SHOULD LABOR BE SUBJECT TO THE ANTITRUST LAWS?

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Introduction

The question of whether or not labor should be subject to the antitrust laws, seems to be an ageless one. It has been debated pro and con since the inception of the Sherman Act in 1890. The question has received current interest with the advent of Attorney General Brownell's National Committee to Study the Antitrust Laws.[1] Out of this committee's sessions came the conflicting opinions of Secretary of Commerce Sinclair Weeks, and the Labor Department's James P. Mitchell, the former feeling that labor should be subjected more closely to the antitrust laws, while the latter was inclined to leave the laws unaltered. The question is debated by speakers, by authors, by labor, and by management. Nor is the question merely an academic one. Several bills have been introduced into Congress which would restrict labor's immunity under the anti-monopoly laws. Probably the most notable of these was the attempt in 1947 to outlaw "industry-wide" bargaining. It was defeated in the Senate by a single vote.

This paper will be concerned with some of the arguments for and against bringing labor under the Sherman Act, the implications of such action, the history of the antitrust laws as they have been applied to labor, the status of the laws today, and some concluding remarks which seem to us to be in order. The first of these interests to be pursued will be a short survey of the history of the antitrust laws and their application to labor unions. This course is undertaken

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[1] In 1953, Attorney General Brownell appointed a committee of sixty one economists and lawyers to study possible revisions of the federal antitrust laws. It its study, the committee considered the question of altering labor's status under those laws. See Business Week, (October 2, 1954), 162 and (December 25, 1954), 58.

in the interest of arriving at a position whereby we will be better able to appraise the question at hand and to gain historical perspective. No attempt is made to analyse the antitrust laws on the state level, rather, the scope of this paper is limited to the federal statutes.

History of the Antitrust Laws and their Application to Labor

In the score of years that preceded the twentieth century there appeared to be a popular fear that the gigantic industrial firms were about to sieze control of our economy, thus wrecking competition, which had been regarded as the regulator of business and as an instrument of protection and safety. This public fear culminated in the passage of a federal law which was designed to preserve competition - the Sherman Antitrust Law of 1890. The pertinent sections of this act are sections one and two.

> Sec. 1. Every contract, combination in the form of trust or otherwise,. . . or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy. . . shall be deemed guilty of a misdemeanor. . .
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> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . .[2]

The act also provided for triple damages to be paid those injured by the violators of sections one or two, and provisions were made enabling the federal courts to enjoin activities which were in "restraint of trade."

The language of the act is not clear in that it does not define just what a restraint of trade, or a monopoly, consists of. The lan-

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[2]Milton Handler, Cases and Materials on Trade Regulation, (Brooklyn: The Foundation Press, 1951), 947.

guage is also vague in that it does not spell out clearly whether labor organizations were intended to come within the jurisdiction of the act or not. Labor has consistently maintained that it was not intended to be subjected to this law. For instance, Samuel Gompers has been quoted as saying,

> We know the Sherman Law was intended by Congress to punish illegal trusts and not the labor unions, for we had various conferences with members of Congress while the Sherman Act was penned, and remember clearly that such a determination was stated again and again.[3]

Professor Edward Berman, after making a comprehensive study of congressional activity leading up to the passage of the act, concludes that there was no valid evidence which could be found in the records of the legislative proceedings that congress had intended the Sherman Act to apply to labor.[4] Louis Boudin, writing in the Columbia Law Review, while not agreeing with Berman's method of analysis, says, ". . . the evidence, we believe, conclusively shows that labor organizations were not intended to be included within the purview of the Act."[5]

These opinions notwithstanding, the interpretation and coverage of the Act was left to the courts, and although the courts had not been prone to regard unions as monopolies or as instruments restraining trade, it became apparent in the early years of the Act that labor would come within its jurisdiction, should labor violate its provisions. In 1893 two cases reached the lower courts which involved labor and the Sherman Law. The first of these involved a draymen's union which had conducted

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[3]American Federationist, (March, 1940), 264.

[4]Edward Berman, Labor and the Sherman Act, (New York, Harper Bros., 1930), 51.

[5]Louis B. Boudin, "The Sherman Act and Labor Disputes," Columbia Law Review, (December, 1939), 1285. For Boudin's analysis, see pages following.

a strike in New Orleans. This strike was followed by sympathetic strikes of other unions within that city until the transportation of goods in interstate and foreign commerce was "totally interrupted." The court interpreted the language of the act literally to mean every restraint of trade and granted an injunction against the striking parties.[6] In a second case of that year, a federal circuit court in Georgia ordered the renewal of a trade agreement between a railway engimeers' union and its employer on the grounds that a strike upon the transportation lines of the country would restrain interstate commerce.[7] Further evidence of the courts intention to apply the Act to labor was shown in 1894 when it was relied heavily upon in granting the sweeping injunctions against labor in the Great Pullman Strike.

Commenting upon these early actions, Professor Berman said that the courts, in deciding that Congress had intended the Act to cover labor, could not support that belief on an examination of the record. They were even more culpable, he felt, in that they had professed to have made such an examination. "It is difficult to see how, had they made a searching examination of the Congressional Record, they could have reached such a conclusion."[8]

The Supreme Court was not occasioned to render a decision on the question until eighteen years after enactment of the Sherman Act, when in 1908 the famous Danbury Hatters' case reached the nation's highest tribunal. A national union, the Brotherhood of United Hatters of America, had been engaged in a vigorous campaign to organize all the felt

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[6]U.S. v. Workingmen's Amalgamated Council (1893) See Berman, op. cit., pp 59-60.

[7]Waterhouse v. Comer (1893) See Berman, op. cit., pp 63-64.

[8]Berman, op. cit., p. 53.

hat manufacturers in the nation. It had been rather successful and by 1903 had closed shop arrangements with 187 concerns, leaving but a dozen firms as non-union holdouts. The union, quite anxious to eliminate the competition of non-union work standards, conducted a strike against one of these holdouts, Loewe and Company of Danbury Connecticut. Failing to organize by this method, the union initiated a nation-wide boycott against all of Loewe's products, causing substantial harm to accrue to the firm. Accordingly the firm sought and secured relief under the anti-trust law in the form of triple damages for losses incurred.

The court held that the boycott was a restraint of trade within the meaning of the Act, and that this ". . . conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business."[9] Thus the courts were still putting emphasis upon the word every embodied within the statute. In its decision, the court implied that the combination was of the same nature as restraints of trade at common law which were aimed at compelling third parties not to engage in trade except under conditions imposed by the combination.[10] But Gregory[11] concludes that actions of this type had not been considered as restraints of trade at common law previously, rather the courts had in their usage of that term alluded only to those who dealt in commodities as producers or marketers, not those who dealt in the services of working people. Further, he con-

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[9]Boudin, op. cit., p. 1320.

[10]Berman, op. cit., pp 79-80.

[11]Charles O. Gregory, Labor and the Law, (New York; W.W. Norton, 1949), 207-208.

tends that restraints at common law were of the nature of control over supply and price. Regardless of whether the court's reasoning in this case was clear or not, they made it strikingly clear that labor unions were to be subject to the act.

The next significant development concerning labor and the Sherman Act occurred in 1914 when Congress passed the Clayton Act. Labor felt that it had won a great victory by this enactment, especially in sections six and twenty. Section six declared that the labor of a human being was not a commodity or article of commerce, and that nothing in the antitrust laws would forbid the existance of, or forbid the carrying out of, the legitimate objectives of labor organizations. It also stated that unions would not be held or construed to be illegal combinations in restraint of trade under the antitrust laws. Section twenty listed several of the activities which labor groups normally engaged in - strikes, picketing, peaceful assembly, secondary boycotts, etc. - and said that none of these activities (provided they were peaceful) could be enjoined by the federal courts. In addition, it prohibited any restraining order from issuing from the federal courts for labor disputes arising between "employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment,"[12] which concerned terms or conditions of employment.[13] Tacked on to the end of section twenty was a sentence which read: "nor shall any of the acts specified in this paragraph be consid-

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[12]Gregory, op. cit., p. 493.

[13]With certain provisions, namely: unless necessary to prevent irreparable injury to property, or to a property right, or for injury which had no adequate remedy at law.

ered or held to be violations of any law of the United States."[14]

The language of the sections would indicate that labor's victory in removing itself from the antitrust laws had been virtually complete. Indeed, labor leaders of the time were so inspired as to refer to the Clayton Act as labor's Magna Charta. But the apparent victory turned out to be a shallow one, for the Duplex case of 1921 rendered both sections to a state of little, if any, protection for labor groups. The Duplex case was another boycott affair in which the machinist union had tried to organize the Duplex Printing Press Company of Battle Creek, Michigan and, failing to do so through an attempted local strike, had instituted a secondary boycott against the company's printing presses. The company brought the case under the Sherman Act and, after two unsuccessful attempts in the lower federal courts, it was successful in the United States Supreme Court. The court opined that certainly labor was not an article of commerce, but that would not prevent unions from violating the act if in fact they did so. Of section twenty, the court ruled that it only applied in the direct relationship of employer and employee. Thus section six of the Clayton Act really didn't mean anything, and section twenty was rendered ineffective as injunctive relief against organizational activity, since the parties in dispute were frequently not in the direct relationship of employer and employee. Once again, the court had shown its intention to rule secondary boycotts in violation of the antitrust laws.

Up to this period the use of the Sherman Act against labor had been infrequent and mainly limited to boycott cases. But in the twenties the act came to be used more freely than in the past, both in the

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[14]Gregory, op. cit., p. 493.

frequency and in the type of activities to which it would apply. One of these instances was evidenced by the application of the Act to a strike case - the first Coronado case. The United Mine Workers had struck the Coronado Coal Company and, in the course of the strike, engaged in a great deal of violence. Although the company could have secured injunctive relief from the state courts because of the violence (such as dynamiting of the mines, burning of coal cars, etc.), it chose to process the case under the damage provisions of the Sherman Act. In the meantime, the courts had developed the test of direct or remote interference with interstate commerce. If it could be shown that the effect upon interstate commerce was direct, immediate, and material, then the combination causing the effect was unlawful. If the effect were only indirect, indicental, and immaterial, then the activity was not unlawful.[15] The Coronado case put the court in a precarious position, for if it found that strike activity had materially interfered with interstate commerce, then by implication practically all union strikes could be found in violation of the Act, for, by this time, almost all companies engaged in interstate commerce in some way or other and conceivably any strike would interfere with their interstate shipments.[16]

The Supreme Court found that the union's strike against the Coronado Company had only resulted in indirect restraint of commerce and thereby the Act had not been violated. But in his opinion Chief Justice Taft implied that, if the internal or subjective intent of the strike was to restrain commerce by keeping non-union goods off the market, then a violation of the act could be shown. This piece of dictum

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[15]Berman, op. cit., pp 77-98.

[16]Gregory, op. cit., pp 211-212.

made it relatively easy for the company to produce a witness - in this case, a disgruntled union official - who appeared before the courts and testified that this was, in fact, the intention of the union. The second Coronado case, with this new evidence, laid down a new rule of law. What the courts had done with this new test of internal intent, was to make it easy to find labor guilty under the antitrust laws. Since the very heart of labor's economic program was to eliminate non-union products from the market, it is often wondered it the courts had intended to smash all of labor's gains and ruin their very program by this test. Gregory[17] suggests that the reason behind this intent test was to enable the courts to outlaw what they considered "intolerable" action - organizational strikes and secondary boycotts - while allowing "tolerable" activities - strikes over wages, working conditions, etc. - to go unmolested.

Labor's legal status under the antitrust laws was not materially affected until the "new deal" days, although two of several cases which occurred in the interim are significant. The first of these was a case of collusion between the carpenter's union, the building contractors, and the woodworking mills in Chicago. The contractors had agreed to install only union-made trim, and the mills had agreed to employ only union labor. The union, in turn, had agreed to supply labor for both. The result of this triangular arrangement was that substantial control of the Chicago market area was obtained, much to the chagrin of the out-of-state non-union mills in Wisconsin and Indiana (and southern Illinois.) The court found in this, the Brims case of 1926, that the union had violated the Act by suppressing out-of-state competition. The second case to be considered is that of the Bedford Cut Stone Company

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[17] Ibid., pp 211-217.

v. Journeyman Stone Cutters' Association (1927). The Supreme Court found that the union's action of refusing to allow its members to work on any Indiana limestone was sufficiently like previous boycott cases to cause it to be in violation of the Act. The court further contended that the intent of the action was to restrain interstate commerce because the action was not confined to local regions. However, Justices Holmes and Brandeis rendered a vigorous dissent pleading for the rule of reason[18] to be applied in this case. They saw the union's actions as a natural procedure under the circumstances. Justice Brandeis, who wrote the dissenting opinion, concluded:

> If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds one of involuntary servitude. The Sherman Law was held in United States v. United States Steel Corporation, 251 U.S. 417,. . . to permit capitalists to combine in a single corporation 50 percent of the steel industry of the United States dominating the trade through its vast resources. The Sherman Law was held in United States v. United Shoe Machinery Co., 247 U.S., 32,. . . to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe manufacturing in America. It would, indeed, be strange if Congress had by the same act willed to deny to members of a small craft of working men the right to cooperate in simply refraining from work when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so.[19]

By the late thirties and early forties the court had begun to "mellow" in their attitude toward labor. It upheld the minimum wage law, overruling the long-standing precedent against this type of legislation, and in 1937 declared the National Labor Relations Act constitutional. The Supreme Court's decision in the Thornhill case linking

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[18]The rule of reason as laid down in the Standard Oil and American Tobacco cases of 1911 changed the meaning of every restraint of trade to every unreasonable restraint of trade.

[19]Berman, op. cit., pp. 177-178.

peaceful picketing to the constitutionally protected right of free speech indicated a rather wide swing from earlier decisions. Just how far the court's attitude toward labor had changed can be seen in the Apex Hosiery case of 1940. The hosiery workers, in an attempt to organize, conducted a sit down strike against the Apex Hosiery Company of Philadelphia. By so doing, they stopped the shipment of approximately $600,000 worth of hosiery into interstate commerce. The court admitted that the strike had restriced shipments in interstate commerce, but that it did not necessarily follow that commercial competition was restrained thereby. Congress had intended to prevent restraints of free competition which tended to restrict production or raise prices, it said. The union was not trying to exercize control over the silk stocking market, it was merely trying to force unionization. Justice Stone, who handed down the decision, went on to say that it is natural for the union, and this is usually its objective, to eliminate the competition of non-union products. But, he continues, this is not the type of price curtailment prohibited by the Sherman Act.[20] The apparent inconsistency between this last statement and the ruling in the second Coronado case did not seem to bother the court, because it did not choose to overrule the latter.

The Apex case can be considered the turning point of labor's legal status under the antitrust laws. The Justice Department released a report of antitrust cases brought against unions in the years 1939, 1940, and 1941 which were based on the theory that union actions went

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[20]For a discussion of the Apex case and excerpts of the court's language, see Benjamin S. Kirsh, The Anti-Trust Laws and Labor: an Analysis of Recent Court Decisions, Series 4, No. 8, Contemporary Law Pamphlets, (New York: New York University School of Law, 1941) especially pp. 1-15.

beyond the protection afforded labor by the Norris-LaGuardia and Clayton Acts.[21] The cases tried were of five types - 1) jurisdictional strikes, 2) strikes to erect tariff walls around a particular locality, 3) refusal to work on and install pre-fabricated materials, 4) "make-work" cases and 5) agreements between employers and unions to fix prices on building materials. The government lost nearly all of the cases in the first four categories. Why it was successful in the fifth type of case will be explained in the next section.

The Present Status of Labor Under the Antitrust Laws

In 1939 a long-standing source of controversy between the machinists' union and the carpenters' union reached an apex in the Anheuser-Busch, Inc. plant in St. Louis, when the two unions became involved in a jurisdictional dispute over who would dismantle certain machinery. The carpenters refused to submit the dispute to arbitration, as they had in the past, and the company awarded the work to the machinists. The carpenters thereupon struck the company, placed pickets around the plant, and called upon all its members and friends the nation over to cease buying Anheuser-Busch beer. For these activities, Hutcheson, president of the carpenters' union, and his fellow officers were criminally indicted under section one of the Sherman Act. A federal district court found no violation of the Act, and the case was appealed to the Supreme Court which decided in favor of the union in 1941,[22] even though previous to this date nearly all boycott cases had been found in violation of the statute. Justice Frankfurter began his deci-

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[21]"Anti-Trust Report; Justice Department," Architectural Record, C (November, 1946), 10.

[22]United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463 (1941).

sion by: "An indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations."[23]

He continues by stating that the Sherman Act, the Clayton Act, and the Norris-LaGuardia Act must be read as one interlacing statute. Thus, "If the facts laid in the indictment come within the conduct enumerated in section twenty of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct whall not be 'considered or held to be violations of any law of the United States.'" [24] The actions complained of were, of course, listed in section twenty of the Clayton Act. This left only the Duplex decision, which had severely limited section twenty, to be considered. Frankfurter, in effect, ruled that the Duplex decision no longer prevailed, in that Section 13 (c) of the Norris-La Guardia Act which defined "labor dispute" without regard to the proximity of the relationship between employee and employer, had overruled that court decision. Thus section twenty (Clayton) was given full stature, and, in many respects, the Sherman Act was repealed insofar as labor was concerned. The court left two tests to apply in the future. First, the labor group must be acting in its own self-interest, and second,they cannot combine with non-labor bodies. To wit:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unself-

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[23] Milton Handler, and Paul R. Hays, Cases and Materials on Labor Law, (St. Paul; West Publishing Co., 1953), 735.

[24] Ibid., p. 737.

> ishness of the end of which the particular union activities are the means.[25]

The courts have, in the past, interpreted the term "self-interest" both broadly and narrowly. Their decisions since the Hutcheson case would indicate that they are prone to interpret the term in its broadest sense. Hunt et al. v. Crumboch et al. (1945) is the leading case in this respect. The facts of the case are as follows. A small partnership operated a trucking concern in interstate commerce under contract with the Great Atlantic and Pacific Tea Company. The union, in an effort to secure a closed shop with A. & P.'s haulers, attempted to unionize this particular partnership and failed. A strike followed, and a union member was killed. A member of the partnership was tried for murder and acquitted. After the union was successful in obtaining closed ship arrangements with all of A. & P.'s contractors, it refused to allow any of the partnership's employees to become members of the union, nor would any union members work for that firm. Then, at the union's behest, A. & P. Company terminated its contract with the partnership. Similar action followed then the partnership attempted to obtain contracts with other manufacturers. Thereupon the partnership petitioned the courts for relief, claiming a violation of the Sherman Law. The Supreme Court found in favor of the union. Citing the two tests laid down in the Hutcheson case (as quoted above) it said:

> The controversy in the instant case, between a union and an employer, involves nothing more than a dispute over employment, and the withholding of labor services. It cannot therefore be said to violate the Sherman Act, as amended.[26]

Thus a union was permitted to drive an employer out of business because

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[25] Handler and Hays, loc. cit.

[26] Ibid., p. 747.

it bore a grudge against him, and this action was interpreted as being conducted in the union's "self-interest," and therefore protected under the Sherman Act.

Pursuing the other test laid down in the Hutcheson case, i.e. combination with non-labor groups, we refer to the Allen Bradley case of 1945. Local # 3 of the International Brotherhood of Electrical Workers was enjoying an arrangement with the contractors and manufacturers of electrical equipment in New York City in which it could obtain higher wages, shorter hours, and greater employment opportunities for its members. These conditions were obtained through a triangular type of collusion similar to the Brims case, mentioned earlier. There was no question but that prices for the electrical equipment had been raised to the detriment of the consumer, and the court ruled that an illegal restraint of commerce had occurred. Because the union had combined with its employers, it was held in violation of the antitrust laws. But, the court ruled, had the union achieved the same results acting alone, it would not have violated the law. To be specific:

> Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individuals refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. . . . But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and

Norris-La Guardia Acts.[27]

Just how strictly do the courts intend to apply the Hutcheson doctrine? Must the union conspire with non-labor groups in all instances before the act is violated? The case of the Hawaiian Tuna Packers v. International Longshoremen's and Warehousemen's Union (1947)[28] throws some light upon this question. Here a district court in Hawaii found that when the union engages in price fixing it violates the provisions of the Act. The union fishermen were attempting to unilaterally set the price at which they would sell the fish to the canneries. (The court found that this action restrained commerce). However, the light cast contains some shadows. While the price fixing was attempted by the union alone, some of the union members - the boat owners - were actually employers. Therefore, even though the employers were technically members of the union, they still retained the powers of the employing class. Had the union conspired with a non-labor group or not? Would the court have found a violation had not some of the union members been employers?

An earlier case, Columbia River Packers Association v. Hinton (1943);[29] decided by the Supreme Court,sheds a little more light. In this, another case involving fishermen, the union had attempted to stop all union members from selling fish to packers unless the packers agreed to buy only from union fishermen. The court ruled that this was not a labor dispute as outlined by the Norris-LaGuardia Act, because the

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[27] Ibid., p. 744

[28] Information taken from a summary of the court decisions as presented in Labor Relations Reference Manual, (Bureau of National Affairs, Washington D.C.), XX (1947), 2449.

[29] Ibid., IX (1943), 403.

dispute related to the sale of fish, and not to the terms and conditions of employment. Therefore an attempt had been made to monopolize the fish industry and the uion was found in violation of the Sherman Act. Thus, it appears on the face of it, that a union acting alone, violates the Act when it engages, or attempts to engage, in price fixing.

In way of summary for this section, a report, issued on March 31, 1955 by the National Committee to Study the Antitrust Laws (mentioned on p. 1), concerning the vulnerability of labor under those laws may be cited. The committee decided that labor is vulnerable to the Sherman Act as modified by the Clayton Act and the Norris-LaGuardia Act (this latter act has widened the meaning of a "labor dispute" as that term was originally defined in section twenty of the Clayton Act):

> 1. Where the union engages in fraud or violence and intends or achieves some direct commercial restraint.
> 2. When the union's activity is not in the course of a labor dispute as defined in the Norris-La Guardia Act.
> 3. When the union combines with non-labor groups to effect some direct commercial restraint.[30]

This then, is the present status of labor under the antitrust laws.

Arguments For and Against Bringing Labor Under the Antitrust Laws

Most of the arguments favoring the subjection of labor to the antitrust laws seem to revolve around the central theme that labor is a monopoly. Several reasons are advanced why this is so. There are those who maintain that unions are monopolies by their very nature. Unions have always been monopolistic in their outlook, their goals and tactics are monopolistic, they can exist no other way.[31] Other writers

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[30]"Report on Union's Status under Antitrust Laws," News and Background Information, (Bureau of National Affairs, Washington, D.C.), XXXV (April 4, 1955), 519-522 [Loose Leaf Service of Labor Relations Reporter]

[31]See, for instance, E.C. Griffith, "Labor Unions - Political Organization for Monopolistic Action," Labor Law Journal, I (June, 1950), 689-693.

attribute the monopoly power of unions to the government protection afforded them by our collective bargaining laws. For instance:

> But now, under the Wagner Act, even as Taft-Hartley amends it, when a union represents the majority of the employees in a bargaining unit, the law forbids the employer to deal with anyone other than the union. This is compulsory monopoly, enforced by law.[32]

> And in most instances, a single union or combination of unions represents, through the monopoly by law that the Wagner Act sets up, employees throughout the industry; and that union or combination of unions dictates uniform labor arrangements throughout the industry.[33]

When government rules and protection are spoken of as enhancing labor's monopoly power, those particular statutes most commonly referred to are the Wagner Act, the Taft-Hartley Act, and Railway Labor Act. One author[34] goes further, however, and says that some of labor's monopoly power is obtained through other laws which are not so obvious as these three, viz. building codes, health and safety ordinances, occupational and business licenses, tariff laws, minimum wage laws, etc.

A great deal of the labor monopoly talk is not backed by any specific evidence or theory, rather it is assumed that union monopoly power must be self-evident to all. However, others do take time to point to specific evidence as proof of monopoly. For instance:

> On the record, the evidence seems overwhelming that labor unions, when they are extensively enough organized, posses the monopoly power characteristic of any economic combination.[35]

For evidence, this author points to labor's reputed power to withdraw

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[32]Theodore R. Iserman, "Labor Monopoly Problems: Gwinn-Fisher Bill would Effect Reforms," American Bar Association Journal, XXXVIII (September, 1952), 743.

[33]Ibid., p. 744.

[34]H.G. Lewis, "Labor Monopoly Problem. A Positive Program," Journal of Political Economy, LIX (August, 1951), 277-287.

[35]Leo Wolman, "Two Steps to Stop Labor Monopoly," Nation's Business, XLI (May, 1953), 32.

workers from large segments of, or an entire industry; the elimination of competition in wages; and compulsory union membership provisions. Lindbloom[36] takes as his evidence the assumption that unions can and will push up wage rates to a level which causes inflation or unemployment. He maintains that unions achieve monopoly, not by controlling supply as a business monopoly would, but by controlling the employer, forcing him to comply with their demands. A congressional committee found that the United Mine Workers of America exercised monopoly power through their ability to instigate a three-day work week.

> Almost every witness before the committee agreed that the United Mine Workers of America had complete monopoly, not only over the labor supply in the coal industry, but over the management and business of the industry itself, as deminstrated by its imposition of a three-day work week upon that industry.[37]

We might now inquire as to what difference it makes if unions have monopoly power or not. Those who attribute such power to labor have ready answers. Here also there is a central theme. The monopoly power of unions enables them to engage in certain bad practices which are to the detriment of the consumer. These "bad practices" are enumerated: exclusive or restrictive practices - closed shop, restrictive work rules, hiring halls, work-permit systems, excessive union fees and dues, limitations upon admission to union membership; "Petrillo-like" conduct - union rules which make excessively costly the use of better methods, materials, and equipment, and rules which compel the employer to hire useless or unnecessary labor or to pay for labor serv-

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[36]Charles E. Lindbloom, "The Union as a Monopoly," Quarterly Journal of Economics, LXII (November, 1948), 671 ff.

[37]U.S. Congress, Senate, The Economic Power of Labor Organizations, Report of the Committee on Banking and Currency, U.S. Senate, 81st Cong., 2nd Sess., July 5 to August 26, 1949, (Washington: Government Printing Office, 1950), 14.

ices which are not actually rendered, i.e. featherbedding; and coercive union practices - violence, strikes, picketing, boycotts, etc. The argument that unions, through their monopoly power, raise wages which in turn raise prices, thus working a hardship upon the consumer, is often used. Mr. Iserman, quoted earlier, says that employers often are forced to band together in self-protection and thus do not feel the sting of wage increases so acutely as if they were acting alone. This is the really bad thing about labor monopoly, because such employers are less inclined to protect the public through lower prices and higher output, and more inclined to lower their resistance to wage demands and pass the cost on to the consumer. Such practices also lead to industry-wide stoppages and force government intervention, he continues.[38]

Not all those tho claim that unions are monopolistic would bring them under the antitrust laws. Professor Griffith[39], for instance, feels that monopolistic practices are so inherent within the labor movement that they cannot be controlled by present legislation. He would advocate a system of taxing wage gains just as the corporation is taxed for profits. Mr. Lewis[40], feels the most prudent procedure to be followed would be to limit the scope of bargaining to no larger a unit than a single firm. This is based on the reasoning that the antitrust laws have shown themselves to be anti-boycott laws, and do not really strike at the heart of the matter - union monopoly. On the

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[38]For complete list of union "bad practices" which would be eliminated by fractionizing the bargaining unit, see H.G. Lewis, op. cit., p. 281. Also see V. Orval Watts, Union Monopoly, its Cause and Cure, (Los Angeles: Foundation for Social Research, 1954) and Theodore R. Iserman, "Why our Antitrust Laws Should Apply to Labor as Well as to Management," Vital Speeches, XIX (April 15, 1953) 409-413.

[39]Griffith, op. cit.

[40]Lewis, op. cit.

other hand, Mr. Iserman[41] would like to see all the "bad practices" of unions be restricted by the antitrust laws.

It would not be fair, or truthful, to group all persons who write about labor monopoly into one category and say they all favor such restrictive legislation as has been advanced. Each may vary slightly according to his interpretation of "labor monopoly". But it cannot be gainsaid that those who propose and/or support bringing labor under the antitrust laws, whatever their particular formula may be, have drawn the bulk of their thinking from this "labor monopoly" school. Legislation advanced has been of two types. One would outlaw "industry-wide" bargaining e.g. the Ball Amendment to the Taft-Hartley Act of 1947 and the Gwinn-Fisher Bill (H.R. 8449) of 1952. The other type, would amend the Sherman Act to bring labor's "unreasonable restraints" of trade under its coverage (Roberston Bill, S. 2912, of 1950). Before we discuss these measures, we shall present some of the comments from the other side of the "monopoly" question.

Labor itself is quick to point out that only one-fourth of the labor force in America is unionized, and that it is not nearly so strong as capital. All the combined financial resources of labor unions would not equal the assets of one large corporation such as General Motors. Those who claim that labor enjoys monopoly power are really just saying that labor has finally attained a position of strength. The late Willian Green suggested that true monopoly result in the labor market when there are no unions. Labor has a right to strive for decent wages, and it can't do so when the employer has an effective monopoly. In the final analysis, he continues, it is the employer who makes the offer of

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[41]Theodore R. Iserman, "Why our Antitrust Laws Should Apply to Labor as Well as to Management", Vital Speeches, op. cit.

employment, who sets working conditions, and who sets the terms for the sale of labor; the union members merely accept the offer or reject it. Further, it is pointed out that certain parties tend to become somewhat hysterical over strikes which make the front pages. Labor contends that over 95% of the many thousands of collectively bargained agreements in the nation, are settled peacefully each year.[42]

Other writers[43] allude to the theory that labor cannot be subjected to competition as commodities are. Competition usually results in lower prices. In the case of commodities, lower prices benefit all of society, but in the case of labor - which by no construction can be called a commodity - lower prices do not benefit society. They point out that the goals of labor are to improve the terms of employment, not to control prices, and by so doing, all of society is enhanced by a higher standard of living.

Mr. Kamin, an attorney, writing in the American Bar Association Journal, suggests that the antitrust laws have not accomplished what they were intended to accomplish. That is, we have not maintained a vigorously competitive economy. American industry must be characterized as oligopolistic. But it is not unions which have caused this economic concentration, rather they respond to it. He quotes from Galbraith, American Capitalism: the Concept of Countervailing Power, to

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[42]For fuller treatment of these arguments see P. Henle, "Myth of Labor Monopoly," American Federationist, LVII (February, 1950), 14-15; and William Green, [arguing "con"] in "Congress Weighs the Growing Problem of Big Union Monopoly; Background Material and Pro and Con Discussion of the Robertson Bill," Congressional Digest, XIX (April, 1950), 113, 115, 117, 119.

[43]For instance, see K. Eby arguing "No" in "Shall the Antitrust Laws be extended to Labor," Rotarian, LXXXI (December, 1952), 26 ff.

make his point:

> As a general, though not invariable rule there are strong unions in the United States only where markets are served by strong corporations.[44]

Therefore all this talk about big unions being monopolies ought to be reappraised. Mr. Arthur Goldberg[45] concedes that labor is a monopoly if the false premise that a man's labor is an article of commerce is accepted. Lester[46] opines that "industry-wide"bargaining is a term which is badly misused. Actually, "company-wide" or "union-wide"are the better terms.. In any event, the 80th Congress displayed ignorance of the history and organization of unions, he continues, by nearly outlawing "industry-wide" bargaining. Those areas in which "industry-wide" bargaining is approached - men's clothing, pottery, and glassware - have been strike-free for from 15 to 50 years.

The above paragraphs have outlined in elliptical form some, but by no means all, of the arguments for and against subjecting unions to the antitrust laws. The next section will present a few more observations upon the subject as well as carry some of our concluding statements.

Should Labor be Subject to the Antitrust Laws?

The discussions centering around this question seem to us to be infested with some shallow thinking. First, many of those who charge labor with being a monopoly, base that charge upon a false analogy be-

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[44]A. Kamin, "Fiction of 'Labor Monopoly'; A Reply to Mr. Iserman," American Bar Association Journal, XXXVIII (September, 1952), 751.

[45]Arthur Goldberg [arguing "con"] in "Congress Weighs the Growing Problem of Big Union Monopoly, [etc.]", Congressional Digest, op. cit., 119, 121, 123.

[46]Richard A. Lester, "New Straight Jacket for Unions?," Nation, CLXXVI (January 17, 1952), 51-52.

tween a labor organization and a business organization. For example:

> Labor monopoly is private economic protectionism of essentially the same type as private enterprise monopoly and has the same consequences: lower output and employment in the protected area and the opposite in the unprotected. The case against it is the same as the case against enterprise monopoly and in general is the case for a free, decentralized economic order.[47]

Another author[48] points out that the government prosecutes the A. & P. Company, which handles about 6% of the nation's food supply, but that the teamsters, who handle nearly all of the nation's food supply, can with impunity raise the cost of food at will, and could shut off the whole supply, if they so chose. Further, he implies that the government would be quick to enjoin the coal operators if they had the power to stop coal production and raise prices as the U.M.W. has. Mr. Rukeyser[49] reports that in the past thirty years, 160 out of 675 antitrust cases the government has brought, have involved the construction industry. Of these construction cases, the antitrust division has been successful against the employers, but not against the restraints of trade caused by labor. He too, alludes to the coal industry, saying that no operator controls more than 5% of the industry, but the union covers 85% of the miners, yet the antitrust laws are applied to the employers but not to the union.

Comparisons such as these cannot validly be made. The union, while similar in some respects to the business firm, is dissimilar enough in other respects, so that an analogy between them is question-

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[47]Lewis, op. cit., 277.

[48]Theodore R. Iserman, arguing "pro" in "Congress Weighs the Growing Problem of Big Union Monopoly, etc. ," Congressional Digest, op. cit., 112, 114, 116, 118.

[49]Rukeyser, M.S. arguing "Yes" in "Shall the Antitrust Laws be Extended to Labor," Rotarian, LXXXI (December, 1952), 26 ff.

able.[50] Lester[51] has pointed out these differences in sharp relief. The union is not a profit making organization, it doesn't sell labor, and it is doubtful if it maximizes the wage bill. It is as much political as it is economic. For instance, strikes are not always over economic issues - they may be for political, psychological, or institutional aims.

A business firm is simply not the same thing as a trade union. If a corporation had control of 85% of an industry it would be an entirely different thing than when a union has 85% of the members of the work force in an industry. The union's purpose in such cases is normally for security reasons, or to take "wages out of competition." In so doing, it is not unusual that they sacrifice some of their bargaining power. Its purpose is not to affect prices. Unions affect prices only incidentally through their wage demands. Should they attempt to directly control the market, by regulating the supply or prices of commodities, they would be subject to the antitrust laws, under current interpretation.

Nor is a labor market the same as a commodity market. Perhaps the meaning of labor monopoly is confused because some fail to recognize this basic distinction. Because of the immobility of labor it does not respond to price changes in the same way that a commodity does, and it is highly doubtful that such a concept as a competitive market price for labor exists. Lester[52] points out that real wage different-

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[50] A.M. Ross, "The Trade Union as a Wage Fixing Institution," American Economic Review, XXXVII (September, 1947), 566-588, especially 571-576.

[51] Richard A. Lester, "Reflections on the Labor Monopoly Issue," Journal of Political Economy, LV (December, 1947), 517-519.

[52] Ibid., pp. 514-517.

ials existed in labor markets long before unions did. These differentials were not caused by a control of the supply of labor. Rather, they resulted because supply does not always adjust to demand in labor markets. Thus when one points to wage levels as evidence of labor monopoly (because the wages are either uniform or non-uniform in some particular labor market)[53] he assumes a labor market to behave as does a commodity market. In an economic sense, there is no particular reason why competition in a labor market should produce the same results as competition in a commodity market. There are certain assumptions made about the nature of a commodity which condition the results expected in the market place, i.e. usually there are many buyers per market, the good is mobile, buyers will respond to price changes in established ways, and so on. These same assumptions cannot be transferred to the labor of a human being. Even with this cursory analysis, it can be seen that results between the two markets will vary. It would appear that much of the reasoning about labor monopoly is built up around an economic theory of the commodity market which cannot be fruitfully compared to that of the labor market, without resulting in confusion.

It is questionable whether unions have been able to raise wages at will as maintained by several writers cited previously. Relying upon Professor Lester[54] once again, there is evidence that union wages have not risen more than non-union wages to be cited as proof of monopoly power. While Ross[55] states that real hourly earnings have advanced more sharply in highly unionized industries than in less union-

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[53] Ibid., pp. 520-526.

[54] Ibid., pp 526-529

[55] A.M. Ross, "The Influence of Unionism Upon Earnings," Quarterly Journal of Economics, (February, 1948), 284 ff.

ized industries, he suggests that there is evidence which would indicate that employment has not suffered thereby. This would lead one to believe that wage raises in highly unionized industries are more the result of bargaining power, than of control of supply through monopoly power. It is doubtful also whether labor has been able to increase its share of the national income.[56] It has been relatively stable since 1922. The unions greatest effect has been upon internal wage structure. Finally, the union's effect upon wages is often obscured because of other economic factors. For instance, the post-war wage-price upward spiral cannot be attributed solely to the monopoly power of unions. Other factors such as pent-up post-war demand and our economy's fiscal and monetary policies ought to be considered.[57]

It is our opinion that consideration of this question of subjecting labor to the antitrust laws ought to be characterized by more thinking about regulating restraints of trade, and less by worrying whether or not labor has monopolistic power. It is the declared policy of our nation to protect the consumer by placing restraints upon combinations, conspiracies, or monopolies which tend to artificially alter prices. But at the same time we have expressed our desire to permit laboring people to have full freedom to form, join, and participate in trade unions. We have given them the right to engage in concerted activity for the purpose of self-help. This has been the policy of our nation for twenty years. The normal methods - strikes, boycotts, picketing, political action, etc. - employed by labor to carry out

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[56] A.M. Ross, "Collective Bargaining and Common Sense," Labor Law Journal, II (June, 1951), 435-443.

[57] See, for instance, Walter A. Morton, "Trade Unionism, Full employment, and Inflation," American Economic Review, XL, (March, 1950), 13 ff.

these rights, have been subjected to "ground rules" by government. For instance, violence will not be tolerated by the courts in any of them; secondary boycotts and certain types of jurisdictional disputes, featherbedding, unreasonable union fees, discrimination or coercion of individuals, and forcing or coercing an employer to do an unlawful act, have been outlawed by our collective bargaining laws. The Hobbs Aitiracketeering Act of 1934 outlaws obstructions of commerce caused by robbery or extortion. These "ground rules" seem to me to eliminate a multitude of the sins (bad practices) complained of by some.

In laying down new ground rules in the interest of public protection and technological progress, we ought to remember that labor people are also members of the public. If in protecting one, we so cripple another as to work an undue hardship upon him, then our system of regulation is not very satisfactory. Such legislative proposals as to outlaw "industry-wide" bargaining, and to limit the bargaining unit to no larger an area than the individual firm, may have this effect, and it is questionable if they would really benefit the public. These proposals would probably cause more jealousy, strife, and strikes. They would not necessarily stop "industry-wide" strikes, and could result in higher wages. They would run counter to many years of union organization, and if successfully applied, could ruin many national unions - especially those organized along craft lines.

I think a better approach would approximate the one taken by the National Committee to Study the Antitrust Laws. It recommended the passage of new legislation to stop specific actions felt to be undesirable.

> This committee believes that union actions aimed at directly fixing the kind or amount of products which may be produced or sold, their market price, the geographical area in which they may be used, pro-

> duced or sold, or the number of firms which may engage in their production or distribution are contrary to antitrust policy. To the best of our knowledge no national union flatly claims the right to engage in such activities. We believe that where the concession demanded from an employer as prerequisite to ordering the cessation of coercive action against him is participation in such a scheme for market control, this union conduct should be prohibited by some statute.[58]

The committee felt this new legislation was necessary because the Sherman Act and the Taft-Hartley Act did not effectively curb union attempts at "outright market control." "But great care should be taken to protect labor's full freedom of association and self-organization for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[59] It was further suggested that the government have the power to proceed without waiting for complaints from others. Nor should there be any provision for private injunctions which have been badly abused under the Sherman Act, it continued.

For evidence of union attempts to fix the kind or amounts of products which may be sold in an area, the committee cited the Allen Bradley Case, Joliet Contractors Association v. N.L.R.B. (1953); United Brotherhood of Carpenters and Joiners of America v. Sperry(1948); and United States v. American Federation of Musicians (1942). The Joliet[60] case was a secondary boycott in which the language of the Taft-Hartley Act turned out to be too precise for effectiveness. The court said that the object of the union must be accomplished by the specific means which the section (8 (b) (4) (A)) defines and not otherwise. This results in certain ambiguities. For instance, two or more glaziers refus-

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[58]"Report on Union's Status under Antitrust Laws," News and Background Information, op. cit., p. 520.

[59]Ibid., p. 520

[60]Labor Relations Reference Manual, XXXI, (1953), 2361.

ing to work because preglazed sash is used, do not violate the Act, for they have not concertedly refused to work in the course of their employment. But if they refused to work (because of the use of preglazed sash) once they had begun the job, then the Act would be violated because this is in the course of their employment. A single workman, on the other hand, could not violate 8 (b) (4) (a) in either case, because his activity is not concerted.

The carpenters v. Sperry case,[61] however, did find a violation of section 8 (b) (4) (A) when picketing and blacklisting was carried on in an attempt to keep an employer from doing business with other companies which manufactured prefabricated houses, even though the picketing was local. In the musicians case[62] the union refused to allow members to make recordings unless "standby" musicians were hired. This was ruled a labor dispute within the meaning of section twenty of the Clayton Act, and therefore could not be enjoined as a violation of the Sherman Act. Since this time, however, Congress has passed the Lea Act (1946) which prohibits featherbedding in the broadcasting industry.

The evidence of union attempts to control prices cited by the committee were the Hawaiian Tuna Packers and Columbia River Packers Association cases previously discussed. Considering all these cases, the minority report of the committee assumes authority. The dissenting members felt that the laws today are adequate to curb any specific activity which the committee found wrong. Further they felt that the suggested language of the new legislation was too broad and that it might be misinterpreted to limit the normal and lawful activities of unions.

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[61] Ibid., XXIII, (1949), 2040.

[62] Ibid., XI, (1944), 596

In addition, they did not feel that the activities referred to were widespread enough to warrant the legislation.

Concluding Remarks

The question of whether or not labor should be subjected anew to the antitrust laws, seems to us to become ensnarled with a subsidiary issue - is labor a monopoly? Those who argue the affirmative to this question often confuse their thinking by comparing labor to business units and by comparing labor markets to commodity markets. This type of thinking by implication, wrongfully assumes labor to be a commodity. Labor power is likewise confused with labor monopoly. Such reasoning demonstrates a lack of knowledge about the nature of trade unions.

Through our national policy we have chosen to give unions certain rights which, on occasion, they have tried to abuse. But these rights were given in the interest of fostering collective bargaining, which, as a process, has achieved full sanction in the eyes of the law and society. When this process sometimes breaks down, and results in specific bad practices, some would have substantial portions of the normal acts of labor brought under the antitrust laws. In the extremes, some of these provisions would set the organization of labor unions back fifty years or more, and certainly wouldn't enhance the process of collective bargaining.

In evaluating the main question, the other laws of the land which regulate union activity ought to be considered in conjunction with the antitrust laws. Certainly an examination of the antitrust laws themselves is in order, to see what they will and will not allow. If labor should use its power to directly regulate the price or supply

of a commodity, then according to the Columbia River Packers Association v. Hinton case they would have violated the antitrust laws. The Allen Bradley case stated that as long as labor is pursuing its own self-interests and acting alone, it does not violate the Sherman Act, effects on price notwithstanding. The latter decision imputes a distinction between the normal goals of a trade union and those of a business enterprise.

Unlawful restraints of commerce should not be ignored merely because they are committed by a labor group. But is it wise to legislate against labor for exercising rights extended to it by society, when the logical fulfillment of those rights works a hardship upon other segments of the economy? Of course the issue is not always so simply drawn. However, it would seem more logical to us to strive for a better economic order by working through our collective bargaining laws as specific practices develop, rather than committing wholesale mayhem by resorting to the antitrust laws.

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