawals.

Source: JX 11, R.149; JX 21, R.159

(F. 26, R. 466; F. 25, R. 465). The total advertising expenditures in Wisconsin are roughly proportional to the percentage of sales made in Wisconsin for both Pabst and Blatz (F. 27, 28, R. 466). Contrary to the suggestion made by the government that Pabst sold many brands, and that each of them had a brand manager (G.B. 6), the complaint itself (R. 23) as well as a government exhibit (GX 110, R. 250) demonstrate that in the years just preceding the Blatz acquisition, virtually all of Pabst sales efforts were on Pabst Blue Ribbon Beer and Ale—except for some effort on a secondary brand in California.

The Milwaukee brewery is the largest of the four Pabst plants and has the greatest capacity (F. 13, R. 460). As a result, this brewery and the one in Peoria serve the large majority of states (See GX 110, R. 250; JX 56, R. 194; GX 115, R. 253-9). The record indicates that beer brewed in Milwaukee is sold in such far distant states as Maine and New Hampshire, Washington and Oregon, and Maryland in the South (GX 115, R. 253-9; JX 56-9, R. 194-7; JX 19-21, R. 157-9).

Blatz, likewise, has always been a national competitor as shown hy its sales in 40 states in 1958 and in 48 or 49 states in 1959-61 (F. 14, R. 461). The government asserts (G.B. 8) that "between 31% and 46%" of Blatz sales "were consistently made" in Wisconsin. The uncontested finding of the trial judge on this point was that the percentage of total Blatz sales made in Wisconsin was declining and well below the stated level:

| *Year* | *Percent of Total Blatz Sales Which Were Made in Wisconsin* |
|---|---|
| 1957 | 31.36 |
| 1958 | 23.49 |
| 1959 | 19.51 |
| 1960 | 17.49 |
| 1961 | 17.02 |

Source: F. 26, R. 466.

**C. Wisconsin.**

The chart opposite page 14 shows that in recent years the state of Wisconsin has consumed only 3% to 4% of national beer output (F. 19, R. 464). Despite this relatively small potential, 54 companies, or one-third of all the firms selling beer in the nation, made 1961 sales in Wisconsin (G.B. 36). These 54, as a group, accounted for one-half of total national production in 1961 (JX 44-46, R. 182-84; JX 78, R. 216). Of these 54 firms 24 had no production facilities in Wisconsin, yet they accounted for 25% of Wisconsin sales[4] (JX 78, R. 216; GX 257, R. 403-5).

The increasing importance of non-Wisconsin-brewed beer in Wisconsin is shown by the fact that the total consumption of beer in Wisconsin increased by less than 7% between 1955 and 1961 while the amount of beer imported into the state increased by 43% during this same period (F. 19, R. 464). The plants nearest to Wisconsin of the two leading shippers into the state, Anheuser-Busch, St. Louis, and Hamm, St. Paul, are located more than 325 miles from the southeast corner of Wisconsin where much of the state's population including Milwaukee is located. Other brewing cities withing roughly the same distance of Milwaukee are Detroit, Chicago, Evansville, South Bend, Louisville and Toledo.

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[4] "Imports" refer to sales of beer in one state by breweries located in a different state. Government trial counsel did not introduce Wisconsin import figures for 1952-1961 which were available in a stipulated tabulation, but the figures for 1955 to 1961 may be computed from JX 19-21, 60, 63, 66, 69, 72, 75, 78, and GX 257, which were in evidence and are in the record here. (R. 157-59, 198, 201, 204, 207, 210, 213, 216, 403). The tabulation is set forth in full, at p. 45 *infra*.

Wisconsin consistently produces much more beer (over 10,000,000 barrels annually in 1947-61) (F. 18, R. 463) than it consumes; in 1957-61, 75% to 80% of Wisconsin-brewed beer was consumed outside of Wisconsin.[5]

In 1961, three of the eight leading sellers in Wisconsin were out-of-state brewers, to-wit, Hamm, ranking second, Anheuser-Busch, sixth and Drewry, eighth. These three firms had remarkable sales increases in Wisconsin in 1955-61, Anheuser-Busch increasing its sales there by 136% and Hamm and Drewry each increasing their Wisconsin sales by more than 50% (JX 60, R. 198; JX 78, R. 216). The home plant of each of these firms is outside of the alleged three-state area as well as Wisconsin (GX 257, R. 403-05). The suggestion of the government that the share of Wisconsin sales accounted for by the various Wisconsin sellers (G.B. 36) has remained constant is disproved by its own exhibit (G.B. 50-51) which shows that in 1955-61 thirteen of the twenty-three leading Wisconsin sellers listed by the government had at least a 25% variation in their percentage share of Wisconsin sales.[6]

**D. Wisconsin, Illinois and Michigan.**

There were eighty-six brewers selling their products in Wisconsin, Illinois and Michigan in 1961 (JX 99-100, R. 237-38); and these eighty-six accounted for about 72% of national sales in 1961 (JX 44-46, R. 182-84; JX 99-100, R. 237-38). Since these three states consume less than 16% of national beer sales (JX 21, R. 159), the sellers in the

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[5] See Argument, p. 49, *infra*.

[6] The appendix to the government brief shows, for example, that Hamm's percentage share ranged from a low of 8.09% to a high of 12.45% (a change of over 25%); Miller varied between 4.35% and 8.36% and eleven other breweries had similar variations.

three states, then, obviously compete in an area much larger than Wisconsin, Illinois and Michigan.

There is a substantial flow of beer into and out of the three-state area. As is shown hereafter,[7] almost 25% of the beer consumed in the three states is brewed elsewhere and, conversely, about 40% of the beer brewed within Wisconsin, Illinois and Michigan, is shipped beyond these states for consumption.

## SUMMARY OF ARGUMENT.

I. This case is simply one in which the government's proof falls far short of its essential allegations, leading the trial court to enter judgment for the defendants. The failures of proof were not caused by unavailability to the government of reliable evidence on the issues. On the eve of trial the government decided to refrain from calling any of the numerous expert trade witnesses whom it had subpoenaed, and to forego introduction of exhibits available to it bearing directly upon the issues of economic fact raised by its allegations of relevant market and competitive effect.

The trial judge had no alternative but to find, as he did, that there was no evidence establishing a smaller geographic market than the national market stipulated by the parties, and none showing that the merger would have any adverse competitive effect in the national market. These factual conclusions were based on a combination of lack of evidence favorable to the government and basic facts in the record supporting the position of the defendants.

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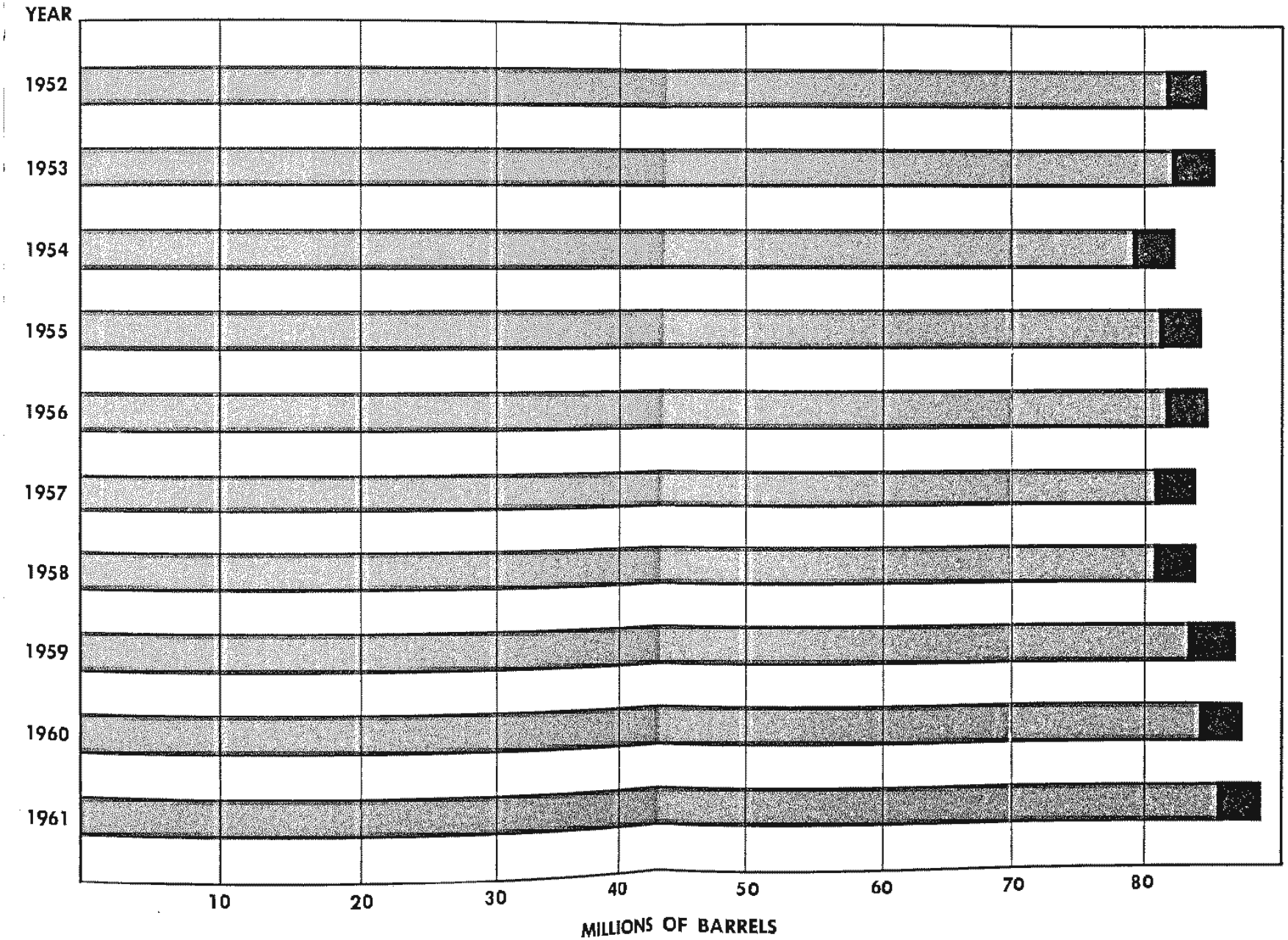
[7] See Argument, p. 54, *infra*.

## WISCONSIN BEER CONSUMPTION COMPARED WITH TOTAL UNITED STATES CONSUMPTION, 1952-1961




Source: F. 19, R. 464; F. 44, R. 472.

A. This appeal thus does not involve any issue of law. The only question is whether the government, having lost on the facts below, can now overturn the trial court's findings of fact. Rules 41(b) and 52(a) of the Federal Rules of Civil Procedure are applicable. The situation is the same as in any other appeal from a final judgment after trial without a jury, where findings of fact have been made by the judge. The government is not entitled to reversal unless it shows the findings to be clearly erroneous. The government brief is therefore mistaken when it indicates that the issue is whether it made a *prima facie* case, implying that doubts can be resolved in its favor, and that it can prevail on its choice of evidence even if the trial judge reasonably concludes that all of the evidence preponderates against it.

B. The method adopted by the government to attempt to overcome the trial judge's findings amounts to an attempt to try the case *de novo* in this Court on the basis of unverified factual assertions and theories having no foundation in the record. Its brief does not even directly undertake to demonstrate the invalidity of the trial judge's findings of fact, but proceeds as if there had been no findings. A series of factual assertions are made intending to establish that Wisconsin is a separate relevant market. We show by reference to the record that these key assertions, upon which this appeal depends, are based on no evidence and are unfounded and erroneous.

II. The government states that the issues on this appeal are primarily ones of "standards" for geographic market determination. This statement ignores the fact that a series of decisions of this Court have established clear tests and standards for market definition.

A. These standards were subscribed to by both sides at the trial and followed by the trial judge.

B. In brief, this Court's decisions establish that (1) relevant market determination is a necessary predicate to the determination of the competitive effect question, (2) to be accomplished by locating an economically significant area of competition, (3) through a pragmatic factual selection of a market corresponding to the commercial realities of the industry, (4) showing where the competitive effect of the merger will be direct and immediate, (5) in light of the geographic structure of supplier-customer relation, (6) thus defining the outer boundaries of an area in which those sellers operate to whom purchasers in the area can turn for alternative sources of supply.

C. It is not clear wherein the government finds these standards wanting, if at all. Its real departure from them comes not as a matter of theory, but in their application to the deficiencies of its own case. As its brief shows, what the government has done is to reverse the required order of inquiry by first selecting the market percentage it wants, and then attempting to rationalize a relevant market around it.

This process carries it to levels of argument falling far below minimum economic and legal standards. Ignoring the *Philadelphia National Bank* recognition that a market must be viewed in terms of both sellers and buyers, the government makes no attempt to deal with the *seller* dimension of the market. That is, it offers no answer for the outstanding fact of record that the Wisconsin brewers sell almost 80% of their Wisconsin production of beer outside of the State of Wisconsin.

The government deals only with the *buyer* dimension of the market, and in a manner which would involve no

compliance with "economically significant" tests. While it concedes that the correct economic standard is whether there are really substantial barriers to competition in Wisconsin from out-of-state brewers, it abandons any substance in the application of this standard. Thus, it says that the barriers need have no particular height, and may consist of nothing more than "some" cost or other disadvantage having no minimum quantity or quality. Exceptions in the form of outside sellers to whom the barriers are "non-existent" are, it says, to be ignored even though they supply 25% of the beer consumed in Wisconsin. Such an approach plainly rests upon expediency dictated by failures of proof, not upon the kind of economic substance which must supply the standards of the law.

The government approach to the Wisconsin market issue neglects completely this Court's recognition of the significance of potential competition. In its reliance on the hypotheses of counsel rather than upon market facts and the testimony of knowledgeable persons, it departs from the minimum requirements of the judicial process. Such an approach is an over-simplified treatment of the merger field, and it is wholly inappropriate in the appeal of a case in which trial counsel had at hand, but did not introduce, reliable evidence on all relevant issues.

III. The preceding discussion should not obscure the fact that even the government's low standards for this case are not met by the evidence of record.

A. On the contrary, the evidence shows that Wisconsin is not a relevant market, and that even if it were, no adverse effect on competition had been shown by any test. We believe that a discussion of this evidence is not required because the failures in the government proof already demonstrated should dispose of the appeal. How-

ever, because of the government's repeated assertions of fact without regard for either the record or the findings, we set forth in some detail the record evidence which shows quite conclusively that Wisconsin is not a relevant geographic market in the beer industry, and that even if it were, this merger would not adversely affect competition there.

B. In addition, while the government seems virtually to have abandoned its complaint allegation that the three-state area, consisting of Wisconsin, Illinois and Michigan is a relevant market, we set forth the record evidence which shows the incorrectness of such an allegation.

C. Finally, while the government also seems not to rely on its original claim that a violation in the national market has occurred, and while its brief actually undermines its trial counsel's stipulation that the entire nation is a relevant market, we conclude by calling the Court's attention to the facts of record concerning the beer industry in the nation as a whole. These facts show that the merger itself is of miniscule significance in an industry characterized by vigorous competition and lack of concentration. There is no evidence in the record of any merger in the beer industry other than the one under attack, nor is there any evidence of reasons other than natural competitive forces for the decline in the number of breweries operating in the United States between repeal of prohibition and December 31, 1961, the agreed evidence cut-off date. The rate of decline has dropped appreciably and there is no basis for inferring that the market shares of the leaders will ever reach the anticompetitive levels which concerned Congress when Section 7 was enacted.

Accordingly, no case on any alternative market thesis has been made. The trial judge was correct in his decision that the government had shown no right to relief on the facts and the law.

## ARGUMENT

### I. The Government's Attempt To Try The Case De Novo In This Court On The Basis Of Unverified Assertions And Theories Of Government Counsel Should Be Rejected.

The issues in this case are whether the trial court erred in finding (a) that neither Wisconsin nor the alleged three-state area had been shown to be relevant markets, and (b) that the effect on competition required by Section 7 of the Clayton Act had not been shown in the agreed relevant national market. The government brief states that these issues are "primarily ones of standards rather than of fact" (G.B. 13). This substitution of words should not operate to conceal the fact that the government itself does not claim that any substantial question of law is presented on this appeal. Further, to the extent that its use of the word, "standards," is meant to signify that its brief does not constitute a direct assault upon key basic findings of fact, we cannot agree. When the government brief finally comes to grips with what it considers the decisive issue of whether Wisconsin is a relevant market (G.B. 35-46), its whole position comes down to a series of flat contradictions by counsel of the trial court's basic factual findings.

Before proceeding to the argnment on that issue it is important here to point out that: (a) the trial court's findings are supported by Rnles 41(b) and 52(a), and must he tested as to whether they are "clearly erroneous," not as to whether the government has made a "prima facie" case; and (b) the government's contradictions of the trial court's findings are based almost entirely upon unverified assertions of fact which rest largely on nothing more than testimony by counsel, and which are directly at war with facts of reeord.

### A. Reversal of the Trial Court Requires That the Findings of Fact be Found "Clearly Erroneous."

The government argues throughout its brief that it need only establish a "*prima facie*" case both here and in the lower court. But this approach overlooks the fact that the provisions of Rule 41(b) of the Federal Rules of Civil Procedure were applicable to the decision in the lower court, and that Rule 52(a) applies here.

The case before this Court involves no more than a situation where "the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

The government made a deliberate, eleventh-hour decision in the court below—contrary to previous repeated representations to the trial judge as to what was "necessary" to prove its case (R. 123)—to present only a selection of documentary evidence, and to deny to the trial court the assistance of any witnesses, particularly the subpoenaed brewery witnesses familiar with "the actual competitive situation in the beer industry" (Op. R. 424). While the court below refrained from drawing the highly permissible inference that this was done because the testimony of these industry experts would have been damaging rather than helpful to the government,[8] it held on the basis of the documents presented that the government had not sustained its burden of proof (Op. R. 439, 441, 442).

The record makes clear that the government had not made out a "*prima facie*" case below in any sense, but in reaching his decision under Rule 41(b), the trial court was

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[8] *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939); see Statement, p. 9, *supra*.

not required to view the evidence in the light most favorable to the plaintiff, as might be implied by the term "*prima facie*," although he may actually have done so. Prior to 1946, a Rule 41(b) motion had been interpreted to be the equivalent of a motion for a directed verdict under Rule 50(a). This did require such a view of the evidence and the plaintiff needed only to establish a *prima facie* case to prevent a judgment against him. However, in 1946, Rule 41(b) was amended to reflect the distinction between the functions of the judge in a trial by the court and his role in a jury trial. The rule itself makes clear that upon a motion at the end of the plaintiff's case, the court is to act as "trier of the facts" and to "determine them and render judgment . . . or . . . decline to render any judgment." As the government itself recently said to this Court in another antitrust merger case:

> "On such a motion in a case being tried without a jury, the district court must weigh and evaluate all the evidence then presented and determine whether or not plaintiff's proof warrants the relief sought. (F.R. Civ. P. 41(b)); see 5 Moore's *Federal Practice* (2d ed.), pp. 1044-1046)." Jurisdictional Statement of the United States in *United States* v. *Continental Can Co.*, Docket 367, October Term, 1963, p. 6, n. 5.

Accordingly, proof of a mere *prima facie* case does not satisfy the requirements of Rule 41(b):

> ". . . the trial court was not required to deny the 41(b) motion even if the evidence, viewed in a light most favorable to the plaintiff, made a *prima facie* case. If, from the record as it stood at the close of plaintiff's case, the court was convinced that the evidence *preponderated* against Ellis, it was empowered to grant Carter's motion." *Ellis* v. *Carter*, 328 F.2d 573, 577 (9th Cir. 1964).

See also *Penn-Texas Corp.* v. *Morse*, 242 F.2d 243, 246-47 (7th Cir. 1957).

The trial court, in compliance with Rule 41(b), rendered judgment on the merits against the government under Rule 58 and made findings as required by Rule 52(a), in addition to preparing a thorough and careful opinion explaining its decision. Since the case is here on appeal, the provision of Rule 52(a) that findings of fact shall not be set aside unless clearly erroneous applies to these findings and to this decision:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record. . . ." *United States* v. *Yellow Cab Co.*, 338 U.S. at 341-2.

The burden of proof is on the government to "show that erroneous legal tests were applied to essential findings of fact or that the findings themselves were 'clearly erroneous' within our rulings on Rule 52(a). . . ." *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 381 (1956). It is not a light burden, *United States* v. *Oregon Med. Soc.*, 343 U.S. 326, 339 (1952), for the Court "on the entire evidence" must be "left with the definite and firm conviction that a mistake has been committed," *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), and it is not enough to show that "the evidence would support a conclusion either way . . . . Such a choice [by the trial judge] between two permissible views of the weight of evidence" would not warrant a holding that the trial judge was "clearly erroneous." *United States* v. *Yellow Cab Co.*, 338 U.S. at 342.[9]

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[9] These same rules apply even though the plaintiff's case has been dismissed under Rule 41(b) rather than after a jury verdict *Palmentere* v. *Campbell*, 344 F.2d 234, 237-8 (8th Cir. 1965); *O'Brien* v. *Westinghouse Electric Corp.*, 293 F.2d 1, 7-9 (3d Cir. 1961).

The government here thus must do more than try to string together a factual thesis asserted to make a minimally sufficient case without regard to the record, or rather as if there had been no record and as if the issue were one on the pleadings. It must convince this Court that the documentary evidence submitted below, unexplained by sworn testimony or other evidence, so contradicts the findings of the trial judge as to show them to be clearly wrong.

The judge below carefully considered all of the documentary evidence submitted by the government, used his judgment as to the weight to which it was entitled, and concluded that this evidence fell short of sustaining the burden of proof established for these cases by this Court. In a case arising under the Expediting Act, 15 U.S.C.A. § 29, where this Court has been deprived of the assistance of a court of appeals in sifting the facts and refining the issues, it is especially important that government counsel be held to, and not be permitted to extend in any way, the record which it presented to the trial court *United States v. Singer Mfg. Co.*, 374 U.S. 174, 175 (1963).

**B. The Arguments, Assertions, and Theories of Government Counsel are No Substitutes for Record Evidence, and Are Contrary to Facts of Record.**

Having presented its limited evidence and closed its case, the government no less than any other litigant must be restricted to the record which it presented in determining whether the decision of the trial court was correct. The government here, except by indirection, has failed to point out how any finding of the trial judge was "clearly erroneous." Nowhere in the government brief is there any citation of record evidence to contradict a finding of the trial court. Attempts are made to disparage the opinion by reliance upon assumptions (G.B. 25, 41), expectations (G.B. 36, 37), suppositions (G.B. 29), inferences (G.B. 25),

hypotheses (G.B. 37), and estimates (G.B. 31), but these cannot change the record evidence nor should they be permitted to serve as substitutes for evidence which was not presented below.

Lacking a record which will support their theory of the case, government counsel have made a series of key assertions of fact having no support in the record or in the findings. In some instances, the government brief fails to make it clear that the trial court expressly found contrary to the assertion being made. In all of the following instances, the brief makes assertions which have no real record support. If these wholly unverified departures from the facts of record are excluded by this Court, as Pabst urges they should be, it will be seen that the foundation selected by the government upon which to base its plea for reversal—the alleged relevance of Wisconsin as a separate market—disappears.

1. *The Assertion that Beer Competition Is Localized.* The trial court found: "There is no evidence in the record that competition in the beer industry is in any manner localized (as, for example, by the factor of inconvenience) or affected by the location of a brewery or that the place of production in any manner affects sales or the extent of the market area" (F. 30, R. 467). Yet, throughout its brief and without mention of this specific finding, the government says, as if it had been proved, that "the distribution of beer is localized" (G.B. 5), that the picture of competition in the beer industry which "emerges is one highlighted by local or regional competition" (G.B. 37), "that most beer sales by producers are made within the immediate area of their breweries" (G.B. 43), "that brewers consider it important for effective distribution that they have breweries proximate to their important markets" (G.B. 44), and that "a pattern holds across the nation"

in which 90% of all beer sold in a state comes from brewers in the state or from brewers just across state borders (G.B. 43).

The government contentions are not only directly contrary to the findings of the trial court, but also to the record evidence which shows that in 1958, Blatz with only a single brewery located in Wisconsin, sold beer in almost every state in the Union (F. 13, R. 460; F. 14, R. 461; JX 56, R. 194). *At least seven other Wisconsin breweries sold more beer brewed in their Wisconsin breweries outside of Wisconsin than in Wisconsin* (Pabst, 68.31%; Weber-Waukesha, 50.11%; Independent Milwaukee, 62.29%; Heileman, 67.89%; Huber, 63.52%; Fox Head, 77.09%; and Fountain, 68.51%) (JX 69, R. 207; JX 35-37, R. 173-5).[10] The record conclusively shows that overall nearly 80% of Wisconsin-brewed beer is shipped out of the state.[11] These statistics show that it is absolutely untrue to state that the distribution of beer is "localized", or that most beer sales are made close to the breweries, or that 90% of the beer is locally brewed or comes from breweries on the border, or that local or regional competition predominates.

2. *The Assertion That Transportation Costs Are A Barrier To Out-Of-State Competition.* The government asserts that "sellers who do not supply the Wisconsin area in many cases almost certainly face substantial barriers in the form of transportation costs" (G.B. 42). The government admits that it makes this assertion despite the fact "that the record in this case contains no direct evidence of such costs" (G.B. 42). Its only support for this extra-record

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[10] Likewise, breweries located in the states of Wisconsin, Illinois and Michigan, as a group, sold more beer outside than inside those three states. See Argument, pp. 54-55, *infra*.

[11] See Argument, pp. 48-49, *infra*.

assertion is a decision in another case in another court, which was subsequently reversed. If this assertion had validity any number of the proposed government witnesses could have supplied this evidence, or it could have been produced in documentary form. In this state of the record the trial court had no alternative but to find, as it did, that

> "There is no evidence in the record that competition in the beer industry is . . . . affected by the location of a brewery or that the place of production in any manner affects sales or the extent of the market area." (F. 30, R. 467).

Actually, the evidence circumstantially shows that transportation costs are anything but a substantial barrier to sales of beer in out-of-state markets. If the government theory were true, Wisconsin brewers would lose four-fifths of their business, since nearly 80% of the beer brewed in Wisconsin is shipped out of the state for consumption.[12] Likewise, Wisconsin purchasers can and do turn to non-Wisconsin suppliers for a substantial and steadily increasing part of their beer requirements, reaching one-fourth of the total in 1961.[13]

3. *The Contention That Prices Vary in Different States, and That This Shows Wisconsin To Be A Separate Market.* Serious errors are made by the government as to beer prices. The government claims that Pabst charged "a higher price for Blatz brand beer [in Wisconsin] after the acquisition than it charged for this brand in any other state" (G.B. 41, 45-66). It also asserts that "producers" prices to distributors, exclusive of freight, varied substantially depending on the distributor's location and that often prices vary as between neighboring states (G.B. 38). From

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[12] See Argument, p. 49, *infra.*

[13] See Argument, p. 45, *infra.*

these supposed basic facts, the government infers that beer competition in Wisconsin is isolated from other states. But the trial judge found that there was a lack of evidence on prices (F. 29, R. 467). And the record actually supports the opposite conclusion.

The government's errors result from misuse of the Pabst and Blatz answers to interrogatories (R. 253-71). These indicate only the Pabst and Blatz prices by state for a single package, namely, the 24/12 ounce returnable bottle. Moreover, the price data are f.o.b. only, and as indicated in the answer, are exclusive of any taxes, freight, disconnts, or other allowances. Examination of the record itself discloses that by merely taking into account taxes and a discount allowed Blatz distributors in Wisconsin, the real Blatz price was actually lower in Wisconsin than it was in Alabama, Connecticut, Oklahoma, and South Carolina (R. 131-2; GX 115-6, R. 253-71; GX 256, R. 389-92).[14] Likewise, the government has not mentioned that the answer to the interrogatory showed that Pabst f.o.b. prices did not "vary" as between neighboring states, but were uniform in an area comprising Wisconsin and eight surrounding states.[15]

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[14] The Blatz price in Wisconsin was 20¢ less than Pabst (R. 131-2) or $2.11742 (GX 115, R. 259); the Wisconsin tax was .07258 (GX 256, R. 392) so the Blatz price was $2.19. Similar calculations show Blatz prices for Alabama to be $2.34, Connecticut $2 24, Oklahoma, $2.54 and South Carolina $3.17.

[15] In the following adjacent states the price of a case of 24/12-oz. returnable bottles of Pabst beer to distributors on July 30, 1958 was $2.32; Wisconsin (actually $2.31742), Minnesota, Iowa, Nebraska, South Dakota, North Dakota, Montana, Wyoming, Colorado; the price was $2.46 in Illinois, Tennessee, West Virginia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana; and it was $2.43 in Michigan, Indiana, Kentucky and Ohio. (GX 115, R. 253-59).

4. *The Statement That The Identity And Shares Of Leading Brewers In Wisconsin Have Been Stable.* Additional errors are evident in the government's statement that the identity of the brewers selling to Wisconsin consumers has changed little over the seven-year period covered by the record in this case (G.B. 36), and that the shares of the sellers have remained remarkably stable (G.B. 37, 41). From this it wants the Court to conclude that the record shows the existence of barriers of some sort preventing competition in Wisconsin by out-of-state sellers (G.B. 36, 43). As to identity, it is not surprising that there was little change since, in 1961, 54 different companies representing about one-third of all breweries in the nation and accounting for half of national production had sales in Wisconsin (G.B. 4; JX 44, R. 182-83). Under these circumstances, there can be no inference of a barrier to out-of-state brewers selling in Wisconsin. Far from showing a "remarkable stability of market shares in Wisconsin over time" (G.B. 44, n. 33), the facts are that market shares have consistently changed in Wisconsin over the years and that one of the most marked changes has resulted from the increase in sales of beer in Wisconsin by out-of-state brewers, demonstrating the interstate nature of beer competition.[16] The record shows that imports of beer into Wisconsin have increased from 583,173 barrels or 18.82% of Wisconsin consumption in 1955 to 836,907 barrels or 25.34% in 1961.

5. *The Assertion That Only A Few Brewers Compete For The Business Of Particular Consumers In a State.* The government states that "the patronage of the beer consumers of a particular State is typically contested by relatively few of the nation's brewers," and suggests that this

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[16] See Statement, pp. 14-5, *supra;* Argument, pp. 44-5, *infra.*

condition is prevalent throughout the industry (G.B. 37-38). These statements have no foundation of any kind. The sales figures by individual brewers for just the three states introduced at the trial, clearly reveal that there are many competitors and many brands in every state: 54 breweries and 132 brands in Wisconsin in 1961, 52 and 140 in Illinois, and 48 and 137 in Michigan (JX 78, R. 216; JX 85, R. 223; JX 90, R. 228; GX 257, R. 406-10).

Having carefully picked and chosen its evidence and limited the case to documents which are mainly stipulated statistics, the government should not now be permitted to introduce additional evidence in this Court by way of assertion and argument of counsel contradicted by record evidence.

## II. The Standards of Proof of Relevant Geographic Market Are Well-Established And The Only Real Issue Is As To Whether The Government Can Meet These Standards Without Proof Of The Facts They Require.

According to the government "the issues of this case . . . are primarily ones of standards rather than of fact" and "the most important issue involves the proper standard for determining when a lesser territorial area than the entire country is a proper market in which to appraise a merger's competitive impact" (G.B. 13).

But there is really no genuine issue in this Court as to the proper legal standards for such a determination. As pointed out later, these standards have been well established by the Court's past decisions—decisions upon which both parties relied in the trial court, and upon which both still rely.

It does not appear that the government is expressly challenging the opinion of the trial judge with respect to the standards which he articulated and applied in his

opinion, and it does not appear that it can do so, since it argues for the same standards as he applied. If the government is actually seeking an overruling or substantial change in any of the prior decisions of this Court on relevant market determinations, it has not so stated.

Rather, what the government argument comes down to is simply a request that the Court relax the established standards in order to let a record pass by which does not measure up to them on the facts.

**A. The Trial Court Applied The Same Standards Which The Government Brief Endorses In Theory, But Does Not Follow In Practice.**

The opinion of the trial judge specifically stated, and both sides agreed, "that in a proper case the effects of a merger or acquisition should be tested in a geographic submarket . . . which corresponds to the commercial realities of the beer industry or is economically significant" (Op. R. 428, 432).

The government discussion of market definition in the abstract (G.B. 25-31) comes down to a long elaboration of the same basic principle applied by the trial court—that market definition is a practical question to be dealt with as a matter of evidence of commercial realities in the actual case presented. The government cannot reasonably challenge the trial court's insistence that reliable evidence be offered to show that something less than the stipulated national market is a relevant market.

As the government says, in a passage with which we heartily agree, and which the trial judge had well in mind:

> "On the other hand, simply establishing that the merging firms were direct competitors in an area does not suffice to prove that the area is a relevant market, and its sales percentages market shares upon which

> predictions of competitive conditions can be based with reasonable confidence. There must be good reason to believe that those selling there are the only sellers who provide significant direct competitive restraints upon the behavior in the area of the firm resulting from the merger. If other firms are able to compete in the area on equal terms with the present sellers, they, too, are direct competitive restraints upon the resulting firm. Market share figures which exclude them will therefore overstate the likelihood that the merger will produce or aggravate oligopolistic conditions." (G.B. 28)

To paraphrase this passage, what happened at the trial was that the government proved that Pabst and Blatz were direct competitors in Wisconsin, and it proved their combined shares there. But it proved little else. It failed to produce facts showing "good reason to believe" that Wisconsin brewers are the "only sellers who provide significant direct competitive restraints" in Wisconsin (G.B. 28). Accordingly, the market shares in Wisconsin so heavily relied upon by the government obviously "overstate the likelihood" that the merger will produce anticompetitive consequences (G.B. 28).[17]

**B. The Decisions of this Court Establish Clear Standards for Market Definition, and the Government Should be Held to Them.**

A series of decisions of this Court have laid down standards for geographic market definition, and the government has not expressly indicated any respect in which it finds them unclear or otherwise deficient. These standards are as follows:

1. The concept of the relevant market area is that it is an "area of effective competition" (*United States*

[17] See Argument, pp. 43-52, *infra*.

v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593 (1957)), which is also "economically significant." (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, 336 (1962)).

2. Determination of the area of competition is a necessary predicate to the determination of effect on competition (*United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. at 593). It must be made before market shares are calculated, because it "is the prime factor in relation to which the ultimate question, whether the contract forecloses competition in a substantial share of the line of commerce involved, must be decided." (*Tampa Elec. Co.* v. *Nashville Co.*, 365 U.S. 320, 329 (1961)).

3. The determination of this area is to be done by a "pragmatic factual approach," not a "formal legalistic one," and the market selected must correspond to the "commercial realities of the industry." (*Brown Shoe Co.* v. *United States*, 370 U.S. at 336).

4. The plaintiff's burden of proof is to do more than merely show "where the parties to the merger do business or even where they compete." (*United States* v. *Philadelphia National Bank*, 374 U.S. at 357). The plaintiff must demonstrate "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." (*Ibid.*)

5. This demonstration of the direct and immediate impact of the merger on competition requires an examination of "the geographic structure of supplier-customer relations." (*United States* v. *Philadelphia National Bank*, 374 U.S. at 357).

6. The method of conducting that examination is to make a "careful selection of the market area in

> which the seller operates, *and to which the purchaser can practicably turn for supplies.*" (*Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327, quoted in *United States* v. *Philadelphia National Bank*, 374 U.S. at 359) (Emphasis by the Court).

Although the government brief has not repeated these standards, it is not clear in what respect, if any, the theoretical discussion contained in the brief is designed to add anything or to subtract anything from them. The government's general summary (G.B. 26) concludes with the same point made in *Tampa Electric* and *Philadelphia National Bank* that it is necessary to determine an area composed of those sellers who provide good alternative sources of supply to the purchasers of the area. The same point is made again later (G.B. 29) in the statement that the market chosen has competitive significance "only if the sale of the product in the area constitutes a market because the purchasers there cannot readily turn to other sellers of the same product or of perfect substitutes for it." As pointed out in the next section, the real significance of the government's discussion of standards seems to be not to develop any new standards but simply to dilute the existing standards to a low level of significance.

### C. What The Government Seeks Is To Avoid Meeting The Established Standards.

What the government argument comes down to is an effort to meet the Court's standards for market definition without proof. This attempt at avoidance of the rules summarized above stands out clearly in two respects.

1. *The government obviously has selected its market area on the basis of the percentage it will yield, rather than on the basis of the competitive realities.* The government brief expressly embodies the specious approach of

selecting an allegedly illegal percentage, and then attempting to rationalize it into a relevant market. The brief sets out "assuming that Wisconsin is a proper geographic market" and makes a long legal argument intended to establish a violation of law without regard for the "necessary predicate" of relevant market definition (G.B. 17-24).

Only after this irrelevant discussion does the government move to what it concedes to be the "difficult question" of whether Wisconsin is a proper market (G.B. 14).

But the teaching of the decisions of this Court is that the area selected must be shown to be "economically significant" by evidence other than the market shares which the plaintiff would like to claim. The law does not allow the government to select any state, county, city, village, hamlet, or city block or portion thereof simply because of its arithmetical attractiveness. In *Brown Shoe*, the Court carefully considered the question of market definition, both as to the vertical and horizontal aspects of the case, before proceeding to the respective questions of competitive effect (370 U.S. at 328, 339).

Likewise in *Philadelphia Bank*, the four-county area including Philadelphia was shown by affirmative evidence to be the "area of effective competition" before the Court considered the government market share statistics. The area was proved by testimonial evidence and a multitude of exhibits introduced by the plaintiff as to competition in commercial banking within and without the four-county area.[18] There was also evidence as to the amount of business

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[18] One witness stated that "to a large degree" his bank's business was dependent upon customers located within a mile or two of its branches and another stated that for small business concerns the market for bank loans was a "strictly local one." (374 U.S. at 358, n. 35).

of the merging banks which occurred within the four-county area which averaged about 75% and ranged to a high of 94% for the combined total business on deposits under $10,000.[19] The Court said this evidence "reinforces the thesis that the smaller the customer, the smaller is his banking market geographically," emphasizing that it was the nature of the business, not market shares, which determined relevant geographic market.

It was only after all this evidence was introduced and on the basis of the commercial realities thus shown that the Court held the four-county area to be a "section of the country" within the meaning of Section 7 and within which the probable competitive effect could be considered and evaluated. Then—and not until then—did the market share evidence become significant for "without a minimally reasonable definition of markets, criteria based on quantitative shares become whimsy. . . ."[20]

As against this rational economic approach, it is clear that the government's mind has run in the opposite direction—*from* an attractive percentage *to* a claim of relevant

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[19] The actual percentages of each of the merging bank's business originating in the four-county area were (374 U.S. at 359, n. 36):

| Type of business | P.N.B. | Girard |
|---|---|---|
| Personal loans | 75% | 70% |
| Real Estate loans | 74% | 84% |
| Time & savings dep. | 81% | 94% |
| Personal trusts | 94% | 72% |
| Lines of credit | 41% | 62% |
| Demand deposits | 56% | 77% |
| Demand deposits of individuals | 93% | 87% |
| Commercial and industrial loans | 54% | 63% |

[20] Kaysen and Turner, *Antitrust Policy; an Economic and Legal Analysis* 134 (1959).

market, not from an economically sound market determination to an ascertained market share.

2. *The government plainly seeks to reduce the necessary proof to levels far below minimum economic standards—indeed to a level which would require very little proof of any kind.* While it speaks of seeking a "rational basis," an "economically meaningful market" and a "careful formulation," (G.B. 32) it applies no such tests to its own case.

Instead, it asks the Court not to approach the matter "too literally" (G.B. 30). One should ignore, it says, any sellers who might appear who are outside the defined area but who offer effective actual or potential competition in it. They should be ignored even though "precisely who and how many" of them exist "may be difficult to determine," and though for this undetermined number, the supposed barriers to entry are "nonexistent" (G.B. 31). One should not insist on an "exhaustive inquiry" into market definition, because it is "futile to expect" that more knowledge will be more useful in this inquiry than only a little obtained by a "limited" inquiry (G.B. 33).

How very "limited" the inquiry will be becomes clear when, after 35 pages of abstract discussion, the government finally comes to the merits of this case (G.B. 35). When it attempts to show that Wisconsin is a separate market the economic deficiencies of the record become starkly clear as against the standards the Court has evolved, and which the government earlier claims to follow. Thus, *Philadelphia National Bank* requires a showing, with which the government earlier in the brief agrees (G.B. 26), that this area conforms both to (1) that in which the sellers compete, and (2) within which the purchasers can practicably turn for supplies. But the record shows

nothing helpful to the government on the first point. On the contrary, it shows that many Wisconsin brewers, including the two merged companies—the sellers in the above formula—sell a large part of their Wisconsin products in many other states. Indeed, almost 80% of the beer produced there is sold outside the state.[21]

Confronted with these facts, it will be observed that the government simply abandons all effort to meet the required test for the *seller* dimension of the market.

Reduced to making only half the required case, it is confronted with the great deficiencies of the record as to the *buyer* dimension of the market. It concedes that the genuine applicable economic standard for this is whether there are substantial barriers which would prevent purchasers from turning to other than the Wisconsin brewers for supplies (G.B. 29). But since the record contains no real evidence on any of the alleged barriers, and the government must rely on extra-record hypotheses and assertions, the brief attempts to dilute the economic standard down to no real standard at all.

Thus, the government says that the alleged barriers need be of no "particular height"; they need not be "uniformly effective"; they may be "relatively low" (G.B. 34); and all that is necessary is to show *some* "cost or other disadvantages" (G.B. 33) or "*some* leeway to price" (G.B. 34) for existing sellers as against outside competitors. But what is the economic or legal significance of barriers having no ascertained height, and which might therefore be so low as to impose no real obstacle to effective competition? How can the law be administered on the basis of an assumption of barriers having no demonstrated degree of

[21] See Argument p. 49, *infra*.

frequency, uniformity or significance, since any major gap in the barrier may be all that is needed to let through a torrent of competition? How can the existence of significant barriers be assumed merely from a showing of *some* "cost or other" disadvantage (G.B. 33), without proof of the quantum of such disadvantage when the very essence of competition is a struggle to reduce price to marginal cost, and to introduce efficiencies which will lower cost?

The government's approach on its face is one of expediency, not of compliance with modern economic discipline. In its thesis that any disadvantage, however relatively slight it might be, constitutes a barrier to competition, the government stresses minor differences, which would be relevant only under the abstract model of "perfect competition", a condition never reached in the realities of the market place and certainly not shown by the record to exist here. Obviously the law cannot be administered on this basis.

The effect of the government's argument is not only to ignore completely the "pragmatic, factual approach" required by the decisions of this Court. It also ignores significant dimensions of potential competition which have been recognized by the Court as having a vital place in the determination of markets and competitive effects in cases under Section 7 of the Clayton Act. *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964). In limiting the Wisconsin market only to sales by current Wisconsin sellers, the brief ignores the potential competition of out-of-state brewers on the theory that only "an actual competitor" (G.B. 40) should be included in Wisconsin. But in *Tampa Electric*, various parts of the states of Florida and Georgia and the two states separately and

combined each were held to be too small to be the geographic market in a case where coal was the line of commerce, because there were 700 producers capable of (365 U.S. at 327, 330, 331) serving the power generating station in Tampa (365 U.S. at 330). These 700 producers operated mines in eight states from Pennsylvania to Alabama to Illinois (365 U.S at 332) and competed throughout an area much larger than Georgia and Florida (365 U.S. at 330-33). The evidence relied upon by the Court made clear that most of the 700 *did not sell coal* in Florida and Georgia—but they "could" have done so if the opportunity presented itself (365 U.S. at 331, 332, 333). In *Tampa Electric,* the Court said:

> "We are persuaded that on the record in this case, neither peninsular Florida, nor the entire State of Florida, nor Florida and Georgia combined constituted the relevant market of effective competition. We do not believe that the pie will slice so thinly. By far the bulk of the overwhelming tonnage marketed from the same producing area as serves Tampa is sold outside of Georgia and Florida, and the producers were 'eager' to sell more coal in those States. While the relevant competitive market is not ordinarily susceptible to a 'metes and bounds' definition. *Cf. Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 611, it is of course the area in which respondents and the other 700 producers effectively compete." 365 U.S. at 331-32.

Moreover the government seeks to make a radical departure from established methods of making the economic proof which the law requires. In *Brown Shoe,* and *Philadelphia National Bank,* where the geographic market was in issue, there was testimony by experienced persons in the industry and other experts as to the extent of the geographic market and competition in it (370 U.S. at 340; 374 U.S. at 334, 358).

The importance of such testimony is not merely theoretical. It is to prevent the dangers of precisely the kind of presentation the government is seeking to sustain in this case, *i.e.*, a case based entirely on the adversary theorizing of counsel, as distinguished from a case based on reasonably reliable objective facts, established by the trial process under oath and with appropriate cross examination.

Pabst agrees that the simplification of antimerger cases is a desirable objective, but it is surely not an appropriate objective to simplify such cases to the extent that the minimum economic facts essential to a rational application of the law are concealed from the courts. Such an approach, which we submit would be inappropriate in any case, is doubly inappropriate in this case, where government counsel cannot possibly mean to represent to this Court that it did not have available to it at the trial all of the kinds of evidence relevant to the standards of the law.

## III. Tested Under Proper Standards and Even Under the Government's Proposed Standards, There Has Been a Clear Failure of Proof on the Disputed Issues of Geographic Market and Competitive Effect.

The evidence of record fails to make a case under any standard: (1) it falls far short of meeting the tests of market definition and competitive effect established by the cases; and (2) the record does not even bear out the minimal expectations derived by the government from the facile "standards" of its own brief. To avoid the repetition which would result from separately reviewing the evidence on the key issues in the light of each set of standards, the following discussion is arranged directly under the points made by the government. Failing to meet the government's own test, the evidence *a fortiori* fails to meet proper judicial standards.

A. Wisconsin.

The evidence does not meet the government's own test for proof that Wisconsin is a separate relevant geographic market. Indeed, the evidence rather conclusively shows that the market must be far larger than Wisconsin. The government begins with a test of where the two merging companies compete (G.B. 33, 35). This test establishes that the market is national. In the merger year, 1958, the vast bulk of both Pabst (85%) and Blatz (77%) business originated *outside* of Wisconsin (F. 26, R. 466). In the same year, Pabst was sold in every state and Blatz in 40 states (F. 14, R. 461). Likewise, the percentage of total national advertising expenditures of Pabst and Blatz in Wisconsin was only proportionate to the sales of the two brands in Wisconsin (F. 27, 28, R. 466).

In *Philadelphia Bank*, the "vast bulk" (about 75%) of the business of the merging banks originated *inside* the four-county area, held to be the relevant area (374 U.S. at 359). An area here which conforms to the facts of *Philadelphia Bank*, *i.e.*, one in which 75% of the business of the competing firms is inside the area, would be most of the United States.

The government's second test is whether there are competitive barriers which preclude sellers outside the alleged area from providing a "fully comparable alternative source of supply" (G.B. 26), or "from competing on equal terms" (G.B. 33). In support thereof, four "factors" are noted which "suggest," according to the government, that there are barriers to effective competition by brewers not at present selling in Wisconsin. The "suggestion" is not at all harmonious with the facts.

The first "factor" asserted by the government is that only one-third of the brewers in the nation had sales in Wisconsin in 1961 (G.B. 36). But, Wisconsin accounts for

less than 4% of total United States sales (F. 19, R. 464), (see chart opposite page 14), and per capita consumption has been sharply falling there, from 29 to 25 gallons per person since World War II (GX 264, R. 415). Moreover, the Wisconsin brewers produce four times as much beer as they sell in Wisconsin.[22] Under these conditions, the fact that one-third of the nation's brewers actually sell there, suggests, indeed compels, the conclusion that the government's first factor is completely wrong.

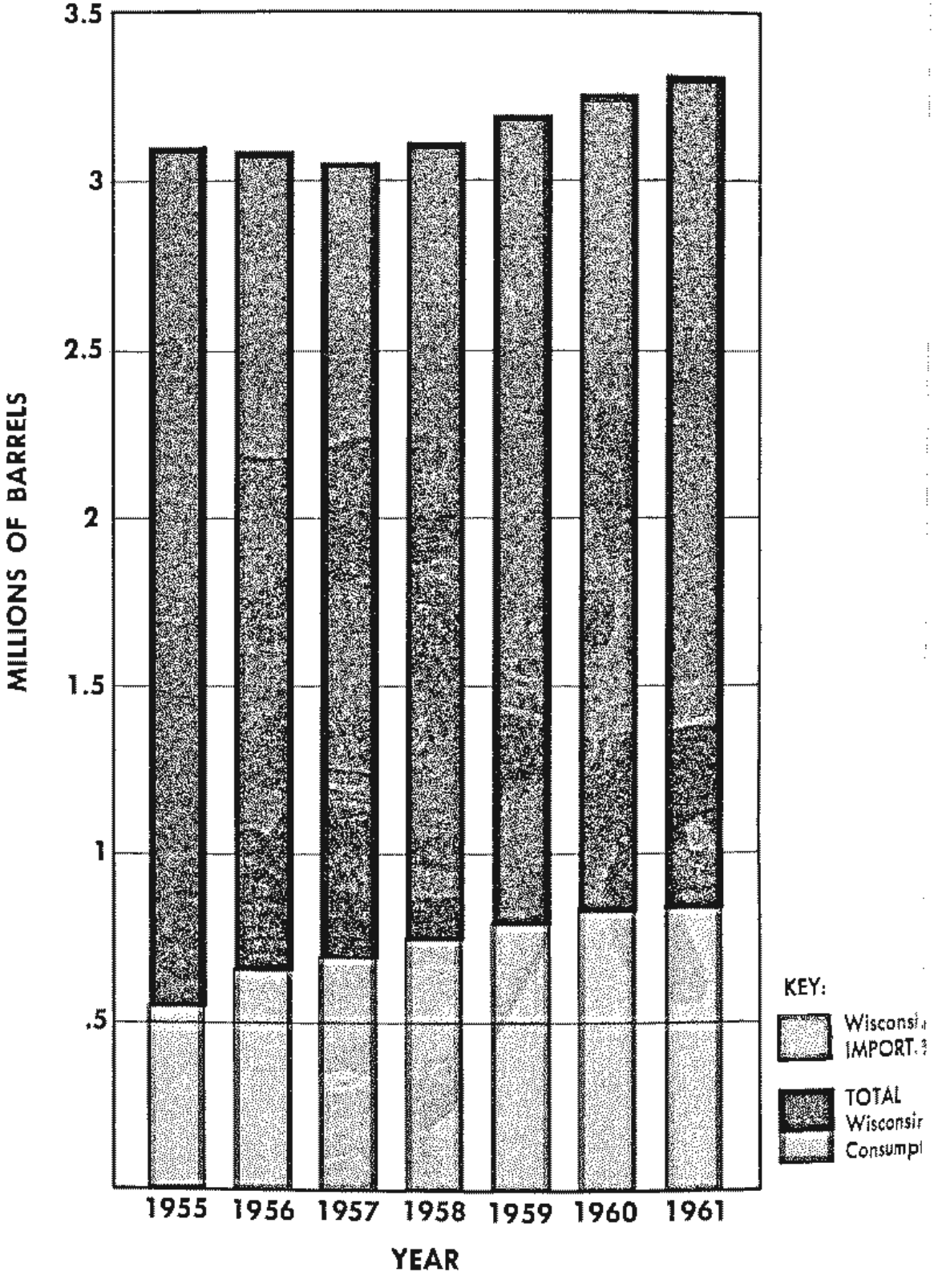
The second "factor" relied upon by the government is likewise unsupported by the record. The government says that the identity of Wisconsin sellers changed little over the years and that the shares of Wisconsin sellers have remained stable in recent years (G.B. 36). But on the contrary, between 1952 and 1956, Blatz' share of Wisconsin sales fell from 20% to just over 12% and Pabst' share in 1958-61 (excluding Blatz) climbed by nearly 35% (JX 18-21, R. 156-59; JX 50-59, R. 188-97). Further the government's own exhibit shows that thirteen of the leading Wisconsin sellers had at least a 25% variation in market share between 1955 and 1961 (G.B. 50-51).[23]

It is especially significant that in 1955-61, big sales increases were made by brewers with no Wisconsin production facilities. In this six-year period, sales of Anheuser-Busch increased by 136%, while Drewry and Hamm each had more than 50% increases in sales volume (JX 60, R. 198; JX 78, R. 216). In fact, as shown by the table below, in 1955-61 the total sales in Wisconsin by non-Wisconsin brewers increased about 43%, while total Wisconsin consumption increased only 7% (F. 19, R. 464). The great significance of this is shown by the fact that in 1961

[22] The amounts of imports and surplus are shown at pp. 45 and 49, *infra*.

[23] See Statement p. 15, *supra*.

# WISCONSIN BEER CONSUMPTION AND IMPORTS, 1955-1961




Source: F. 19, R. 464; JX 60-78, R. 198-216; GX 257, R. 403-405; and computations made therefrom.

these imports accounted for 25% of total Wisconsin sales, as the following table shows:

| Year | Wisconsin Imports | Percent of Total Wisconsin Consumption |
|---|---|---|
| 1955 | 583,173 | 18.81 |
| 1956 | 650,863 | 21.03 |
| 1957 | 694,750 | 22.65 |
| 1958 | 746,874 | 23.99 |
| 1959 | 788,103 | 24.64 |
| 1960 | 828,485 | 25.36 |
| 1961 | 836,907 | 25.34 |

Source: F. 19, R. 464; JX 60-78, R. 198-216; GX 257, R. 402-05; and computations made therefrom.

The increasing importance of imports into Wisconsin is illustrated by the chart opposite page 45.

These facts show that beer purchasers in Wisconsin can and readily do turn for beer to out-of-state as well as to local brewers. This rapidly increasing volume of Wisconsin sales by non-Wisconsin brewers is reliable evidence—in contrast to the government's contrary, unverified assertions—that other non-Wisconsin brewers could, if they elected, sell substantial quantities of their product within Wisconsin.

The government implies that one leading non-Wisconsin importer, Hamm, should not be counted because it is located "just across the State line from Wisconsin" (in St. Paul, Minnesota) (G.B. 6, 43). But the bulk of Wisconsin's population is concentrated in Milwaukee and the surrounding area in the southeast corner of the state[24] 330 miles or more

[24]About half of the 1960 population of Wisconsin is located in the nine counties in southeastern Wisconsin including Milwaukee, Madison and points south of those two cities. Another 20% is located from Green Bay to Milwaukee, almost as far from St. Paul (County and City Data Book 1962, U.S. Dept. of Commerce, Bureau of the Census, pp. 412, 422).

away. The second most important shipper into Wisconsin, Anheuser-Busch, is in St. Louis, 367 miles away from Milwaukee. If brewers in these two cities are capable of shipping increasing quantities into Wisconsin, other out-of-state brewers obviously can do the same. Brewers from Chicago, Detroit, Evansville, Louisville, Ft. Wayne, and South Bend can compete with the Wisconsin brewers in Wisconsin just as they can and do compete with them throughout the intervening area where many of the Wisconsin brewers also sell.

Taken together, these facts not only demonstrate the complete invalidity of the stable share contention, they also demonstrate that many non-Wisconsin brewers are, and others could be, in competition with Wisconsin-based brewers and to such a degree as to demonstrate convincingly that the area of effective competition extends throughout a huge geographic area in which numerous sellers effectively compete, actually and potentially, as alternative sources of supply for Wisconsin consumers.

The government also offers as a third "factor" the speculation that a "pattern of local concentration . . . appears to be typical of the structure of competition throughout the beer industry," which is "highlighted by local or regional competition," and that "relatively few of the nation's brewers" contest for sales in any "particular State" (G.B. 37-38). This proposition is disputed by what has just been shown as to Wisconsin.

It is equally wrong as to sales in other states. Although the government had available, and had stipulated as to the accuracy and authenticity of, sales statistics by individual brewers for 31 additional states which showed who sold what, and where, it deliberately excluded all of this information, except as to Pabst and Blatz brands, to the three

states. Nevertheless, insight into the geographically widespread shipping pattern of beer can be gained by reference to the data in the record on Pabst and Blatz sales by states (F. 14, R. 461; F. 24, 25, R. 465). Prior to the acquisition in 1958, Blatz operated only one plant (F. 13, R. 460) and its nationwide requirements were shipped out of Milwaukee. In the years 1949-51, Blatz was shipped to each of the states in the continental United States and in 1952-58 it was shipped to no less than 37 states (F. 14, R. 461). The nine states (JX 56, R. 194) in which Blatz was not sold in 1958 accounted for only 4.52% of national population in 1960 (U.S. Bureau of Census, *Statistical Abstract of the United States* 10 (33rd ed. 1962)). In other words, Blatz was able to—and did—ship nationally out of its Milwaukee brewery for the entire period shown by the record of ten years prior to the merger.

The record also proves that Pabst has had a nationwide shipping pattern and for many years its beer has been sold in every state (F. 14, R. 461). The two Pabst plants at Peoria and Milwaukee serve nearly every state in the nation (see GX 110, R. 251; JX 56, R. 194). The Milwaukee plant alone had output in 1958 which was three times that of Pabst sales in Wisconsin, nearly 69% of the production (1,054,314 barrels) (GX 110, R. 251) being shipped beyond the state boundary for consumption. In five states located in the Southeast in 1958, Arkansas, Georgia, North Carolina, South Carolina and Virginia, Pabst brand sold a larger percentage of that state's consumption than it did of national consumption despite the fact that it has no breweries located in the area.[25]

[25] Nationally, Pabst brand's market share was 2.69%; for these states its share of state consumption in Arkansas was 2.70%, Georgia 5.47%, North Carolina 6.82%, South Carolina 10.52%, and Virginia 5.18% (JX 21, R. 159; JX 59, R. 197).

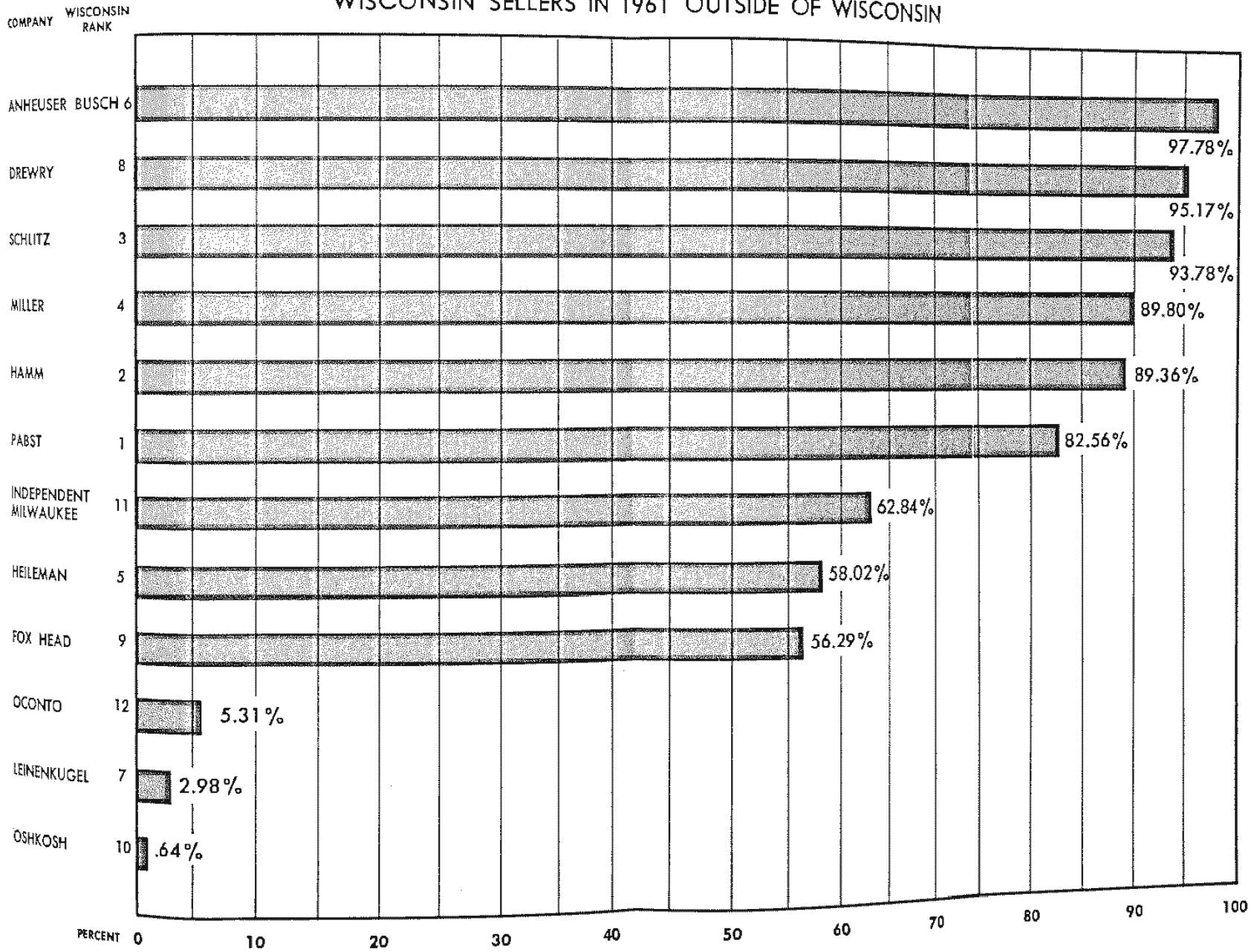
While the evidence in the record does not indicate all the states, other than Wisconsin, Illinois, and Michigan, where Wisconsin brewers other than Pabst and Blatz sold their output, it does indicate that among the Wisconsin brewers, Schlitz sold 93.78% of its total 1961 output in other states; Miller, 89.80%; Heileman, 58.02%; Huber, 69.88%; and Potosi, 53.22% (JX 44-46, R. 182-84; JX 78, R. 216). Of these firms only Schlitz has a brewery outside of Wisconsin (GX 257, R. 403-05). The vast geographic extent of the competition among the Wisconsin sellers—no matter where situated—also disproves the government's thesis that beer is a locally concentrated industry. In 1961, 90% of the total output of the twelve leading sellers of Wisconsin beer was sold outside of Wisconsin, as shown in the chart opposite page 48.[26] Nearly 80% of all beer produced in Wisconsin

[26] The 12 leading Wisconsin sellers in 1961 made the following indicated percentage of their total sales outside of Wisconsin in 1958 and 1961:

| *Company* | *Wisconsin Rank in* 1961 | *% of Sales Outside of Wisconsin* | |
|---|---|---|---|
| | | 1958 | 1961 |
| Anheuser-Busch | 6 | 98.28 | 97.78 |
| Drewry | 8 | 95.88 | 95.17 |
| Fox Head | 9 | 77.09 | 56.29 |
| Hamm | 2 | 88.58 | 89.36 |
| Heileman | 5 | 67.89 | 58.02 |
| Independent Milwaukee | 11 | 62.29 | 62.84 |
| Leinenkugel | 7 | 3.59 | 2.98 |
| Miller | 4 | 92.98 | 89.80 |
| Oconto | 12 | 3.79 | 5.31 |
| Oshkosh | 10 | .21 | .64 |
| Pabst | 1 | 85.18 | 82.56 |
| Schlitz | 3 | 94.00 | 93.78 |

Source: JX 35-37, R. 173-75; JX 44-46, R. 182-84; JX 69, R. 207; JX 78, R. 216; and computations made therefrom.

# PERCENT OF NATIONAL SALES OF TWELVE LEADING WISCONSIN SELLERS IN 1961 OUTSIDE OF WISCONSIN




Source: Computed from JX 44-46, R.182-184; JX 78, R.216

in 1957-61 was shipped out of the state for consumption as shown in the following table and the chart opposite page 50:

| Year | Wisconsin Production | Wisconsin Exports | Exports as Percent of Production |
|---|---|---|---|
| 1957 | 11,014,566 | 8,642,643 | 78.47 |
| 1958 | 11,034,403 | 8,668,322 | 78.56 |
| 1959 | 10,119,075 | 7,708,710 | 76.18 |
| 1960 | 10,056,894 | 7,618,031 | 75.75 |
| 1961 | 10,383,561 | 7,917,314 | 76.25 |

Source: JX 9-11, R. 147-49; JX 19-21, R. 157-59; JX 66-80, R. 204-18; GX 257, R. 403-05; and computations made therefrom.

The significance of these facts on Wisconsin exports is twofold and it is decisive: (1) the facts show that the government is mistaken in arguing that beer competition is typically localized; (2) moreover, they strongly corroborate the inference, from the heavy imports into Wisconsin, that Wisconsin consumers are in no sense dependent for supplies upon existing Wisconsin sellers. Beer flows into and out of Wisconsin in such volumes that the government's Wisconsin market thesis is literally washed away.

The fourth "factor," according to the government, is the assertion that beer "producers" often charge "substantially different prices" to distributors which "vary as between neighboring states" (G.B. 38). Although the government calls this a "phenomenon," as if it had been proved, the record is completely insufficient, to support any such generalization. Actually, the two price exhibits relate only to *one* package (24/12 oz. returnable bottles) out of the many sizes of bottles and cans sold, and they relate only to Pabst and Blatz, and not to any other seller. There is no in-

dication of the significance of this package,[27] nor can any conclusions be reached as to other producers' prices. Surely, if the evidence on price had favored the government, one of its proposed witnesses could have testified on this subject. Furthermore, as was shown in the Statement and Argument,[28] the government contentions that the Blatz price was lower in Wisconsin than in any other state and that prices generally tend to vary between states are simply contrary to the record evidence.

The government seeks corroboration for its "fourth factor" in the nature of beer marketing (G.B. 38-44). Transportation costs, it hypothesizes, "almost certainly" must impose a barrier (G.B. 42). At the same time, it admits that "the record in this case contains no direct evidence of such costs" (G.B. 42). The government makes no effort to explain how, if its transportation and distribution thesis is correct, Blatz could sell in almost every state in the union from its Wisconsin plant, almost 80% of the beer produced in Wisconsin is sold outside of Wisconsin throughout the country, and 25% of the beer consumed in Wisconsin is imported. The actual facts are that a very substantial interstate flow of beer is necessary, because many states (17 in 1961) produce no beer at all, many others (20 in 1961) consume more than they produce and the 12 remaining states have to supply some, or all, of the requirements of the 37 beer-deficit states.[29] The government specu-

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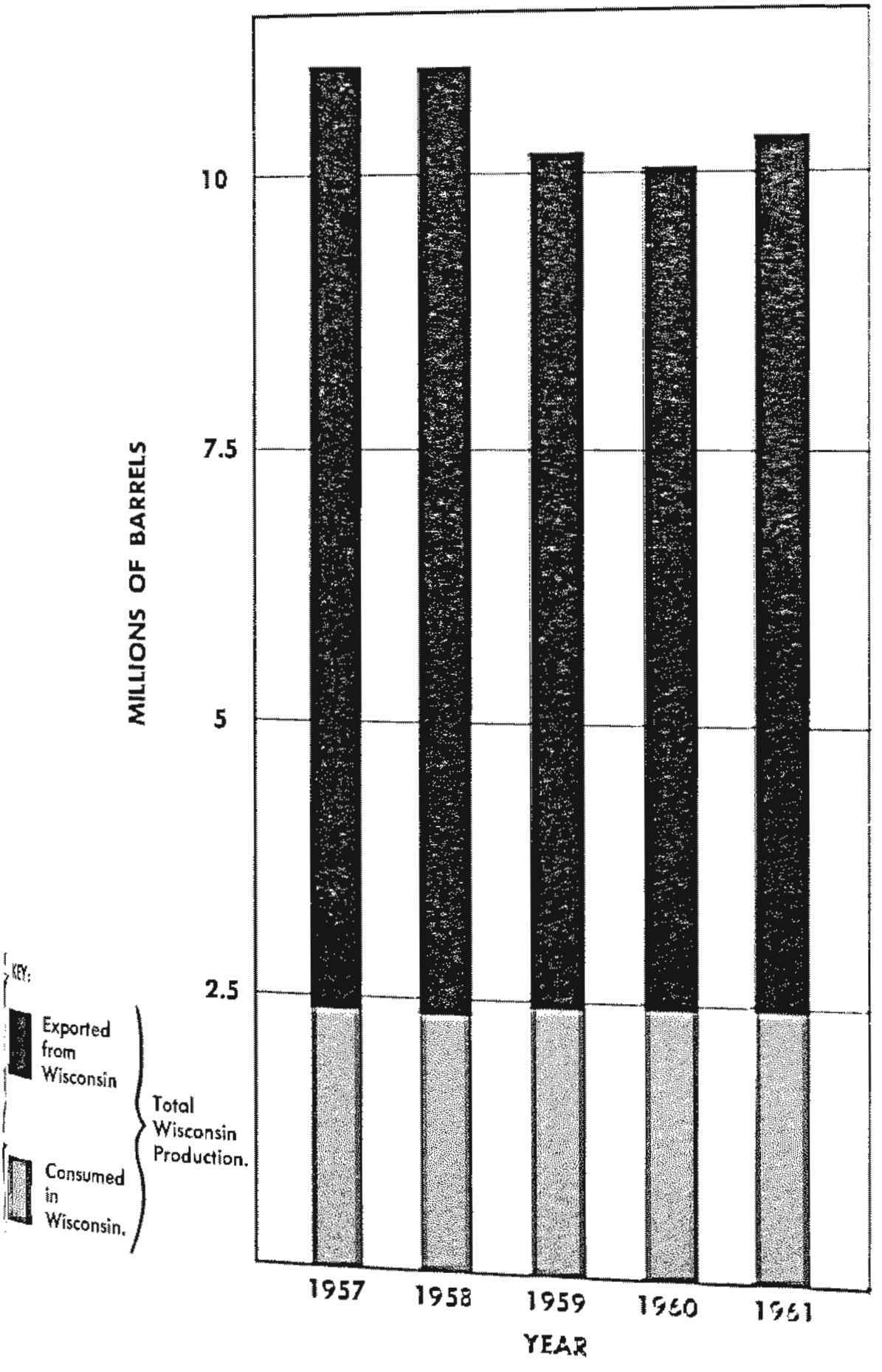
[27] Packages available include cans, bottles, returnable, and non-returnable, in sizes such as 7, 8, 12, 32, 64 ounces as well as kegs in fractions of barrels (GX 256, R. 386-88).

[28] Pages 8 and 28-29, *supra*.

[29] See Statement and Argument, pp. 14-15, 44-46, and map opposite p. 12, *supra*.

# WISCONSIN BEER PRODUCTION AND EXPORTS

## 1957-1961




Source: F. 13, R. 463; F. 12, R. 464; JX 66-80, R. 204-218; GX 257, R. 403-405; and computations made therefrom.

lations about beer distribution and transportation costs must thus be categorized as a myth.[30]

The government also suggests that consumer preferences for established brands preclude new entry into Wisconsin (G.B. 40-41). Again, there is no evidence at all to support this thesis. As noted above, several non-Wisconsin producers radically increased their Wisconsin sales in the period 1955-61 and their ability to do so suggests that others can do likewise.[31]

In light of the facts of record, and the clear failures of proof of the government's allegations, the trial judge had no alternative but to find that there was no evidence on which to segregate Wisconsin as a geographic market.

Since Wisconsin was not shown to be a relevant geographic market there was no need for the trial court to consider the question of competitive effects in the state. Even on the assumption (G.B. 17-24) that Wisconsin is an area of effective competition the government has not met its burden of proof as to competitive effect within the state. In *Philadelphia National Bank* the merger was condemned because the merging banks would have at least 30% of the business in the relevant market (374 U.S. at 364). In contrast, here the percentage share of the merging firms was only 24% in 1958 (JX 69, R. 207). After "shading" the combined market shares of

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[30]Another unproven myth is that a scheme of state-by-state regulation forces brewers to operate on a state-by-state basis (G.B. 42, n. 30). The court found that state statutes and regulations are common to all breweries and do not deter shipment among the states and not a single regulation from among all those in evidence relates solely to Wisconsin (GX 256, R. 361-402; F. 36, R. 469).

[31] See Statement and Argument, pp. 14-15, 44, *supra*.

Pabst and Blatz, the figure comparable to the 30% of *Philadelphia Bank* is less than 20% in this case.[32]

Thus, the facts here do not bring into play the presumptive illegality test established by this Court. In addition, there are other facts "in the record" which "rebut [any] inherently anticompetitive tendency" (374 U.S. at 366) of the percentages and demonstrate the absence of anticompetitive effects.

The thrust of the "additional facts" in evidence is that there are so many restraints upon any firm seeking to raise Wisconsin prices above competitive levels, that it cannot be concluded that the Wisconsin market share of Pabst-Blatz, even if relevant, is "undue" or that an anticompetitive inference can be drawn from it. The total output of all Wisconsin breweries is so great that combined Pabst-Blatz sales in Wisconsin are but a small part of it (9% in 1961) (see F. 18, R. 463; F. 24, R. 465). This huge excess production, much of it coming from such significant firms as

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[32] In *Philadelphia Bank* this Court "shaded" (reduced) the raw market shares of the merging banks because of peripheral problems of market definition (see 374 U.S. at 364, n. 40). The same adjustment here reduces the Pabst-Blatz combined share below 20%, thus less than the minimum "line of *prima facie* unlawfulness" suggested by the works of Professors Kaysen and Turner, Markham, and Stigler, cited by the Court (see 374 U.S. at 364, n. 41). Actually, as our discussion of relevant market concerning Wisconsin shows, "there is no evidence . . . that competition in the beer business is in any matter localized" (F. 30, R. 467) and entry into the Wisconsin beer business is not difficult; in *Philadelphia* the impediments were greater for in banking "convenience of location is essential" and "entry is . . . wholly a matter of governmental grace" (374 U.S. at 358, n. 44; 367). Thus, assuming that Wisconsin is a rough approximation of an area of effective competition, greater "shading" seems appropriate for beer than for banking.

Schlitz, Miller, and Heileman, acts as a check upon all Wisconsin sellers, particularly when fluctuating sales show that most producers have excess capacity (see JX 32-46, R. 170-84). Another such check comes from the increasing shipments by non-Wisconsin brewers into Wisconsin—25% of total Wisconsin sales in 1961.[33] Also, the fact that 132 different brands were sold in Wisconsin in 1961 (F. 22, R. 465) demonstrates the continuing vigorous nature of brand competition in Wisconsin. These facts demonstrate that in Wisconsin, on the improper assumption it is an area of effective competition, the Pabst-Blatz acquisition has not had and will not have anticompetitive effects.

**B. Wisconsin, Illinois and Michigan.**

The government also alleged below that the states of Wisconsin, Illinois and Michigan as a group constitute a section of the country in which the acquisition should be judged (F. 4, R. 457). Pabst denied this allegation (F. 6, R. 458) and the government was put to its proof (F. 7, R. 458). After trial the lower court ruled the government had failed to prove that the combination of the three states of Wisconsin, Illinois and Michigan is a relevant market area (Op. R. 441; C. 4, R. 480).[34] It is difficult to determine from the footnote reference to the three-state area in the govern-

[33] See pp. 44-45, *infra*. Entry into Wisconsin by any of the 108 non-Wisconsin sellers would require merely that they decide to sell in Wisconsin and then direct sales efforts into the state. There is no record evidence of any barrier to building distribution or creating consumer acceptance for an out-of-state brand.

[34] The trial court did not, as the government brief here states, reject these three states as a relevant market (G.B. 45, n. 34) or hold them not to be a section of the country (G.B. 11). The court's ruling was simply that the government *failed to prove* that the three states are a relevant section of the country.

ment brief whether the correctness of the ruling below is raised in this appeal.[35]

The evidence before the trial court clearly demonstrates the correctness of the ruling below—not only does the evidence fail to prove that the three states are an area of effective competition, it proves the contrary. For example, while the beer output of the three-state area is substantially greater than the consumption in these three states, nearly 25% of the beer consumed in Wisconsin, Illinois and Michigan is brewed outside of these states. Conversely, roughly 40% of the beer produced in Wisconsin, Illinois and Michigan is shipped outside of these states for consumption. These facts are illustrated by the following table:

**THREE-STATE AREA**

| Year | Production | Exports | Exports As Percent of Production |
|---|---|---|---|
| 1957 | 18,885,745 | 7,900,526 | 41.83 |
| 1958 | 17,992,328 | 7,237,258 | 40.22 |
| 1959 | 17,935,478 | 6,927,151 | 38.62 |
| 1960 | 17,991,436 | 6,945,723 | 38.61 |
| 1961 | 18,728,513 | 7,564,469 | 40.39 |

| Year | Consumption | Imports | Imports As Percent of Consumption |
|---|---|---|---|
| 1957 | 14,230,609 | 3,245,374 | 22.81 |
| 1958 | 14,035,503 | 3,222,888 | 22.96 |
| 1959 | 14,438,808 | 3,221,417 | 22.31 |
| 1960 | 14,609,421 | 3,528,106 | 24.15 |
| 1961 | 14,562,604 | 3,479,736 | 23.90 |

Source: JX 9-11, R. 147-149; JX 19-21, R. 157-159; JX 91-100, R. 229-238; GX 257, R. 403-405; and computations made therefrom.

[35] The issue is raised, if at all, by footnote 34 (G.B. 45).

Furthermore, the twenty leading sellers in Wisconsin, Illinois and Michigan in 1961 sold 70% of their total output in other states (JX 44-46, R. 182-84; JX 99-100, R. 237-38; and computation made therefrom). The identity of these sellers and the percentage share of the total sales of each outside Wisconsin, Illinois and Michigan are shown in the chart opposite page 56. Total national sales of the 86 firms which made sales in the three-state area in 1961 were 64,839,777 barrels, or 73% of total national production (JX 99-100, R. 237-8; JX 44-46, R. 182-4).

In 1958, 69% of Pabst sales and 37% of Blatz sales were made outside of Wisconsin, Illinois and Michigan (Pabst being sold in all states and Blatz in 40 states) and, in 1961, 58% of all Pabst Brewing Company sales were made outside of these three states (sales having been made in all states) (JX 56, 59, R. 194, 197). These percentage figures are so much greater than the percent of the total business done by the merging banks outside of the section of the country in *Philadelphia National Bank*[36] as to compel the conclusion that the three-state area is not a relevant market.

Just as in the case of Wisconsin, the record evidence not only fails to establish that the three-state area is a relevant geographic market, it clearly establishes the contrary.

C. The United States.

There is no issue as to whether the United States is an appropriate geographic market since the government alleged (F. 4, R. 457), Pabst agreed (F. 5, R. 457) and the trial court found (C. 3, R. 480) that the United States is a

[36] Only an average of about 25% of the business of each of the merging banks in *Philadelphia National Bank* was outside the section of the country there. (See 374 U.S. at 359, n. 36).

relevant section of the country for testing the competitive effect of the acquisition.[37]

1. *State of Competition in National Market.* As shown in the Statement,[38] competition among brewers in the United States is extremely vigorous. There were 162 firms selling beer in 1961, 25 different companies each accounted for at least 1% of national sales, no single firm made as much as 10% of national sales, and the top four firms had but 27.62% of the national market. There is also considerable shifting of rank among the industry leaders. The acquisition of Blatz by Pabst must be assessed in the light of this pro-competitive industry structure.

2. *Market Shares.* The extremely small percentage shares of Pabst and Blatz in the national market in the merger year (2.67% for Pabst, 2.04% for Blatz, 4.71% combined) (F. 16, R. 462)[39] certainly do not raise any presumption of illegality, the combined percentages being but a small fraction of the "undue percentage share" (30%) held to raise a presumption of illegality in *Philadelphia Bank* (374 U.S. at 363-64). In the 1949-58 period Pabst's share of national sales had fallen from 5.14% in 1949 and 4.81% in 1952 to 2.67% in 1958; indeed, the percentage share of Pabst and Blatz combined in 1958 was less than Pabst alone in 1949 or 1952 (F. 16, R. 462). The fact that in the first two full years after the merger, 1959 and 1960, combined Pabst and Blatz brand sales still did not reach the percentage of national sales of Pabst brands alone in 1949 would, according to one of the writers cited by the

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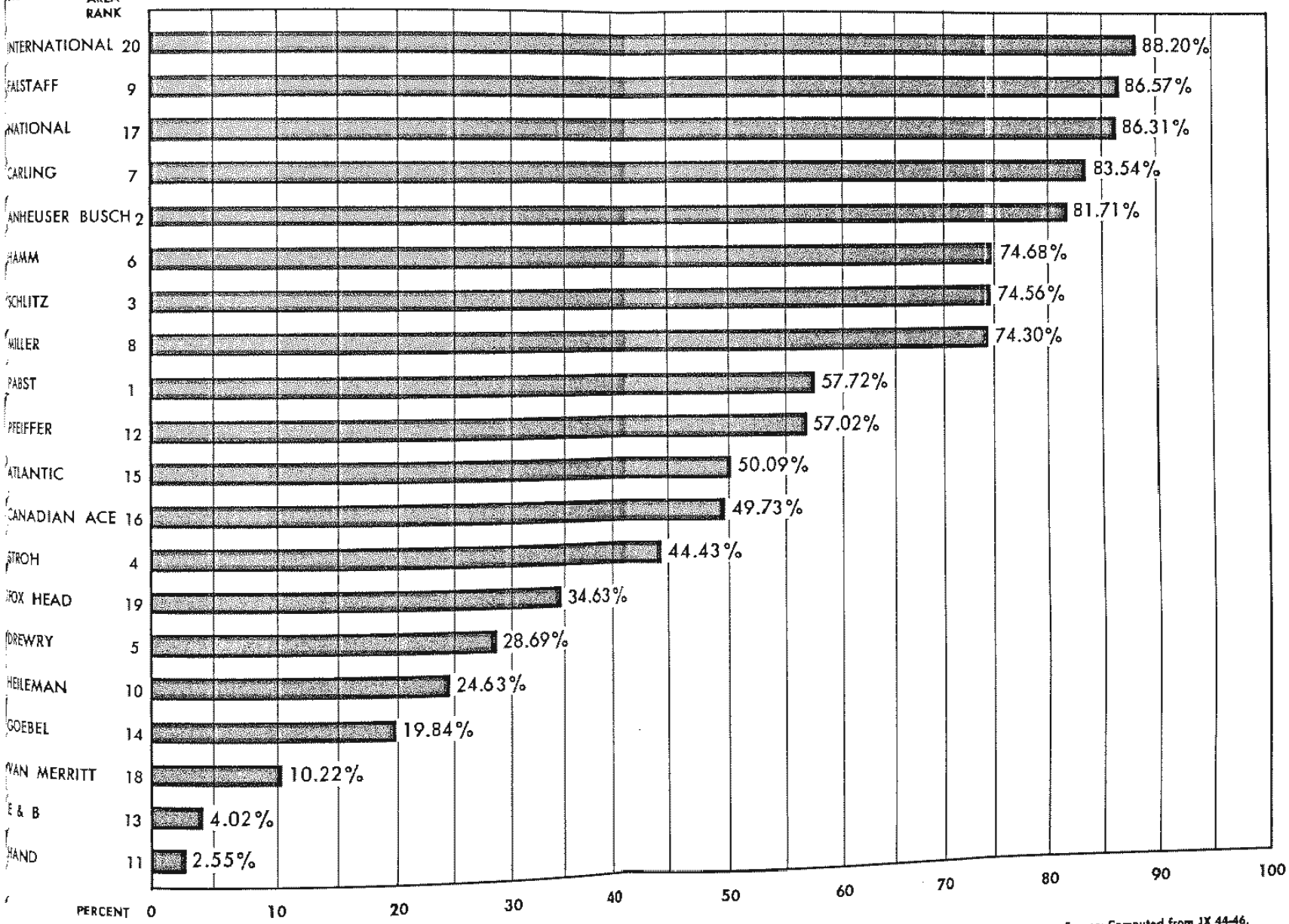
[37] Actually the government may have abandoned its contentions as to the national market, see *e.g.*, its comment (G.B. 38) that a particular "phenomenon . . . implies that the market for beer is not a national one." Similarly, see G.B. 36 where the government implies that the market for beer is not "truly national."

[38] See Statement pp. 9-12, *supra*.

[39] In the merger year, 1958, Pabst ranked 11th and Blatz ranked 13th (F. 16, R. 462).

# PERCENT OF NATIONAL SALES OF TWENTY LEADING THREE-STATE-AREA SELLERS IN 1961 OUTSIDE OF THREE-STATE-AREA




Source: Computed from JX 44-46, R.182-184; JX 99-100, R.237-238

court in *Philadelphia National Bank*, 374 U.S. at 362, 363, n. 38, 364, n. 41,[40] make the merger presumptively legal. In view of these minimal market shares the trial judge concluded that the government could not by these shares alone "shift to Pabst the burden of proving the absence of probable anticompetitive effects in the continental United States," and he therefore carefully considered all of the other record evidence related to anticompetitive effects. (Op. R. 447-55).

3. *Lack of Concentration.* The brewing industry is not concentrated. When considering the amendment to Section 7 of the Clayton Act in 1949-50, the level of concentration which concerned Congress was one where a handful of sellers control the bulk of a market's business,[41] not the

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[40] Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 316 (1960).

[41] See, *e.g.*, the general remarks of Rep. Carroll ("in industry after industry three, four, five or six huge corporations dominate prices, production and employment" 95 Cong. Rec. 11493 (1949)), Rep. Douglas ("industry after industry has . . . been taken over by the Big Three, the Big Four, the Big Six, or sometimes by simply the leader," 95 Cong. Rec. 11501 (1949)), and Sen. Kefauver ("control of industries which manufacture a great many of our basic products—steel, copper, lead, and many other products . . . —is held by a handful of corporations," 96 Cong. Rec. 16450 (1950); according to Rep. Douglas the top three had 60% of steel capacity and 88% of copper refinery capacity while the leader in the lead industry accounted for 40% of production, 95 Cong. Rec. 11500 (1949)). Sen. O'Conor (96 Cong. Rec. 16435-36 (1950) pointed to shares held by the leading three companies ranging from 56% to 100% in 13 specific industries. For charts of similar data for various industries see 95 Cong. Rec. 11485, 11500-01, 11502, (1949). Taken as a whole the legislative history demonstrates a Congressional concern with those oligopolistic situations where, as described in the Senate Report, "three or four large concerns produce the entire supply" S. Rep. No. 1775, 81st Cong., 2d Sess. 8 (1950).

situation where, as here, the four leading firms accounted for little more than one fourth of national sales in 1961 (F. 49, R. 476). Furthermore, in all of the recent horizontal merger cases before this Court the share of sales of the four leading firms subsequent to the acquisition under attack has been radically greater than the very low figure in this case. In *Philadelphia National Bank*, for example, the four leaders had 78% of assets, in *United States* v. *Alcoa*, 377 U.S. 271, 278 (1964), 77% of the market, in *United States* v. *First National Bank & Trust Co. of Lexington*, 376 U.S. 665, 669 (1964), 91% of assets, and in *United States* v. *Continental Can Co.*, 378 U.S. 441, 461 (1964), the four leaders accounted for 66% of the business in the line of commerce. None of these cases remotely suggest that the small aggregate market shares of the four largest companies in the brewing industry (F. 49, R. 476) is in any manner anticompetitive or raise any presumption that it might become anticompetitive.

In each of the preceding cases there was an increase in concentration among the leading firms in the relevant market as a result of the acquisition under attack. This court in *Philadelphia Bank* specified that a 33% increase in concentration from 44% to 59% among the two leading firms was one of two factors which would in proper circumstances raise a presumption of illegality (374 U.S. at 363). Here, however, not only was there *no increase* in concentration in 1958 (the merger year) between the two leading national sellers of beer as a result of the Pabst-Blatz acquisition, but there was not even an increase among the top four. The combined percentage share of Pabst and Blatz in 1958 (4.71%) was less than the share of the fourth leading firm (Ballantine, 4.78%) in that year; the relative increase among the top five or six sellers in 1958 was about 2% (F. 45, R. 473).

4. *Trend Toward Concentration.* At trial the government sought to prove an alleged "trend toward concentration" in the brewing industry with statistical evidence showing (1) a decrease in the number of breweries, (2) an increase in national beer consumptiou and production,[42] and (3) an increase in the market shares of the ten and twenty-five leading brewers (Op. R. 448).

The government failed to show the significance of any of its statistics as evidence that "concentration" or a "trend thereto" has anticompetitive consequences in the market. In marked contrast to other cases where the government has shown the significauce by evidence, the best the government could do here when asked about the significance of the percentage shares of the 25 leading firms was to tell the court that "we have another chart showing the top ten" (R. 134).[43] The government also

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[42] The inadequacy of this claim is illustrated by the fact that 93% of the increase in beer consumption between 1934 and 1961 occurred prior to 1947 (F. 44, R. 472). The post-1947 leveling off in consumption and consequent intensification of competition (necessarily "weeding out" the inefficient operators) actually provides the "non-merger" explanation for the decrease in number of breweries since that date.

[43] In *Philadelphia Bank*:

> "The Government's case in the District Court relied chiefly on statistical evidence bearing upon market structure and on testimony hy economists and bankers to the effect that, notwithstanding the intensive governmental regulation of banking, there was a substantial area for the free play of competitive forces; that concentration of commercial banking, which the proposed merger would increase, was inimical to that free play . . ." 374 U.S. at 334.

There was also testimony in *Brown Shoe* from members of the industry as well as econotnists as to competitive significance of statistics. *United States* v. *Brown Shoe Co.*, 179 F.Supp. 721, 733 (E.D. Mo. 1959).

argued that a mere decrease in the number of breweries constitutes by itself a trend toward concentration (R. 421). In other merger cases the government has not attempted to draw any inference of anticompetitive consequences from such unexplained statistical data alone but instead has supplied testimony to explain them. Thus, in *Philadelphia Bank* one witness testified for the government that the merged bank would have the power to affect the price and supply of available bank credit within the area of effective competition while another testified that the elimination of a large lender would significantly reduce the degree of competition because an important alternative source of credit would be eliminated (*United States* v. *Philadelphia National Bank,* 201 F.Supp. 348, 366, 367 (E.D. Pa. 1962)). No explanation, which would give meaning to the statistical evidence produced was offered here.

In its complaint the government asserted that the number of breweries operated in the United States has been declining due to "merger, consolidation and natural attrition" (R. 23), but the government did not prove that *any* breweries went out of business for reasons other than "natural attrition" (F. 48, R. 476).

In almost every horizontal merger case considered by this Court there has been evidence presented of an extensive history of mergers within the industry as well as of mergers or acquisitions by one or both parties to the combination question. In *Brown Shoe,* there was evidence of acquisitions or mergers of others in the industry, 370 U.S. at 301, 302, 345, of Brown, 370 U.S. at 302-3, 334, 345, and of Kinney, 370 U.S. at 302-3. In *Philadelphia Bank,* the acquiring bank had acquired nine formerly independent banks since 1950, the acquired bank six, and the largest seven banks in the area had increased

their combined share from 61% to 90%, largely due to acquisitions (374 U.S. at 331, 367; 201 F. Supp. at 368); and, in the United States, "of the 1,601 independent banks which thus disappeared, 1,503 . . . disappeared as the result of mergers." 374 U.S. at 325-6. Similarly in *United States* v. *Alcoa,* 377 U.S. 271, 279 (1964), and *United States* v. *Continental Can Co.*, 378 U.S. 441, 444-45 (1964), there was evidence of industry and company merger history before the court. In contrast, the trial court found that "there is no evidence in the record of any merger or acquisition in the beer industry other than the acquisition of Blatz by Pabst" (F. 48, R. 476).[44]

The most reasonable explanation in the state of this record is that the decline in the number of breweries is the result of the growing size of the geographic market for beer created by changes in the national economy.[45] As a result of this growth, it can be anticipated that the rate of decline in the number of breweries will substantially lessen and the computation of a three-year moving average confirms this fact:

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[44] The government here recognizes this deficiency of proof but its attempt to remedy it by including references to merger cases filed *after* this trial was over (G.B. 22) likewise fails since those cases are still pending, have no relation to this case and will be decided on their own facts. Nothing in or outside the record connects those cases with this case.

[45] See Statement, pp. 10-11, *supra.*

| Year | Three Year Average Annual Decline in Number of Breweries[46] | Number of Operating Breweries |
|---|---|---|
| 1952 | 27.67 | 357 |
| 1953 | 26 | 329 |
| 1954 | 25.33 | 310 |
| 1955 | 21.67 | 292 |
| 1956 | 16 | 281 |
| 1957 | 15.33 | 264 |
| 1958 | 13.33 | 252 |
| 1959 | 12.33 | 244 |
| 1960 | 11.67 | 229 |
| 1961 | 7.67 | 229 |

[46] Source: GX 213, R. 348: the figures are the average number of breweries (plants, not firms) going out of existence in the three-year period ending with the indicated year. There is no record evidence of the number of firms prior to 1957. For 1957-61 the number of firms has declined from 206 to 162 but at a much lower rate (177 to 162) in 1959-61 than in 1957-59 (206 to 177) (F. 47, R. 476).

There are other reasons which suggest that the decrease will stop well before the number of firms reaches an unduly small number. The decrease has already virtually halted for firms with annual sales in excess of 250,000 barrels; there were 55 such firms in 1957 and 53 in 1961 (JX 32, R. 170; JX 44, R. 182). National beer production has, in fact, begun to rise after being stagnant in the 1947-58 period (F. 44, R. 472).

With respect to market shares, the fact that the shares of the leaders are well distributed and fluctuating shows healthy and vigorous competition. There is no basis for inferring that the share of the ten leading brewers, 53% in 1961, (F. 49, R. 476) will eventually reach any anticompetitive level.

No merger which results in a combined market share for the two companies of only 4.71%, less than the share of one of them alone only a few years before, presents any of

the dangers to competition which Section 7 was enacted to prevent. To condemn a merger on so little could very well discourage rather than promote competition.

## CONCLUSION.

The government lost below because the evidence it elected to present did not prove a violation of Section 7 under the standards established by this Court. Tested either by those standards, or by the government's own hypothetical assertions as to what the law should be, the government has shown no right to relief on the evidence in this case. The appellee, Pabst Brewing Company, respectfully submits that the decision of the trial judge was correct and should be affirmed.

Respectfully submitted,

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