THE YELLOW CAB ANTITRUST CASE

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In United States v. Yellow Cab Co., the Supreme Court held that the ownership by the Checker Cab Manufacturing Corporation, a taxicab manufacturing company, of cab operating companies in Chicago, New York City, Pittsburgh and Minneapolis, constituted a violation of the Sherman Act if it could be proven that the operating companies were acquired in order to exclude other manufacturers from the business of selling taxicabs to those companies. The Court said:

It is... alleged that the appellees have agreed to control the operation and purchase of taxicabs by the principal operating companies in Chicago, New York City, Pittsburgh and Minneapolis, insisting that they purchase their cabs exclusively from CCM. This excludes all other manufacturers of taxicabs from 86% of the Chicago market, 15% of the New York City market, 100% of the Pittsburgh market and 58% of the Minneapolis market. At the same time, the trade of the controlled cab companies is restrained since they are prevented from purchasing cabs from manufacturers other than CCM. The result allegedly is that these companies must pay more for cabs than they would otherwise pay, their other expenditures are increased unnecessarily, and the public is charged high rates for the transportation services rendered.

Received antitrust lore interprets the Yellow Cab opinion as the high water mark of an effort within the Court to apply a per se rule to vertical acquisitions. The law now is, or is thought to be, that a vertical acquisition is illegal.

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2 Id. at 224; Complaint, para. 53(4) (Record at 17).

only if its tendency is to lessen competition\textsuperscript{4}—although examination of the facts thought to establish such an effect in the leading Supreme Court case shows that the Court’s retreat from a per se rule is imperceptible to any but a black letter lawyer.\textsuperscript{5}

The defendants in the Yellow Cab case—Checker Motors; its President and large stockholder Morris Markin; and other controlled corporations—operated two businesses which fit the common definition of a monopoly. The Checker Motors Manufacturing Company was and remains the only manufacturer of special use taxicab vehicles in the United States. And two related companies, Checker and Yellow Taxi Companies, controlled and continue to control over 80 per cent of the operating licenses in the city of Chicago. The manufacturing monopoly was a monopoly in only a trivial sense, however, because special use taxicab vehicles faced effective competition from the cheaper general purpose automobiles produced by General Motors, Ford, Chrysler and others. Ownership of the Chicago licenses, however, conferred effective monopoly power on the defendants because unlicensed competitors were barred by the regulatory ordinance.\textsuperscript{6} After 1937 the monopoly power of the licenses was particularly effective because the city had obligated itself to issue any new licenses up to 1,108 in number to the defendants.\textsuperscript{7} This arrangement substantially reduced the incentives any competitor might have had to apply to the city for additional operating licenses.

Although the case is notable from a doctrinal standpoint because of the vertical integration between the manufacturing and operating companies, the Chicago monopoly was the original occasion for and focus of the case.

The occasion for the filing of the case by the Department of Justice appears to have been a “march on Washington” by disgruntled veteran cab drivers

\textsuperscript{4} The dearth of litigation in the vertical acquisition area makes any more specific statement of the law impossible. In the absence of any substantial judicial gloss, the Department of Justice merger guidelines issued in 1968 are the leading authority. They state that mergers which lead to “significant anticompetitive consequences” will be challenged by the Department, Merger Guidelines No. 11, C.C.H. Trade Reg. Rep., § 4510 at 6885 and that this standard will ordinarily be satisfied if the supplying firm accounts for approximately 10\% or more of the sales in its market and the purchasing firm accounts for approximately 6\% of the market. Merger Guideline No. 12, \textit{id.} at 6886. Whether or not the acquisition of cab operating companies by the defendants in Yellow Cab would be challenged under the guidelines turns on the definition of relevant market in Guideline No. 3. All of the cab operating companies purchased more than 6\% of the cabs purchased in their local markets and Checker made more than 10\% of national cab sales.

\textsuperscript{5} See Brown Shoe Co. v. United States, 370 U.S. 294 (1962).


\textsuperscript{7} \textit{id.} at 327-29, 344. Of the 1,108 priority license rights, 37 belonged to persons not affiliated with the defendants who had also surrendered licenses in 1937.
from Chicago organized as the "American Cab Drivers Association for Discharged Veterans." The marchers were owner-operators of unlicensed taxicabs in Chicago who were protesting the city's efforts to drive them from the streets through repeated arrests for operating without the taxicab license required by city ordinance. The news stories covering the "march," or more correctly, taxi caravan, do not make it clear what relief the marchers were seeking. The New York Times reported on February 18, 1946, the day the caravan of some 400 vehicles left Chicago, that the marchers were asserting their "constitutional right to earn a living." The common sense of the assertion, however, cannot overcome its lack of support in post New Deal constitutional jurisprudence. When the marchers arrived in Washington—in apparent good humor in spite of the otherwise contemporary flavor of their tactic—they were ushered into the presence of the Assistant Attorney General for antitrust. That was on February 21, 1946. The complaint was filed on July 25. The press release issued by the Department of Justice quoted the then Attorney General, Tom C. Clark, as saying that "one purpose of the suit is the dissolution of the cab-operating monopoly in Chicago so as to permit others, including veterans, an opportunity to engage in such business." No other purpose was mentioned.

It is puzzling why of all the restraints on entry to numerous businesses and occupations that returning veterans might have protested, they should have protested the relatively obscure and unimportant limitations on entry into the urban taxicab market. The phenomenon was not confined to Chicago—similar efforts occurred in other cities including Baltimore, Philadelphia, Pittsburgh, Indianapolis, Los Angeles, and San Francisco. For instance, in Philadelphia a group of veterans endeared themselves to the public by offering free taxi service and surviving on tips—an unsuccessful stratagem to avoid the legal restraints on entry. It is clear, however, why the Chicago veterans

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12 Returning veterans after World War I, for instance, obtained entry into the bar on motion in a number of states. This privilege was not made available to World War II veterans. Veterans faced licensing and union restrictions in many activities.


had a special grievance. Under an ordinance passed in 1937 their desire for licenses could not be met by the City Council without the issuance, first, of 1,071 licenses to the Checker affiliated operating companies and 37 other licenses to independents.\textsuperscript{15} The desire of the veterans for operating licenses could have been legally honored under the ordinance had the City Council first issued the 1,108 priority licenses and then issued any number of licenses to the veterans. It is perhaps revealing of the practical sophistication of these apparently naïve—and effectively so—protestors that they did not suggest this course of action. Instead they demanded that Checker and Yellow’s priority rights be disregarded and that licenses be issued to them. Their attack on the “monopoly” never became an attack on the monopoly system.

An explanation for the nationwide veteran protest directed at taxi licensing may be the actions of the Office of Defense Transportation during the closing days of the war. During the war the Office of Defense Transportation had operated a system of “certificates of war necessity” for motor carriers. Without a certificate an operator could not obtain parts and fuel under the rationing system. The Office of Defense Transportation froze the number of cabs operating on September 1, 1942.\textsuperscript{16} This, combined with the deterioration of the private vehicle fleet and the high level of wartime activity, made operation of certified cabs especially profitable (assuming, of course, that no capital value is ascribed to the non-transferable certificate). This situation would attract entry from anyone able to obtain the necessary certificate without charge. On May 11, 1945 the Office of Defense Transportation issued its General Order No. 50\textsuperscript{17} relating to property carrying vehicles and a separate statement of policy relating to taxicabs.\textsuperscript{18} Both the General Order and the statement of policy provide for special treatment for veterans. The General Order provided that a veteran might obtain one certificate of war necessity for the operation of a property carrying commercial vehicle without making the usual showing of war or civilian necessity. The Order also required that the veteran possess any necessary local, state or federal operating authority. The accompanying statement of policy asserted that veterans were entitled to operate taxicabs if, preceding their entry into the armed forces, they had owned and operated a taxicab. It further asserted that in communities where taxicabs constitute the sole or predominant means of personal

\textsuperscript{15} An obligation upheld in Yellow Cab Co. v. City of Chicago, 396 Ill. 388, 71 N.E.2d 652 (1947).


\textsuperscript{17} \textit{Id}. at 341.

\textsuperscript{18} A report of the Statement of Policy has been found only in the New York Times, May 13, 1945, at 12, col. 1.
transportation, any veteran would be entitled to operate a taxicab. The authority of the Office of Defense Transportation to thus override local regulation was nonexistent. The Statement of Policy referred to the Service-
man's Readjustment Act of 1944, a statute devoid of legitimating provi-
sion. But the action of the Office of Defense Transportation may well have spurred veteran entry into the taxicab business and may have at first de-
terred vigorous enforcement of the licensing requirements by local authorities. The veterans, once they had started to operate, were more resentful than they otherwise would have been of their exclusion from the industry.

A group of protesting veteran cab drivers, no matter how appealing and successful their publicity ploys, is not the equivalent of a Sherman Act cause of action. The effort to use the Sherman Act to limit monopoly might strike a layman as perfectly sensible. But application of the Sherman Act to the Chicago taxi monopoly presented considerable legal difficulty. In the first place, it could be argued that the legally proper actions of the City Council in creating and perpetuating the monopoly immunized the private firms from antitrust attack—although the history suggests that the Council has re-
peatedly acted at the behest of the firms themselves. Second, the local nature of the taxicab business presented an issue as to whether the business was within the scope of the federal statute. The complaint directed itself to these two legal difficulties.

First of all, the complaint did not directly attack the Chicago regulatory system. Instead, the antitrust investigators found that two of the subsidiary operating corporations—one with outside minority ownership—had agreed between themselves in 1937 to seek a reduction in the number of outstand-
ing licenses in Chicago. Such an agreement to seek legislative change in a regulatory program would not of itself be a violation of the Sherman Act, or at least it has subsequently been so established. But the agreement went further because it provided that one operating company would compensate the other for losses resulting from the reduction in the number of licenses and guaranteed to each company a fixed percentage of new licenses should the number of licenses be increased in the future. The complaint then attacked the 1937 ordinance as a fruit of this preceding and allegedly illegal agreement. The drafter of the complaint, however, feared that the charge

22 Complaint, paras. 19(e)-(i), 43-45 (Record at 7-8, 14-15, United States v. Yellow Cab Co., 332 U.S. 218 (1947)).
23 Complaint, para. 53(5) (Record at 17).
would fail for want of interstate commerce. So he added two other counts designed to cure the lack of interstate commerce. One was addressed to the railroad passenger transfer business, a service provided in Chicago by another company owned by Checker. This charge clearly involved interstate commerce but was quite peripheral to the taxi monopoly. The other charge focused on the interstate commerce in taxicabs sold by the manufacturing company to the operating companies. Again interstate commerce clearly was involved. The monopolization alleged was the monopolization of the sales to the operating companies by acquisition. Thus did vertical integration enter the case. But the relief actually sought in the complaint makes clear that the objective of the action was the Chicago taxi monopoly. The principal relief sought was, first, that the defendants be required to waive their priority rights under the 1937 ordinance to any licenses that might be issued, thus enabling the veterans to obtain licenses immediately. This requested relief was apparently based on the theory that the priority rights, although created by a legal city ordinance, were the result of the preceding agreement and hence illegal. Second, the complaint requested the defendant corporations be broken into three groups: 1. the manufacturing company and one of the Chicago operating companies [Checker], 2. the non-Chicago operating companies and 3. the other Chicago operating companies [Yellow]. Thus vertical integration would be reduced but not eliminated.

The District Court dismissed the complaint for failure to state a cause of action on the ground of lack of interstate commerce. The Supreme Court reversed both as to the vertical integration and the railroad transfer charges of the complaint. The decision was handed down by the Supreme Court on June 23, 1947 and the case returned to the District Court for trial. The following term the Court retreated from the suggestion in the first Yellow Cab opinion that a vertical acquisition is a violation of the Sherman Act—even suggesting that vertical integration might, in certain cases, promote economic efficiency. Vertical integration is not illegal, ruled the Court, unless it either is undertaken with a wrongful intent or takes place in a context which facilitates abuse of market power. The Yellow Cab case went to trial

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24. Complaint, para. 19(c) (Record at 8).
25. Complaint, paras. 19(b), 20-28 (Record at 8-10).
27. Complaint, Prayer for Relief, para. H (Record at 18).
30. The rule of Paramount Pictures: "[T]he legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent." 334 U.S. at 174.
on November 1, 1948 and was tried under these new rules. The government, now left with the vertical integration issue as its principal charge, amended its complaint to ask that the manufacturing company be separated from all cab operating companies. The request that the Chicago operating companies be required to surrender their priority license rights remained in the complaint—although now without any support in the substantive charges of the complaint.

The trial court found that Checker and Markin had not acquired the operating companies for the purpose of excluding competitors from the sale of cabs. This was in spite of the fact that the Checker Cab Manufacturing Corporation minutes recording the discussion of the acquisition of the operating companies specifically mentioned the advantage of securing orders that could be expected to flow from the acquired companies. The defendants argued that the minutes were not important because they failed to show any plan to obligate the operating companies to purchase Checker cabs without regard to the relative merits or price of Checker cabs. It would be difficult to imagine, of course, that the defendants would or could have obligated themselves to compel their own operating companies to use Checker cabs no matter what the cost of producing them, their advantages in taxi service, and the relative cost of alternative vehicles. To accept the defendants’ standard of the required proof severely limited the significance of the first opinion. The crucial issue, of course, was exactly what must be intended to make a vertical acquisition illegal. The District Court found that the defendants merely intended to take advantage of business opportunities as they appeared, and did not intend to suppress competition in the sale of cabs.

31 Amended Complaint, Prayer for Relief, para. H (Record at 52-53, United States v. Yellow Cab Co., 338 U.S. 338 (1949)).
32 Amended Complaint, Prayer for Relief, para. C (Record at 52).
33 "He [Markin] . . . stated that the plan contemplated the organization of a management company, which would endeavor to furnish uniformity of management for such operating companies and to effect various economies in operation. He felt that in this way this Company would be in a position to receive recurring orders from substantial operating companies that would be in a position to pay cash." Gov't Ex. No. 1, (January 25, 1929, minutes of directors' meeting of Checker Motors Corp.), Record, vol. 2, at 967-68, United States v. Yellow Cab Co., 338 U.S. 338 (1949). "Mr. Markin stated that, pursuant to discussion which he had had with directors from time to time, he had been working on a plan whereby this Company might obtain a sustained production by insuring recurring orders from large operating companies." Gov't Ex. No. 2 (April 5, 1929, minutes of directors' meeting), Record vol. 2, at 969.
35 A question which, according to Mr. Justice Jackson's file, Justice Murphy raised in conference but was to be left unanswered. File of Mr. Justice Jackson, United States v. Yellow Cab Co., No. 22, 1949 Term.
36 80 F.Supp. 936, 942-44.
ment argued that Checker planned to and did sell its cabs to the companies. 87

The trial court also found that the defendants had not entered the railroad transfer business for the purpose of suppressing competition, and dismissed that charge of the complaint. 88 The government appealed only from the dismissal of the vertical integration charge.

On appeal the case presented the Supreme Court with no inconsiderable difficulty. The proof at trial had confirmed the basic conspiracy alleged in the complaint which the Court had held sufficient to state a cause of action. Yet the Court had held subsequent to the first Yellow Cab case that more than an intent to supply an acquired firm was required for a violation of the Sherman Act 89 while distinguishing the Yellow Cab case as a case where illegal circumstances were alleged. The vertical integration aspect of the Yellow Cab case had been distinguished in the Columbia Steel decision on the disingenuous ground that vertical integration there was illegal because it was part of a scheme to monopolize cab service in certain cities. 90 The vertical integration and the local cab monopolies were in fact entirely separate. Indeed, the government felt it necessary to argue that the first Yellow Cab case had not been overruled. 41

The government brief on appeal argued that the evidence established a plan to limit the acquired operating companies to the purchase of Checker cabs. It did not argue why such a plan was or could be harmful. In the passage from the first opinion quoted at the opening of this essay the Court had suggested two possible harms. First, that competing companies would lose sales they otherwise would have made: and second, that taxi rates to users would be increased. The evidence in the record did not suggest the presence of either harm. There was no evidence that the operating profitability of the manufacturers had been affected by the loss of such a small number of unit sales. The sales in question were about 2,250 42 out of 3,518,244 43 on an annual basis. It is difficult to argue that the manufacturers of general purpose automobiles would be injured by the loss of four one hundredths

88 80 F. Supp. at 944.
89 See cases cited supra note 28.
90 334 U.S. at 522.
41 Brief for the United States, at 56-61.
42 Defendant's Exhibit D-13, Record, vol. 2, at 1628, shows a total Checker production of 29,260 units between January 1, 1929 and December 31, 1947. Checker production was halted from 1942 through 1947 due to the war.
percent of total production.\textsuperscript{44} Indeed, that is a considerable overestimate of the harm since it is unlikely that Checker would have made no sales to affiliated companies had they been independent. Nor did the evidence show that Checker cabs, considering their special features for the taxi business, were significantly higher (or lower) in price than other available alternatives. The argument that higher priced cabs would result in higher taxi fares makes sense only if taxi fares are subject to effective cost-based regulation. An unregulated firm—whether a monopoly or not—cannot increase its profits by raising its costs. A regulated firm can raise prices only if it raises costs and therefore may find it profitable to do so,\textsuperscript{45} particularly if the higher cost will increase the profits of an unregulated segment of the same firm. However, Chicago taxi fare regulation has never in any meaningful sense been based on cost, and the same situation may have prevailed in other cities where Checker operated. The record contained no evidence showing that the defendants had ever relied on the cost of cabs as a basis for an increase in fares.

The Supreme Court affirmed the trial court on the ground that its findings of “fact” were not clearly erroneous.\textsuperscript{46} The critical findings did not relate to the presence or absence of actual or even possible harm to competition but, according to the opinion, to imponderables, such as the intent of parties to certain 1929 business transactions, whether corporate officers were then acting in personal or official capacities, what was the design and purpose and intent of those who carried out twenty-year-old transactions, and whether they had legitimate business motives or were intending to restrain trade of their competitors in car manufacture, such as General Motors, Ford, Chrysler and Packard.\textsuperscript{47}

After conference Mr. Justice Jackson, the author of the opinion, had written to the Court:

It will be recalled that my view at the conference was that this case should be affirmed, with a mere citation of the rule, as to the weight to be given to the findings of the District Court. Since it was assigned to me upon that expression

\textsuperscript{44} The ratio of total Checker production 1929-1942 to total U.S. production is .0006. Sixteen thousand, nine hundred and ninety-six of the total 29,260 Checker units, or 58\%, were sold to affiliated companies. Thus “tied” sales constituted .0004 of total U.S. production.

\textsuperscript{45} The trial court found that the existence of municipal regulation militated against a finding of unreasonable restraint of trade, apparently on the theory that the regulation provided protection against any possible harmful consequences. 80 F. Supp. at 944. But in fact, only effective rate regulation based on cost would have made the strategy of raising prices to the operating companies a rational one.

\textsuperscript{46} 338 U.S. 338 (1949).

\textsuperscript{47} \textit{Id.} at 340.
of view, I take it that it was not desired to do it per cur, but that the opinion should be as near to that which I expressed as possible.

On his copy, Mr. Justice Frankfurter penned: "Being as innocent as you, 'I take it' the same way—and on that basis, but only on that basis, I agree to this slight disposition of a great cause."  

The second Yellow Cab opinion was handed down in December of 1949. By then the "veteran" operators had largely been swept from the streets, not by restrictive licensing laws but by competition. With the successful post war replacement of the private automobile fleet taxi usage resumed its long term downward trend. In Chicago, for instance, only 504 veterans of the more than 2,000 drivers once on the street in the immediate post war period ultimately received permanent operating licenses, and even then Checker and Yellow have found it desirable not to operate all of their licensed cabs. The "great cause" had passed.

48 Copy in file of Mr. Justice Jackson, United States v. Yellow Cab Co., No. 22, 1949 Term.

49 For an account of veteran cab difficulties in different cities see Business Week, May 8, 1948, at 96.

50 E. Kitch, M. Isaacson & D. Kasper, supra note 6, at 339.

51 Id. at 297-299.