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# THE INTERACTION OF FEDERAL LABOR AND ANTITRUST POLICIES: AN ANALYSIS OF THE LEGALITY OF COORDINATED COLLECTIVE BARGAINING BY EMPLOYERS

by

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**M**ULTI-EMPLOYER collective bargaining, a practice in which two or more employers bargain jointly with labor unions that represent their employees,<sup>1</sup> has long been a common and accepted practice in the United States.<sup>2</sup> Under the National Labor Relations Act<sup>3</sup> the principal legal restraint on combinations of employers that have associated for the purpose of negotiating a common labor contract has been the requirement that the union consent to the multi-employer bargaining unit.<sup>4</sup> Em-

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1. For a general discussion of the legal status of multi-employer bargaining see: Rains, *Legal Aspects and Problems of Multi-Employer Bargaining*, 34 B.U.L. REV. 159 (1954); Willborn, *A New Look at NLRB Policy on Multiemployer Bargaining*, 60 N.C.L. REV. 455 (1982).

2. The National Labor Relations Act, 29 U.S.C. §§ 151-168 (1982) [hereinafter cited and referred to as the NLRA or the Act] does not specifically approve or disapprove multi-employer bargaining. NLRA § 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A) (1982), provides that it is an unfair labor practice for a union to "forc[e] or requir[e] any employer or self-employed person to join any . . . employer organization." Courts have interpreted this provision to preclude union coercion of employer participation in multi-employer bargaining. *Mobile Mechanical Contractors Ass'n v. Carlough*, 664 F.2d 481, 485 (5th Cir. 1981), *cert. denied*, 456 U.S. 975 (1982); *Frito-Lay, Inc. v. Local 137, Int'l Bhd. of Teamsters*, 623 F.2d 1354, 1358 (9th Cir.), *cert. denied*, 449 U.S. 1013 (1980), 449 U.S. 1112 (1981); *Amex Coal Co. v. NLRB*, 614 F.2d 872, 879 (3d Cir. 1980), *rev'd on other grounds*, 453 U.S. 322, 323-24 (1981); *Union de Tronquistas Local 901 v. Arlook*, 586 F.2d 872, 875 (1st Cir. 1978). Although this statutory reference to multi-employer bargaining is minimal, the National Labor Relations Board [hereinafter referred to as the NLRB or the Board] has long held that collective bargaining on a multi-employer basis is legal and appropriate. See *Furniture Firms*, 81 N.L.R.B. 1318, 1320 (1949); *Associated Shoe Indus.*, 81 N.L.R.B. 224, 231 (1949); *Shipowner's Ass'n*, 7 N.L.R.B. 1002, 1040-41 (1938), *appeal dismissed sub nom.* *AFL v. NLRB*, 103 F.2d 933, 936 (D.C. Cir. 1939), *aff'd*, 308 U.S. 401, 412 (1940); see also *NLRB v. Truck Drivers Local 449*, 350 U.S. 87, 94-95 (1957) (multi-employer bargaining antedated Wagner Act).

3. 29 U.S.C. §§ 151-168 (1982).

4. See *NLRB v. Beckham, Inc.*, 564 F.2d 190, 192-94 (5th Cir. 1977); *NLRB v. Hart*,

ployers undertake multi-employer bargaining for the purpose of equalizing labor costs and achieving an economy of scale in contract negotiations. Nevertheless, this practice has never been seriously challenged under federal antitrust laws.<sup>5</sup> One explanation for the lack of antitrust scrutiny may be that union assent to a multi-employer bargaining unit appears to insulate the structure from the federal antitrust laws.<sup>6</sup>

Another form of employer bargaining combination, coordinated bargaining agreements, does not appear as deserving of protection from the antitrust laws. In coordinated bargaining employers agree to common objectives for their separate negotiations with a union and assist each other in meeting those objectives. A combination of four general features characterizes coordinated bargaining<sup>7</sup> agreements: (1) an agreement among employers to pursue common terms on matters of common interest in collective bargaining; (2) an agreement by each employer to share information on the status of its particular negotiations with a union; (3) an agreement by all employers to lockout their employees in the event of a strike against an individual employer on an issue of mutual importance to all members of the coordinated bargaining agreement; and (4) a lack of union consent to the employers' bargaining relationship.

Historically, employer coordinated bargaining has not been a major force in American labor relations.<sup>8</sup> Nevertheless, the practice has substantial potential as a means for equalizing and stabilizing labor costs. One reason for employers in some industries to consider a coordinated bargaining structure is the continuing decline in pattern bargaining in several major industries.<sup>9</sup>

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453 F.2d 215, 218 (9th Cir. 1971), *cert. denied*, 409 U.S. 844 (1972); *see also* Charles D. Bananno Linen Serv. v. NLRB, 454 U.S. 404, 420 (1982) (Stevens, J., concurring) (union consent required). The union consent requirement has not inhibited the growth of multi-employer bargaining. In 1978, the last year in which the Bureau of Labor Statistics maintained statistics concerning the percentage of contracts negotiated on a multi-employer basis, 42% of major collective bargaining agreements, representing approximately 3.2 million workers, were negotiated on a multi-employer basis. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN No. 2065, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS 12 (1980).

5. For a discussion of the legality of multi-employer bargaining under the federal antitrust laws see *infra* notes 76-182 and accompanying text.

6. *See infra* note 77 and accompanying text.

7. The phrase "coordinated bargaining" has also been used to characterize union efforts to combine forces in negotiating labor contracts covering two or more bargaining units at one or more companies. *See* Cohen, *Coordinated Bargaining and Structures of Collective Bargaining*, 26 LAB. L.J. 375, 380-81 (1975). Coordinated bargaining, as used herein, should also be distinguished from the common practice of pattern bargaining. For a discussion of pattern bargaining see *infra* notes 9-10 and accompanying text.

8. The degree of use of employer coordinated bargaining cannot be accurately measured. Employers engaging in coordinated bargaining have an incentive to keep the arrangement confidential because, by definition, coordinated bargaining is conducted without union approval.

9. For a general discussion of the decline of pattern bargaining see Freedman & Fulmer, *Last Rites for Pattern Bargaining*, HARV. BUS. REV., Mar.-Apr. 1982, at 30. *See also* COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS (BNA) No. 1053, at 3 (Oct. 10, 1985); *Phone Firms, Unions Prepare to Bargain*, WALL ST. J., Mar. 31, 1986, at 6, col. 1; *Plant Pacts May Succeed National Labor Agreements*, AUTOMOTIVE NEWS, July 29, 1985, at 6; *What Threatens Nationwide Truck Bargaining*, BUS. WK., Oct. 15, 1984, at 46; *The Beginning of the End for Industrywide Wages?*, BUS. WK., Mar. 5, 1984, at 78; *Industrywide Wage Patterns Get*

In pattern bargaining employers in an industry adopt, with union approval, a collective bargaining agreement negotiated by one company in the industry. The decline in pattern bargaining is attributable to a variety of technological and economic developments that have reduced the unity of interests among employers in industries that historically have set wages and terms and conditions of employment on a nationwide or industrywide basis.<sup>10</sup> Coordinated bargaining enables employers affected by the breakup of pattern bargaining to realign with a narrower group of employers who share common interests.<sup>11</sup> Employers in the coordinated bargaining group may pursue particular contract terms that satisfy their individual needs and interests as well as pool their economic strength to resist union pressure to continue with pattern bargaining.<sup>12</sup>

Coordinated bargaining may also be desirable to employers in deregulated industries as a means of minimizing the effects of competition from upstart companies.<sup>13</sup> In the airline industry, for example, deregulation has confronted major carriers with competition from new airlines operating on a nonunion basis with substantially lower labor costs.<sup>14</sup> By pursuing labor negotiations on a common front, the major carriers could minimize disparities in labor cost between themselves and could exert greater pressure on unions to reduce labor costs to a level that would enable the carriers to compete effectively with nonunion airlines.<sup>15</sup>

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*a Test in Copper*, BUS. WK., July 18, 1983, at 58; *Industrywide Rail Pact Near the End of the Line*, BUS. WK., Oct. 11, 1982, at 33.

10. See Freedman & Fulmer, *supra* note 9. Recent examples of industries in which a lack of common interests is threatening pattern bargaining include the steel, rubber, oil, and lumber industries. See, e.g., *Changes in Steel Labor Talks Spark Confusion*, WALL ST. J., Apr. 7, 1986, at 6, col. 1; *Steel's Labor Strategy: Divide and Conquer*, BUS. WK., May 20, 1985, at 64-65; *Union Selects Goodyear to Set Contract Pattern for Tire Industry*, DAILY LAB. REP. (BNA) No. 69, at A-1 (Apr. 10, 1985); *Oil Industry Makes Bid to Win Concessions and Delays Most Pacts*, WALL ST. J., Jan. 23, 1984, at 30, col. 1; *Lengthy Strike at Louisiana-Pacific Tests Chairman's Resolve to Cut Starting Wages*, WALL ST. J., Oct. 17, 1983, at 33, col. 4 (lumber).

11. For discussion concerning the potential of coordinated bargaining see Hart, *Union Power and the Possibilities of De Facto Multi-Employer Collective Bargaining*, 6 UCLA-ALASKA L. REV. 155 (1977).

12. For the most part, employers will exercise the economic strength of coordinated bargaining association through common interest lockouts in defense against strikes directed at members of the coordinated bargaining association. A lockout is a refusal to allow employees to work. The potential purposes of a lockout are pressuring a union to modify its position in collective bargaining or supporting another employer that has been struck. A strike against one member or against a few members of a multi-employer bargaining association is referred to as a whipsaw strike. To counteract the damaging effects of a whipsaw strike on the struck employer and to put greater pressure on the union, nonstruck employers in a multi-employer association or coordinated bargaining association may lockout employees. For a general discussion of lockouts see Baird, *Lockout Law: The Supreme Court and the NLRB*, 38 GEO. WASH. L. REV. 396 (1970).

13. In the past decade federal deregulation has substantially affected the airline, trucking, railroad, and intercity busing industries. The telecommunications and finance industries have also experienced substantial deregulation in recent years. For an overview of the effects of deregulation on American business see *Deregulating America*, BUS. WK., Nov. 28, 1983, at 80.

14. For a discussion of postderegulation efforts by the major air carriers to reduce labor costs see Jansonius & Broughton, *Coping With Deregulation: Reduction of Labor Costs in the Airline Industry*, 49 J. AIR L. & COM. 501 (1984).

15. The Railway Labor Act, 45 U.S.C. §§ 153-163 (1982), rather than the NLRA, governs analysis of the legality of multi-employer or coordinated bargaining in the airline indus-

Finally, employers may find coordinated bargaining useful in minimizing labor's bargaining strength in a geographical area where a union or unions exert particularly strong influence.<sup>16</sup> Throughout the 1970s and early 1980s employers in the northeast and industrial midwest encountered growing competition from companies in the southern and western states and in foreign countries where unions are less prevalent and influential.<sup>17</sup> By taking a unified approach in collective bargaining and agreeing to support mutual interests in their separate negotiations, employers in areas of strong union influence can more effectively negotiate contract terms necessary to remain competitive with outside companies.

In short, coordinated bargaining by employers has significant potential for minimizing pressures exerted by organized labor and for negotiating contracts that enable unionized employers to compete effectively with nonunion companies. The impetus for coordinated bargaining will persist as multi-employer collective bargaining associations continue to break up and as employers in a wide range of industries face mounting pressure from nonunion competitors. This Article discusses the legality of employer coordinated bargaining under federal labor and antitrust laws. Part I of this Article examines the legality of coordinated bargaining under the federal labor laws. Part II addresses the antitrust implications of both coordinated and multi-employer<sup>18</sup> collective bargaining.

## I. APPLICATION OF FEDERAL LABOR LAWS TO COORDINATED BARGAINING ARRANGEMENTS

Multi-employer bargaining associations have long possessed the right under federal labor law to take concerted action designed to put economic pressure on unions and employees in order to improve the employers' bargaining position.<sup>19</sup> Historically, the most potent economic weapon available

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try. Attempts at multi-employer bargaining in the airline industry have not succeeded. See Arouca & Perritt, *Transportation Labor Law and Policy for a Deregulated Industry*, 1 LAB. LAW. 617, 645 n.184 (1985).

16. For a discussion of the potential use of coordinated bargaining to counter union dominance in a geographical area see Hart, *supra* note 11.

17. The migration of population and industry from the American northeast to southwest is discussed in J. NAISBETT, MEGATRENDS 207-29 (1982). The difficulty facing American industry due to foreign competition has been a steady topic of commentary in American journals and magazines for several years. Recent discussions of the labor implications of foreign competition include: Orr & Orr, *Job Cuts Are Only One Means Firms Use to Counter Imports*, MONTHLY LAB. REV., June 1984, at 39; Schlein, Brown & Sleemi, *Collective Bargaining in 1986*, MONTHLY LAB. REV., Jan. 1986, at 16; *The Effect of Labor Costs on International Competitiveness of 130 U.S. Industries*, BUS. AM., Sept. 20, 1982, at 7; *Labor's Bid to Keep Plants from Moving*, BUS. WK., Jan. 24, 1983, at 25; *International Forces Will Prevail, But Will Unions Be Able to Change with the New Global Work Place?*, PERSONNEL ADMIN., Dec. 1983, at 100.

18. In considering the legality of coordinated bargaining arrangements, this Article focuses on the application of the federal antitrust laws to multi-employer bargaining. While the legality of multi-employer bargaining under the labor laws is well established, there is little antitrust authority on point. Even so, the legality of coordinated bargaining under the antitrust laws is a major component of the legality of multi-employer bargaining.

19. See *NLRB v. Brown*, 380 U.S. 278 (1965); *NLRB v. Truck Drivers' Local 449*, 353 U.S. 87 (1957).

to employers has been the lockout.<sup>20</sup> Offensive lockouts, ones that are not in response to a strike against another member of the employers' association, are permissible so long as the employers are not motivated by anti-union animus and the purpose of the lockout is not solely to undermine the union's status as bargaining agent.<sup>21</sup> In addition to allowing employers to pool economic strength in negotiations through a lockout, multi-employer bargaining enables employers to achieve an economy of scale in collective bargaining and to minimize labor costs as a competitive factor.<sup>22</sup> Coordinated bargaining represents an attempt by employers to gain the advantages of multi-employer collective bargaining when union consent to formal multi-employer bargaining is unavailable or when individual employers prefer not to commit to multi-employer bargaining.

#### A. Union Consent to Expansion of Bargaining Unit

Employers are not free to impose multi-employer bargaining unilaterally on a union in order to obtain the bargaining leverage and protections that membership in a multi-employer bargaining association can offer.<sup>23</sup> Indeed, in order to obtain the benefits of a multi-employer unit when a union has objected to formation of such a unit, the participating employers must show that the union has otherwise manifested an unequivocal intent to bargain on a multi-employer basis.<sup>24</sup> Nevertheless, union consent to bargain on a multi-employer basis has rarely been an issue in disputes before the National Labor Relations Board or the courts.<sup>25</sup> When the issue has arisen, the Board has

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20. See *supra* note 12. Employers can also exert economic pressure on a union striking against a competitor through a mutual aid pact. In the airline industry, for example, until the mid-1970s, the major carriers participated in a mutual aid pact that involved sharing revenues with carriers facing a strike. See OFFICE OF ECONOMIC ANALYSIS, CIVIL AERONAUTICS BD., STAFF REPORT, COMPETITION AND THE AIRLINES: AN EVALUATION OF DEREGULATION 112 n.13 (1982).

21. Employers may also use offensive lockouts before an impasse in negotiations if the lockouts are based on legitimate business concerns. See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

22. See, e.g., *Darling & Co.*, 171 N.L.R.B. 801 (1968), *aff'd sub nom. Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969) (illustrating impact of pooled lockout to avoid impact of untimely whipsaw strikes).

23. See *supra* note 4 and accompanying text. The converse is also true. A union cannot compel an employer to bargain on a multi-employer basis absent consent by the employer. See *Mine Workers Local 1854*, 238 N.L.R.B. 1583 (1978), *enforced in part sub nom. Amax Coal Co. v. NLRB*, 614 F.2d 872 (3d Cir. 1980). There is authority that the Board has power to order multi-employer bargaining, see *Tennessee Prods. & Chem. Corp. v. NLRB*, 423 F.2d 169, 177-78 (6th Cir.), *cert. denied*, 400 U.S. 822 (1970), but the Board has never exercised this apparent authority without an agreement or an established practice by the parties.

24. See *Painters Local 1247*, 233 N.L.R.B. 980, 982 (1977) (union not obligated to bargain on multi-employer basis with members of employers' association that had not been recognized by union); *Stouffer Corp.*, 101 N.L.R.B. 1331 (1952). *But cf. Teamsters Local 705*, 210 N.L.R.B. 210 (1974) (union unlawfully refused to bargain on individual basis with employer that was represented by same bargaining agent that represented multi-employer bargaining association of which employer was not a member).

25. As a practical matter, unions have historically preferred multi-employer bargaining to promote equality in members' wages, terms, and conditions of employment, and to use union bargaining resources efficiently. Unions find multi-employer bargaining less attractive, however, when the multi-employer group does not include a dominant portion of employers in an industry or geographical area. Most reported decisions on the union consent issue involve a

held that union consent to negotiate with an employers' association may be established circumstantially notwithstanding the union's denial that it agreed to bargain on a multi-employer basis.<sup>26</sup> This holding is consistent with the Board's position on employer consent to participation in multi-employer bargaining.<sup>27</sup>

In the vast majority of cases involving union objections to multi-employer bargaining, the Board's determination concerning intent depends on the existence of a history of bargaining on a multi-employer basis.<sup>28</sup> The Board has never clearly delineated how a sufficient bargaining history is identified.<sup>29</sup> The safest conclusion is that union negotiation with an authorized representative of an employers' association for a single contract covering all association members is strong evidence of unequivocal intent.<sup>30</sup>

The foregoing principles illustrate the importance of union cooperation in

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union withdrawal from a multi-employer bargaining arrangement that is unsatisfactory to the union. *See, e.g.,* NLRB v. Brotherhood of Teamsters Local 70, 470 F.2d 509 (9th Cir. 1972) (court found that union unlawfully withdrew from multi-union, multi-employer unit), *cert. denied*, 414 U.S. 821 (1973); Teamsters Local 705, 210 N.L.R.B. 210 (1974) (union consistently bypassed employer association); Sheet Metal Workers Local 110, 191 N.L.R.B. 182 (1971) (union violated the Act by refusing to execute collective bargaining contract with multi-employer association), *enforced*, 69 Lab. Cas. (CCH) ¶ 13,145 (6th Cir. 1972); Stouffer Corp., 101 N.L.R.B. 1331 (1952) (union with ten-year history of multi-employer negotiation sought to abandon such negotiation).

26. For a detailed discussion of the factors considered in determining whether a union has consented to multi-employer bargaining see C. MORRIS, *THE DEVELOPING LABOR LAW* 476-79 (2d ed. 1983); Willborn, *supra* note 1, at 468-71 & nn.84-99.

27. *See* NLRB v. New York Typographical Union, 632 F.2d 171, 183 (2d Cir. 1980); NLRB v. Preston H. Haskell Co., 616 F.2d 136, 139 n.10 (5th Cir. 1980); McAx Sign Co. v. NLRB, 576 F.2d 62, 64-66 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); Electric Theatre, 156 N.L.R.B. 1351, 1352-53 (1966); Bennett Stone Co., 139 N.L.R.B. 1422, 1424-25 (1962).

28. *See* Crane Sheet Metal, Inc. v. NLRB, 675 F.2d 256 (10th Cir. 1982); NLRB v. Teamsters Local 378, 672 F.2d 741 (9th Cir. 1982). In the context of employer consent to multi-employer bargaining, one court defined the test for unequivocal intent to bargain as part of a multi-employer association as follows: "[T]he relevant test [is] in the disjunctive: a multi-employer bargaining unit may be established either by 'a controlling history of collective bargaining on such basis, or an unequivocal agreement of the parties to bind themselves to a course of group bargaining in the future.'" *McAx Sign Co. v. NLRB*, 576 F.2d 62, 66 n.3 (5th Cir. 1978) (emphasis in original), *cert. denied*, 439 U.S. 1116 (1979). Professor Willborn criticizes the *McAx* disjunctive test because the test could bind an employer or union to bargaining on a multi-employer basis without adequate consent. Willborn, *supra* note 1, at 470 n.93. A history of multi-employer bargaining as conclusive evidence of unequivocal intent to bargain on a multi-employer basis is also a factor in determining whether a union consented to multi-employer bargaining. *See* Painters Local 1247, 233 N.L.R.B. 980, 985 (1977).

29. *See generally* C. MORRIS, *supra* note 26, at 477-78.

30. Adoption of a labor contract negotiated by an employer association is not in itself a sufficient expression of intent to be bound to multi-employer bargaining. *Iron Workers Local 433*, 266 N.L.R.B. 154, 159 (1983). The District of Columbia Circuit recently held that a union's history of adopting agreements negotiated by a multi-union committee, combined with the union's presence in multi-union negotiating sessions, did not evidence the union's unequivocal intent to be bound by a new contract negotiated by the multi-union association. *Teamsters Local 174 v. NLRB*, 723 F.2d 966, 975 (D.C. Cir. 1983).

Professor Willborn has pointed to the following factors as evidencing a lack of sufficient multi-employer bargaining history to warrant a finding of unequivocal intent: execution of individual contracts rather than group contracts, the absence of a formal organization, and failure to empower the bargaining agent with sufficient authority to execute a binding agreement. Willborn, *supra* note 1, at 470-71 & nn.94-98.

the formation of an employers' association for purposes of collective bargaining. Absent union consent a newly formed employers' association cannot occupy a formal role in the collective bargaining process. The remainder of Part I analyzes the legality of coordinated bargaining strategies through unrecognized employers' associations.

*B. Decisions Under the National Labor Relations Act Concerning the Legality of Employer Coordinated Bargaining*

Section 8(a)(5) of the National Labor Relations Act prohibits employers from refusing to engage in collective bargaining with employee representatives.<sup>31</sup> This duty to bargain implies that employers must negotiate in good faith<sup>32</sup> and refrain from attempting to force bargaining beyond the scope of the appropriate bargaining unit.<sup>33</sup> Unions may challenge coordinated bargaining as an unfair labor practice under at least two related theories based on section 8(a)(5) of the Act.<sup>34</sup> First, by agreeing with other employers to pursue common terms on some or all subjects of bargaining, an employer reduces its willingness or ability to be flexible in negotiations.<sup>35</sup> Second, a coordinated bargaining agreement necessarily injects the interests of other employers into negotiations, thereby compelling unions to bargain on a multi-employer basis.<sup>36</sup>

In the few cases in which the Board has had an opportunity to rule on the legality of unrecognized employer bargaining associations,<sup>37</sup> the Board has stopped short of holding that the Act either permits or prohibits coordinated bargaining arrangements. In some cases the Board has taken an expansive view of union consent to the arrangement and thereby has found the existence of a multi-employer collective bargaining unit.<sup>38</sup> In others the Board

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31. 29 U.S.C. § 158(a)(5) (1982).

32. *Id.* § 158(d). See generally C. MORRIS, *supra* note 26, at 570-79.

33. See *Weyerhaeuser Co.*, 166 N.L.R.B. 299 (1967), *enforced*, 398 F.2d 770 (D.C. Cir. 1968); *Stein Printing Co.*, 204 N.L.R.B. 17 (1973); *Council of Bagel & Bialy Bakeries*, 175 N.L.R.B. 902 (1969).

34. 29 U.S.C. § 158(a)(5) (1982). See generally Burbash & Wile, *Employer Cooperation in Bargaining: Antitrust and NLRA Limitations*, 38 N.Y.U. CONF. ON LAB. § 11.01 (1985). Coordinated bargaining agreements may also be challenged on grounds that the participating employers are unlawfully interfering with protected employee rights and the union's role as bargaining representative. See *Stein Printing Co.*, 204 N.L.R.B. 17 (1973); *Weyerhaeuser Co.*, 166 N.L.R.B. 299 (1967), *enforced*, 398 F.2d 770 (D.C. Cir. 1968).

35. Under the Railway Labor Act, 45 U.S.C. § 152 (1982), the Second Circuit held that a form of coordinated bargaining by employers did not impermissibly compromise the employers' duty to bargain in good faith. In *Kennedy v. Long Island R.R.*, 319 F.2d 366, 370 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), the court held that creation of a mutual strike insurance fund by employers outside of multi-employer bargaining did not violate the employers' duty under the Act to make reasonable efforts to arrive at and maintain agreements.

36. A coordinated agreement that precludes employer execution of a union agreement before other employers' negotiations are complete places the nonexecuting employer in violation of NLRA § 8(d), 29 U.S.C. § 158(d) (1982).

37. Union recognition of an employer's bargaining association subjects the bargaining relationship to NLRB rules on multi-employer bargaining. See *supra* notes 19-21 and accompanying text.

38. See *Weyerhaeuser Co.*, 166 N.L.R.B. 299 (1967), *enforced*, 398 F.2d 770 (D.C. Cir. 1968); see also *Stein Printing Co.*, 204 N.L.R.B. 17 (1973); *Council of Bagel & Bialy Bakeries*, 175 N.L.R.B. 902 (1969).



limited its inquiry to the specific conduct challenged by the complainant union without discussing the legality of the employers' bargaining arrangement.<sup>39</sup> The former approach is well illustrated by the Board's decision in *Weyerhaeuser Co.*<sup>40</sup>

*Weyerhaeuser* arose after four members of a newly formed multi-employer bargaining association locked out employees in support of two other association members who had been struck by the unions representing their employees.<sup>41</sup> At the time of the concerted lockouts the unions had not expressly recognized the association, neither had the unions ever bargained jointly with the six employers. In response to the association's lockout the union filed an unfair labor practice charge with the Board alleging that the employers that were not experiencing strikes were discriminating against the union and employees for engaging in protected activity.<sup>42</sup>

Initially, the Board dismissed the complaint against the employers and upheld the lockout as legal.<sup>43</sup> The Board indicated that employers have the right to engage in coordinated bargaining activity.<sup>44</sup> By condoning eco-

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39. See *Evening News Ass'n*, 145 N.L.R.B. 996 (1964), *enforcement denied sub nom. Detroit Newspaper Publishers Ass'n v. NLRB*, 346 F.2d 527 (6th Cir. 1965), *vacated and remanded*, 382 U.S. 374 (1966), *on remand*, 166 N.L.R.B. 6 (1967), *aff'd sub nom. Newspaper Drivers Local 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969); see also *Nordstrom, Inc.*, 229 N.L.R.B. 601 (1977). Unfair labor practice charges concerning employers' conduct in coordinated bargaining arrangements fall in three categories. First, NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982), requiring employers to bargain with the representative of their employees, provides the most plausible challenge to coordinated bargaining. As a result of employer participation in a coordinated bargaining association, the union may argue that an employer refuses to bargain separately with the union. See *Evening News Ass'n*, 154 N.L.R.B. 1494 (1965), *enforced sub nom. Detroit News Publishers Ass'n v. NLRB*, 372 F.2d 569 (6th Cir. 1967). Second, under NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982), a union could allege that a lockout or other action taken to protect or benefit association members interferes with or restrains employees in the exercise of their rights protected under NLRA § 7, 29 U.S.C. § 157 (1982). Third, under NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), a union could challenge an employers' association's actions on the grounds that the association members are discriminatorily attempting to discourage membership in the labor union.

40. 155 N.L.R.B. 921 (1965), *vacated and remanded sub nom. Western States Regional Council 3 v. NLRB*, 365 F.2d 934 (D.C. Cir. 1966), *on remand*, 166 N.L.R.B. 299 (1967), *enforced*, 398 F.2d 770 (D.C. Cir. 1968).

41. The labor organizations involved in *Weyerhaeuser* were the International Woodworkers of America, AFL-CIO, Western States Regional Council 3, and the Western Counsel of Lumber and Sawmill Workers, AFL-CIO. In addition to *Weyerhaeuser*, employers involved in the litigation included Crown Zellerbach Corp., Rayonier Inc., and International Paper Co. The struck employers were U.S. Plywood Corp. and St. Regis Paper Co.

42. The complaint filed by NLRB Region 31 alleged, in accordance with the union's charge, that the nonstruck employers discriminated with respect to tenure and terms and conditions of employment in violation of NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), and interfered with, restrained, and coerced employees in violation of NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982).

43. 155 N.L.R.B. at 923.

44. The Board stated:

Whatever the precise status of the Association, . . . it is clear that, at the least, it served as the designated bargaining representative through which its six members bargained jointly with the Unions during those negotiations. . . .

. . . Even assuming, therefore, that the [employers] were mistaken as a matter of law with respect to either the establishment or the recognition of the Associa-

conomic reprisals to support the bargaining position of members of an unrecognized employers' association, the Board tacitly approved of coordinated collective bargaining by employers.

On appeal, however, the District of Columbia Circuit expressed concern over unanswered questions in the Board's decision.<sup>45</sup> In particular, the circuit court requested a clarification of whether a single bargaining representative possessed authority from the six members of the employers' association to negotiate a labor contract.<sup>46</sup> The court also wanted a determination of the importance of union approval of the bargaining relationship agreed to by the employers.<sup>47</sup> On remand the Board backed away from its previous decision that acknowledged the legality of coordinated bargaining by employers and held instead that the union had consented to multi-employer bargaining.<sup>48</sup>

Shortly before its decision on remand in *Weyerhaeuser* the Board upheld the legality of a lockout in a case in which no basis existed for finding that the employers were part of a multi-employer association.<sup>49</sup> *Newspaper Driv-*

tion as a multiemployer unit, . . . we find that the principles announced by the Supreme Court in *American Ship Building* and *Brown Food* apply to the situation where, as here, two or more employers *bargain jointly* with a union, an impasse in negotiations is reached over a mandatory subject of bargaining, and the union strikes only some of the employers engaged in such joint bargaining.

*Id.* at 922-23 (footnote omitted; emphasis added). For a discussion of *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), and *NLRB v. Brown*, 380 U.S. 278 (1965), see *infra* note 49.

45. *Western States Regional Council 3 v. NLRB*, 365 F.2d 934, 935 (D.C. Cir. 1966).

46. *Id.* at 938-39.

47. *Id.* The Sixth Circuit's remand of the Board's initial decision in *Weyerhaeuser* can be viewed in two ways. By failing to affirm the decision, the court arguably disapproved of the Board's tacit finding that coordinated bargaining is legal under the NLRA. Alternatively, the Sixth Circuit's remand may simply have reflected uncertainty over the Board's actual holding concerning coordinated bargaining.

48. *Weyerhaeuser Co.*, 166 N.L.R.B. 299 (1967), *enforced*, 398 F.2d 770 (D.C. Cir. 1968). The Board stated:

The test to be applied in assessing the status of the Association as a multiemployer unit is well established: it is whether the members of the group have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action, and whether the union representing their employees has been notified of the formation of the group and the delegation of bargaining authority to it, and has assented and entered upon negotiations with the group's representative. . . .

. . . [B]oth [unions] treated with the Association *qua* Association, by submitting their proposals to the Association as such and by responding to its offers as group offers.

166 N.L.R.B. at 299-300 (emphasis in original, citation omitted).

49. Two years earlier, in *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), the Supreme Court had held that after an impasse in negotiations an employer may lawfully lock out its employees "for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." *Id.* at 318. In *NLRB v. Brown*, 380 U.S. 278 (1965), decided on the same day as *American Ship*, the Court held that members of a multi-employer association may lawfully lock out all employees represented by a union that struck one of the employers in the association. *Id.* at 281-82. The Court, in *American Ship* and in *Brown*, reasoned that a court must seek independent evidence of anti-union motivation before holding a lockout unlawful because a lockout is not a form of employer conduct so destructive of collective bargaining that employer motivation is irrelevant. 380 U.S. at 309; 380 U.S. at 289.

ers Local 372 v. NLRB (Detroit News)<sup>50</sup> involved two publishers, the Detroit News and the Detroit Free Press, that had negotiated separately with Teamsters Local 372 on contracts covering drivers of newspaper delivery trucks.<sup>51</sup> In preparation for their respective contract renewal negotiations in 1962, the newspapers secretly agreed that if the union struck one paper over an issue that both papers considered important,<sup>52</sup> the other publisher would lock out its employees. Accordingly, when the union called a strike against the Detroit Free Press, the Detroit News ceased publishing and closed its doors to employees.

The union responded to the lockout by filing an unfair labor practice charge claiming, among other things,<sup>53</sup> that the Detroit News's lockout in favor of another employer's bargaining position was motivated by a desire to undermine the union's status as bargaining agent. The Board, and the Sixth Circuit on appeal, rejected this argument. The circuit court explained that since any concessions granted to the union by the struck Detroit Free Press could adversely affect the Detroit News's bargaining position, the News's support of the Free Press was motivated by a desire to enhance its own position and not by a desire to undermine the union's bargaining agent status.<sup>54</sup>

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50. 404 F.2d 1159 (6th Cir. 1968), cert. denied, 396 U.S. 923 (1969), enforcing 166 N.L.R.B. 219 (1967).

51. The Detroit News and Detroit Free Press had historically negotiated on a multi-employer basis with Teamsters Local 372. This relationship ended in the early 1960s when the union withdrew from the multi-employer bargaining. The newspapers, however, refused to recognize the union's withdrawal from multi-employer bargaining. The Sixth Circuit ultimately found that the newspapers had violated NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982), by refusing to bargain on a single employer basis with the union. Evening News Ass'n, 154 N.L.R.B. 1494 (1965), enforced sub nom. Detroit Newspapers Publishers Ass'n v. NLRB, 372 F.2d 569 (6th Cir. 1967).

52. In multi-employer bargaining, it is common and lawful for the parties to assign certain issues to multi-employer bargaining and to leave other issues to local or single employer bargaining. See, e.g., Kroger Co., 148 N.L.R.B. 569 (1968); Radio Corp. of America, 135 N.L.R.B. 980 (1962).

53. The union first argued that the Detroit News's lockout was not valid under the standards set forth in *American Ship* since the Detroit News and the union had not reached an impasse in negotiations. The Board rejected this argument, finding the parties "deadlocked on key issues." 166 N.L.R.B. at 221-22. On appeal, the Sixth Circuit held that the terms "impasse" and "deadlock" are synonymous. 404 F.2d at 1160. The Board subsequently rejected the union's argument that *American Ship* does not apply in a pre-impasse context. Darling & Co., 171 N.L.R.B. 801 (1968), aff'd sub nom. Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969).

The union did not argue that the secret agreement between the Detroit News and Detroit Free Press constituted an unlawful refusal to bargain. The Sixth Circuit nevertheless addressed these NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982), considerations in the newspapers' coordinated bargaining strategy. The court concluded that the employers had not unlawfully attempted to force the union into multi-employer bargaining. 404 F.2d at 1161-62 n.2. The court reasoned that "[t]here was no attempt here to obtain the benefits of a multi-employer bargaining unit since the agreement concerned only a few of several issues and since neither employer agreed to be bound by the negotiations of the other." *Id.* at 1162 n.2.

54. The court stated:

By locking out its employees, the News sought to advance its own immediate bargaining position by supporting the struck employer in its attempt to withstand the union's demands on the vital issues. Clearly, concessions granted by the struck employer could be expected to have an adverse effect on the News' ability to adhere to its own position. Thus, . . . the interest of the News in using economic pressure was grounded upon a very real, direct, and immediate bargaining motivation to advance its own cause.

This decision, and the Board's initial decision in *Weyerhaeuser*, indicate that employers are free to engage in coordinated collective bargaining, at least to the extent of applying economic pressure to union and employees in support of the employers' mutual interests. This power to combine economic forces in negotiation with a union gives employers much of the power they would enjoy in multi-employer collective bargaining. As discussed in the following section, the degree of permissible cooperation in coordinated bargaining has been explored in greater detail in situations analogous to employer coordinated bargaining when representatives of several employee bargaining units combine forces in negotiating separate contracts with one or more employers.

### C. Legality of Coordinated Bargaining by Unions Under the Act

#### 1. Relevance of Union Coordinated Bargaining Cases

In contrast to the scarce authority discussing coordinated bargaining by employers, much authority exists discussing and establishing the legality of coordinated bargaining by unions.<sup>55</sup> Management and labor have equivalent obligations to bargain in good faith<sup>56</sup> and refrain from efforts to compel collective bargaining beyond the recognized bargaining unit.<sup>57</sup> Because of these corresponding duties union coordinated bargaining cases may serve as analogous authority in support of employer coordinated bargaining.

The analogy is weakened, however, by one difference in the circumstances of employers and unions bargaining on a coordinated basis. Whereas unions are incapable of implementing contract terms of mutual interest to them, employer participants in coordinated bargaining have the power to implement desirable contract terms unilaterally once negotiations break down.<sup>58</sup> Thus, from a policy standpoint, opponents of employer coordinated bargain-

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404 F.2d at 1161.

55. See *Procter & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968 (4th Cir. 1981), *cert. denied*, 459 U.S. 879 (1982); *NLRB v. Indiana & Mich. Elec. Co.*, 599 F.2d 185 (7th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174 (8th Cir. 1969); *General Elec. Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969); *Standard Oil Co. v. NLRB*, 322 F.2d 40 (6th Cir. 1963); Note, *Multi-Unit Collective Bargaining: Autonomy and Dependence in Liberal Thought*, 72 *GEO. L.J.* 1369 (1984). Coordinated bargaining by labor "is a negotiating technique whereby a union coordinates its bargaining with other unions or other bargaining units." *NLRB v. Indiana & Mich. Elec. Co.*, 599 F.2d 185, 190 n.4 (7th Cir.), *cert. denied*, 444 U.S. 1014 (1979).

56. NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3) (1982), makes it an unfair labor practice for a union to refuse to bargain with an employer whose employees the union represents. As applied, § 8(b)(3) imposes a duty to bargain in good faith on unions. See *Maas & Feduska, Inc. v. NLRB*, 632 F.2d 714 (9th Cir. 1979); *Associated Gen. Contractors of America v. NLRB*, 465 F.2d 327 (7th Cir.), *cert. denied*, 409 U.S. 1108 (1972).

57. See *Douds v. International Longshoremen's Ass'n*, 241 F.2d 278, 282 (2d Cir. 1957) (union unlawfully demanded inclusion of employees outside geographical area of recognized unit).

58. Once a good faith impasse in negotiations is reached, an employer may unilaterally implement the terms of its final proposal to the union. See generally *Murphy, Impasse and the Duty to Bargain in Good Faith*, 39 *U. PITT. L. REV.* 1 (1977) (discussion of employers' unilateral actions).

ing could contend that employer coordinated bargaining carries greater potential for affecting the outcome of negotiations and is not merely the flip side of union coordinated bargaining.<sup>59</sup>

## 2. Case Law Concerning Union Coordinated Bargaining

In its 1962 decision in *Standard Oil Co.*<sup>60</sup> the Board held that a union has the right to select individuals from outside the bargaining unit to serve on the union's bargaining committee and that this right is not lost merely because the committee members might coordinate positions and strategies for negotiations concerning other bargaining units.<sup>61</sup> Since that decision union freedom to select members of a bargaining committee has been translated into a generalized right to engage in coordinated bargaining.<sup>62</sup> Unions may not, however, attempt to pressure employers into negotiations going beyond the recognized bargaining unit.<sup>63</sup>

Since the legality of union coordinated bargaining is well established, recent cases have focused on efforts by employers to frustrate union coordinated bargaining strategies. In *Procter & Gamble Manufacturing Co.*<sup>64</sup> unfair labor practice charges were directed at Procter & Gamble's refusal to accommodate employees at four different Procter & Gamble plants. The employees had been collectively chosen by unions<sup>65</sup> as bargaining committee

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59. The Board has relied on the ability of employers to effect changes in employment in holding employer campaign promises illegal and union campaign promises legal. See generally R. WILLIAMS, P. JANUS & K. HUHN, *NLRB REGULATION OF ELECTION CONDUCT* 63 (1974) (management promises often relate to matters that management controls). An additional distinction between union coordinated bargaining and employer coordinated bargaining that is relevant to this analysis is the antitrust laws' exemption for union activity. One commentator noted that courts may be inclined to apply the NLRA more restrictively to union coordinated bargaining since the antitrust laws' protections are not available to curb potential union abuses. Conversely, courts might view labor's antitrust exemption as a mandate for liberal approval of union conduct related to collective bargaining. See Hart, *supra* note 11, at 162 & nn.32-34.

60. 137 N.L.R.B. 690 (1962), *enforced*, 322 F.2d 40 (6th Cir. 1963).

61. *Id.* at 690.

62. See *General Elec. Co.*, 173 N.L.R.B. 253 (1968), *enforced*, 412 F.2d 512 (2d Cir. 1969).

63. In *NLRB v. Indiana & Mich. Elec. Co.*, 599 F.2d 185 (7th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980), the court stated:

[A]n employer may not lawfully refuse to bargain with a union negotiating committee or committees simply because the union is coordinating the various bargaining efforts and the employer suspects or anticipates that the union may ultimately use this coordination to force it into company-wide negotiations. Rather, to justify a refusal to bargain on that score, an employer must demonstrate that the coordinated bargaining in question is done in bad faith with the purpose of forcing a company-wide bargaining situation—that is, that the union is actually abusing the device and not simply that the union might do so in the future.

*Id.* at 191.

64. 248 N.L.R.B. 953 (1980), *enforced*, 658 F.2d 968 (4th Cir. 1981), *cert. denied*, 459 U.S. 879 (1982).

65. The controversy in *Procter & Gamble* involved negotiations for new contracts at Procter & Gamble's plants in Port Ivory, New York, Kansas City, Kansas, Dallas, Texas, and Baltimore, Maryland. Each plant had a separate bargaining unit and separate, independent unions represented the employees in the various plants. Independent Oil and Chemical Workers, Inc. represented employees at the Port Ivory plant; Independent Oil and Chemical Work-

members for separate contract renewal negotiations at each plant.<sup>66</sup> Tactics employed by Procter & Gamble to exclude "outsiders"<sup>67</sup> from local bargaining included: invocation of the company's access rule, which prohibited visitors from entering Procter & Gamble plants except on guided tours;<sup>68</sup> interrogation of the outsiders concerning their role and purpose in negotiations; discontinuance of compensation to employee negotiators; refusal to grant leaves of absence for conducting union business to the outside employee negotiators; and denial of requested vacation time to some of the outside employee negotiators.<sup>69</sup>

The Board held that Procter & Gamble's denial of union business time to outsiders was consistent with past practice in terms of the expired labor contracts and, therefore, was lawful.<sup>70</sup> The Board did find, however, that the company's other actions amounted to unlawful interference with the unions' right to select their bargaining committee members.<sup>71</sup> First, the Board determined that Procter & Gamble's refusal to negotiate on plant premises and discontinuance of compensation to employee negotiators was retaliation for the unions' selection of outsiders for bargaining.<sup>72</sup> Second, the Board found that Procter & Gamble's denial of vacation time or uncompensated leave to the outside employee negotiators along with the company's refusal to negotiate on weekends effectively prevented the unions from selecting their bargaining committee members.<sup>73</sup> To remedy these violations, the Board ordered Procter & Gamble to reimburse the unions for their share of the rent for conference rooms where the parties conducted their bargaining, to pay

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ers of Kansas City, Kansas, represented employees at the Kansas City plant; Independent Oil and Chemical Workers of Dallas represented employees at the Dallas plant; Independent Oil and Chemical Workers represented employees at the Baltimore plant. The Fourth Circuit found that the four unions wanted to bargain with Procter & Gamble on a multi-plant basis. 658 F.2d at 972.

66. Historically, the parties had negotiated separately at each of the four plants. Before the 1976 contract renewal negotiations a bargaining committee made up of members employed at each local plant represented each union in the separate negotiations. The Company paid the local negotiators for the time they were away from work to engage in collective bargaining. As an initial step towards establishing a multi-plant bargaining unit, the unions decided that the bargaining committees for the 1976 and 1977 renewal negotiations would include members from unions at the other Procter & Gamble plants. In his decision Administrative Law Judge Bernard Ness discusses the bargaining history at the four Procter & Gamble plants in detail. See 248 N.L.R.B. at 955-60.

67. The Fourth Circuit defined "outsiders" as "employees at the other three Procter & Gamble plants whom the negotiating union invited to participate as its bargaining representatives." 658 F.2d at 972 n.3.

68. Procter & Gamble's access rule applied to employees of other Procter & Gamble plants as well as nonemployees. The access rule caused the parties to conduct bargaining away from the plant. Since Procter & Gamble refused to bargain at the various union halls, the parties incurred additional expense for rented conference rooms.

69. For a discussion of Procter & Gamble's efforts to frustrate use of outsiders in negotiations see 658 F.2d at 973-75.

70. 248 N.L.R.B. at 953.

71. *Id.* at 975.

72. *Id.* at 973.

73. *Id.* at 974-75. In holding that Procter & Gamble unlawfully denied some form of uncompensated leave time to the unions' outside negotiators, the Board relied on *Indiana & Mich. Elec. Co.*, 235 N.L.R.B. 1128, 1128 (1978), *enforced*, 599 F.2d 185 (7th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980).

local employee negotiators for time missed from work, and to cease and desist from denying uncompensated leave time or vacation time to outside employee negotiators.<sup>74</sup> The Fourth Circuit enforced the Board's decision and order in full.<sup>75</sup>

In summary, the Board's approval of coordinated bargaining by unions, although not squarely analogous, suggests that employer coordinated bargaining may be lawful under the Act. Further indication that employer coordinated bargaining is lawful under the labor laws exists in the approval in the *Detroit News* case of lockouts in support of another employer's bargaining position outside the context of multi-employer collective bargaining. Regardless of the legality of employer coordinated bargaining under the Act, however, antitrust implications of coordinated bargaining discussed in Part II demonstrate that employers are not free to engage in coordinated bargaining without fear of legal repercussion.

## II. LEGALITY OF MULTI-EMPLOYER COLLECTIVE AND COORDINATED BARGAINING UNDER ANTITRUST LAWS

In contrast to the relatively settled, albeit sparse, labor law permitting unsanctioned multi-employer bargaining relationships, courts have not decided or even definitively addressed the appropriateness of multi-employer collective and coordinated bargaining under antitrust principles. In the multi-employer collective bargaining context joint activities by or agreements between employers acting unilaterally and not in concert with labor present substantial antitrust issues. Absent any exemption from the antitrust laws, an agreement between multiple employers in a recognized bargaining unit may be unlawful if the terms of the agreement impose an excessive restraint upon the business market.<sup>76</sup> Nevertheless, a multi-employer collective unit offers a case for an exemption from application of the antitrust laws because of the requisite union consent to multi-employer bargaining in such a situation and because of policy considerations favoring multi-employer bargaining.<sup>77</sup> On the other hand, a coordinated bargaining approach, unsanctioned by union approval, is much less deserving of exemption from antitrust scrutiny. Any exemption aside, however, even an agreement coordinated by employers may still not constitute an antitrust violation unless the agreement itself restrains the commercial market.

Part A of this section briefly describes the statutory, or express, labor antitrust exemptions. Part B discusses a nonstatutory exemption as it relates to the legality of multi-employer bargaining. Part C addresses coordinated bargaining arrangements from the perspective of the nonstatutory exemption. Finally, Part D analyzes the legality of coordinated agreements under the antitrust laws without regard to the applicability of an exemption, basing the analysis upon the degree of restraint of trade imposed by the arrangement.

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74. 248 N.L.R.B. at 953.

75. 658 F.2d 968 (4th Cir. 1981), *cert. denied*, 459 U.S. 879 (1982).

76. See *infra* notes 120-24 and accompanying text.

77. See *infra* notes 84-132 and accompanying text.

*A. Application of Statutory Antitrust Exemption  
to Activities of Labor Organizations*

As a general proposition, labor organizations are statutorily exempt from antitrust liability<sup>78</sup> for legitimate labor activities unilaterally undertaken in furtherance of their own interests.<sup>79</sup> An employers' association cannot claim this statutory exemption, however, since immunity extends only to labor or union activities and not to the activities of employers.<sup>80</sup> The statutory exemption also does not extend to concerted action or agreements between unions and nonlabor groups.<sup>81</sup> Indeed, business enjoys no special exemption from the antitrust laws.<sup>82</sup> Accordingly, the statutory exemption does not insulate a combination of businesses for collective bargaining. Concerted employer action, whether done in a multi-employer collective bargaining unit or through coordinated bargaining, can claim no express protection from the antitrust laws.<sup>83</sup>

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78. The Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 (1982), prohibits the issuance of injunctions in cases involving a labor dispute. "Labor dispute" is defined in *id.* § 113. Clayton Act §§ 6 and 20, 15 U.S.C. § 17 (1982) and 29 U.S.C. § 52 (1982) respectively, declare that labor organizations are not combinations or conspiracies in restraint of trade and specifically exempt certain union activities from the coverage of the antitrust laws. Clayton Act § 6, 15 U.S.C. § 17 (1982), provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate object thereof . . .

Clayton Act § 20, 29 U.S.C. § 52 (1982), limits the power of federal courts to issue injunctions in cases "involving, or growing out of, a dispute concerning terms or conditions of employment" and specifies that certain actions do not violate any federal law.

79. *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621 (1975); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). In *Hutcheson* the Court stated:

So long as a union acts in its self-interest and does not combine with non-labor groups, . . . the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

*Id.* (citation omitted).

80. *Mackey v. National Football League*, 407 F. Supp. 1000, 1008 (D. Minn. 1975), *rev'd on other grounds*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). The legislature created the statutory exemption to insulate legitimate collective activity by employees because federal labor policy favors such activity even though it is inherently anticompetitive. 543 F.2d at 611-12.

81. *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-22 (1975); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941); *Mackey v. National Football League*, 543 F.2d 606, 611 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

82. See *Mackey v. National Football League*, 543 F.2d 606, 616 n.19 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); see also *Carpenters Dist. Council v. United Contractors Assocs.*, 484 F.2d 119, 121-22 (6th Cir. 1973) (employers' so-called union not entitled to antitrust law immunity), *modified*, 539 F.2d 1092 (6th Cir. 1976).

83. See *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 99-100 (1962); *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970) (§ 6 does not exempt joint employer action regarding employee wages), *aff'd sub nom. Jacobi v. Bache & Co.*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). *But see California State Council v. Associated Gen. Contractors*, 648 F.2d 527, 544 (9th Cir. 1980), *rev'd on other grounds*, 459 U.S. 519 (1983) (statutory exemption accrued to such units through an exemption relating to "[b]ecoming or remaining a member . . . of any employer organization;" court relied on 29 U.S.C. § 104(b) (1982) read with Clayton Act § 29 U.S.C. § 52 (1982)).



*B. Nonstatutory Antitrust Exemption for Multi-Employer Bargaining Conduct*

Courts have applied a limited nonstatutory antitrust exemption to certain concerted actions or agreements between unions and nonlabor groups.<sup>84</sup> When a collective bargaining agreement at issue benefits both the labor and nonlabor group, the nonlabor group may claim the benefit of the nonstatutory exemption.<sup>85</sup> When, however, employers make an agreement among themselves concerning negotiations for wages and other terms with the union, and the union is not a party to the agreement, granting the nonstatutory antitrust exemption to the employers requires an expanded interpretation of the exemption and reliance on analogous principles from case law concerning multi-employer collective bargaining.

The nonstatutory exemption immunizes from antitrust laws certain labor-employer agreements that pertain to issues that are mandatory bargaining subjects under labor law. Such mandatory bargaining subjects include wages, hours, and other working conditions.<sup>86</sup> The exemption also applies

84. See *Local 189 Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 688-89 (1965). The Supreme Court has held that the limited judicially crafted exemption for certain agreements is necessary to accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the NLRA. *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622-23 (1975); see *Mackey v. National Football League*, 543 F.2d 606, 611-12 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

85. *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). *But see Carpenters Local 1846 v. Pratt-Fransworth, Inc.*, 690 F.2d 489, 530 (5th Cir. 1982), *cert. denied*, 461 U.S. 942 (1983) (labor exemptions to antitrust laws "offer no shelter for the acts of employers, except perhaps only incidentally").

86. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1982) lists the mandatory subjects of bargaining. In determining the applicability of the nonstatutory exemption, the subject matter of the agreement must be considered in light of the national labor policy. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965). The Court explained that the requirement that employers and unions bargain about wages, hours, and working conditions, "weighs heavily in favor of antitrust exemption for agreements on these subjects." *Id.* Employers and unions are not required to bargain about other matters, however, and as to these, the issue is whether the restriction

is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.

*Id.* at 689-90. Thus, negotiated restrictions as to when and how long employees must work are within the realm of required bargaining and therefore within the national labor policy. *Id.*; see also *American Fed'n of Musicians v. Carroll*, 391 U.S. 99, 109, *reh'g denied*, 393 U.S. 902 (1968) (musicians' price floors are mandatory bargaining subjects because sufficiently related to employees' wages); *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 303-04 (1959) (owner-drivers' minimum equipment rentals are mandatory bargaining subjects because sufficiently related to their wages); *NLRB v. Wooster Div. of Borg-Wagner Corp.*, 356 U.S. 342, 349 (1958) (duty to bargain is limited to wages, hours, and other terms and conditions of employment); *Wood v. National Basketball Ass'n*, 602 F. Supp. 525, 528 (S.D.N.Y. 1984) (college draft rules are mandatory subjects of collective bargaining since rules determine team acquiring exclusive rights to player); *Murphy Tugboat Co. v. Shipowners & Merchants Tugboat Co.*, 467 F. Supp. 841, 856 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) (port pilotage charge ceiling is sufficiently related to employees' wages to be within the definition of terms and conditions of employment).

when a union and employer seek to attain goals that are permissive subjects of bargaining under the Act.<sup>87</sup>

The exemption permits restraints on competition in the labor market, despite the restraints' effect on price competition in the commercial market, unless the restraining activity contravenes antitrust policies to a degree not justified by national labor policies.<sup>88</sup> Thus, freedom from antitrust scrutiny for agreements that inhibit free competition represents an accommodation to recognized goals of federal labor law.<sup>89</sup> In assessing claims to this exemption, the courts have looked to the importance of relevant labor policies to determine whether to tolerate the decrease in business competition resulting from conduct that advances the goals of federal labor law.<sup>90</sup> Under this test multi-employer agreements concerning collective bargaining negotiations with a union should warrant limited protection.

Multi-employer bargaining units, by their nature, involve joint agreements and activities among employers in connection with their negotiations with the union. As mentioned before, no express statutory provision authorizes multi-employer bargaining units.<sup>91</sup> Nevertheless, in *NLRB v. Truck Drivers Local 449 (Buffalo Linen & Credit Exchange)*<sup>92</sup> the Supreme Court held that Congress approved the certification and existence of multi-employer bargaining units as vital to the national policy of promoting labor peace.<sup>93</sup> In addition, certain Board rules expressly authorize and regulate multi-em-

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87. *Feather v. United Mine Workers*, 711 F.2d 530, 542 (3d Cir. 1983); *James Julian, Inc. v. Raytheon Co.*, 593 F. Supp. 915, 923 (D. Del. 1984). An agreement between a union and an employer outside a collective bargaining relationship, imposing a direct restraint on a business market that is not justified by congressional labor policy because the restraint has actual or potential anticompetitive effects that would not flow naturally from the elimination of competition over wages and working conditions, is not, however, exempt from antitrust scrutiny. *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d 1368, 1373 (3d Cir. 1979), *cert. denied*, 459 U.S. 916 (1982).

88. *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 625 (1975).

89. *Id.* at 623. The source for the exemption is "the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. . . . [L]abor policy [therefore] requires tolerance for the lessening of business competition based on differences in wages and working conditions." *Id.* at 622; *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 692-93 (1965) (White, J., writing for the court in a 6-3 decision with three Justices concurring in the judgement but dissenting from the Court's opinion). Likewise, the union has a legitimate goal in organizing workers and standardizing working conditions. *Connell*, 421 U.S. at 624.

Even where the goal is legal, however, the methods chosen are not immune from scrutiny. Where the chosen methods impose a direct restraint on the business market and have substantial anticompetitive effects that would not follow naturally from the elimination of competition over wages and working conditions, antitrust concerns outweigh any labor interest. *Id.* at 625.

90. Various courts have articulated the test for entitlement to the exemption differently. As early as 1965 the Court began balancing whether the restraint is intimately related to a subject protected by national labor policy and whether the agreement's restraint on the product market was the least restrictive means necessary to achieve the legitimate interests. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-91 (1965); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 517-18 (3d Cir. 1979), *vacated*, 448 U.S. 902 (1980), *on remand*, 641 F.2d 90 (3d Cir. 1981); *accord Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 625 (1975).

91. See *supra* note 84 and accompanying text.

92. 353 U.S. 87 (1957) [hereinafter referred to and cited as *Buffalo Linen*].

93. *Id.* at 95.

ployer bargaining units upon the consent of the union and employers.<sup>94</sup>

In *Buffalo Linen* the United States Supreme Court reversed an appellate holding that Congress did not approve multi-employer bargaining.<sup>95</sup> Finding that multi-employer bargaining antedated the federal labor acts and that Congress affirmatively rejected proposals to limit or prohibit multi-employer bargaining, the Court concluded that Congress intended to permit such units.<sup>96</sup> Thus, *Buffalo Linen* furnishes a predicate for an antitrust exemption by finding congressional authority for multi-employer bargaining units.

The *Buffalo Linen* decision is also significant in establishing the importance of multi-employer bargaining units to national labor policy, a necessary prerequisite for shielding concerted employer action from antitrust examination.<sup>97</sup> *Buffalo Linen* evidences Supreme Court recognition that multi-employer bargaining promotes labor peace through strengthened collective bargaining,<sup>98</sup> thereby furthering the goal of federal labor law, as expressed in the Wagner Act<sup>99</sup> and Taft-Hartley Act,<sup>100</sup> to promote collective bargaining.<sup>101</sup> Accordingly, multi-employer bargaining units appear to support a strong national labor policy.

Because of the settled importance of multi-employer bargaining units to labor law, collateral agreements and activities necessary to the multi-employer bargaining process are equally vital. Agreements that are intimately related to a mandatory subject of bargaining warrant immunity.<sup>102</sup> In other

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94. *California State Council of Carpenters v. Associated Gen. Contractors, Inc.*, 648 F.2d 527, 544 (9th Cir. 1980) (citing NLRB, TWENTY-THIRD ANNUAL REPORT 36 (1958); 4 T. KHEEL, LABOR LAW § 14.03[4][b] (1979)), *rev'd on other grounds*, 459 U.S. 519 (1983).

95. 353 U.S. at 94.

96. *Id.* at 94-96. The Court noted that industries with numerous employers of small work forces, and industries with quick employee turnover, had used multi-employer bargaining well before the Wagner Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1982)). Use of multi-employer bargaining increased greatly after the Act's enactment as employers attempted to match the unions' increased strength. 353 U.S. at 94-96. At the time of the debates over amendments to the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-197 (1982)), moreover, proposals to limit or outlaw multi-employer bargaining were received with protests that the proposals would actually weaken collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining. The Court concluded that Congress's refusal to outlaw multi-employer bargaining showed its recognition of the device as essential to effectuate national labor policy. 353 U.S. at 94-96. Moreover, the Court found that Congress's inaction demonstrated an intention that the Board continue certification of multi-employer units. *Id.*

97. One of the requirements stated in *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), is that the market restraint must advance a legitimate labor goal to justify a nonstatutory exemption. *Id.* at 625.

98. 353 U.S. at 95.

99. 29 U.S.C. §§ 151-169 (1982).

100. *Id.* §§ 141-197. The Taft-Hartley Act, also known as the Labor Management Relations Act, supplemented and modified the Wagner Act in several important respects. Among other things, the Taft-Hartley Act created protection for concerted activities by employees, prohibited secondary boycott activity by unions, and created a damages action for breach of a labor contract. *See generally* H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 482-513 (1950) (discusses remedies under the Taft-Hartley Act).

101. *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 294 (1959).

102. *See Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965).

words, when the activity at issue is necessary to make the labor laws work, an exemption from antitrust liability is necessary.<sup>103</sup> This result appears sound. To apply the antitrust laws to any agreement concerning the joint bargaining stance of employers in a recognized multi-employer bargaining unit would eviscerate any practical ability of the member employers to bargain collectively with the union. Antitrust liability would outlaw the very conduct that, according to the Supreme Court, Congress approved when enacting the Wagner and Taft-Hartley Acts.<sup>104</sup>

Integral to the analysis of antitrust immunity of a multi-employer bargaining unit is the requirement of consent and recognition by the union, which agrees to conduct sessions with representatives or committees of numerous employers in lieu of bargaining separately with each.<sup>105</sup> Moreover, despite Board approval of the existence of multi-employer bargaining units in general, it is important to remember that the legality of particular multi-employer units remains a matter of Board scrutiny.<sup>106</sup> Advocates of antitrust immunity for a multi-employer association may not cite Board approval of other multi-employer units as support without establishing that the multi-employer unit in question would meet with Board approval.

The nonstatutory exemption is a policy exemption from antitrust liability that courts have granted to activity within the recognized purposes of labor unions.<sup>107</sup> Exempting labor union activity and collective bargaining contracts from the antitrust laws depends upon the extent to which conduct with anticompetitive consequences advances legitimate labor objectives.<sup>108</sup> Because labor and management are encouraged to bargain in multi-employer units,<sup>109</sup> application of the antitrust laws to multi-employer bargaining and attendant agreements and activities runs counter to national labor policy.<sup>110</sup>

The few cases that have considered the propriety of antitrust scrutiny of

103. *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

104. See *Buffalo Linen*, 353 U.S. at 95-96 ("[I]n many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining.")

105. See *supra* notes 23-30 and accompanying text.

106. See *supra* notes 23-31 and accompanying text. The Supreme Court gleaned a congressional intent to "leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future." *Buffalo Linen*, 353 U.S. at 96 (quoting *Truck Drivers Local 449 v. NLRB*, 231 F.2d 110, 121 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957)). Indeed, the Board has special expertise regarding, and often decides, whether a proposed bargaining subject is a term or condition of employment. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685-86 (1965). Nevertheless, a Board determination in labor proceedings will not be conclusive regarding antitrust issues. See *id.*; *International Ass'n of Heat & Frost Insulators & Asbestos Workers v. United Contractors Ass'n*, 494 F.2d 1353, 1354 (3d Cir. 1974).

107. *Signatory Negotiating Comm. v. Local 9, Int'l Union of Operating Eng'rs*, 447 F. Supp. 1384, 1390 (D. Colo. 1978).

108. *Id.* at 1391.

109. See, e.g., *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957); *Brotherhood of Teamsters Local 70*, 214 N.L.R.B. 902 (1974).

110. The Supreme Court has not criticized multi-employer bargaining units. In addition, the Court has approved union wage scale agreements with multi-employer bargaining units even though the agreements end price competition based on wages within such units. See *United Mine Workers v. Pennington*, 381 U.S. 657, 664 (1965).

joint employer conduct in multi-employer bargaining units have held the conduct to be within the nonstatutory exemption. A federal district court in *Signatory Negotiating Committee v. Local 9, International Union of Operating Engineers*<sup>111</sup> considered a combination of employers who were negotiating through a union-recognized bargaining committee.<sup>112</sup> The court found that the collective bargaining agreement in that case warranted an exemption from antitrust liability.<sup>113</sup> The court used language indicating that collateral activities might also have warranted an exemption. The court stated that a combination of employers for the limited purpose of conducting negotiations with a union through a representative committee had no tendency to restrict competition with employees that are outside the association.<sup>114</sup>

Another district court in *Plumbers & Steamfitters Local 598 v. Morris*<sup>115</sup> considered the collateral activity issue directly. In that case the court held that an agreement made for the purpose of forcing the union to accede to negotiating demands was, in object and effect, a lawful activity under the antitrust and labor laws.<sup>116</sup> The agreement among the employers in that case included a decision to lock out employees when the union struck a member employer.<sup>117</sup> The court stressed that national labor policy depends on collective bargaining agreements and the process for reaching those agreements,<sup>118</sup> and held that even the alleged conspiracy of forcing union submission to negotiating demands was entitled to an antitrust exemption.<sup>119</sup>

Even if otherwise applicable, the nonstatutory labor exemption can evapo-

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111. 447 F. Supp. 1384 (D. Colo. 1978).

112. The Signatory Negotiating Committee served as the collective bargaining agent for certain Colorado employers in the building, heavy engineering, and utility construction industries. These employers had assigned their rights to negotiate collective bargaining agreements with specified labor organizations to the committee.

113. 447 F. Supp. at 1390-91. The court's summary judgment decision dealt with a collective bargaining agreement that included provisions applicable to subcontractors who had not signed the agreement. The union enacted the provisions to ensure that all employers of operating engineers at the same site paid equal wages and benefits. The union attempted to enforce the provisions through a short-term agreement, not involving the plaintiff committee, but embodying many provisions of the bargaining agreement in force with the plaintiff. The union also tried to enforce the provisions by requiring that contractors include the terms in their contracts with subcontractors. The bargaining agreement required subcontractors to join the union after 31 days of employment at the site.

114. *Id.* at 1390. The court noted that the individual contractors had assigned their rights to bargain and that the committee did not represent a trade association. *Id.* at 1386, 1390.

115. 1981-1 Trade Cas. (CCH) ¶ 63,989.

116. *Id.* at 76,160. The local union sued employers that had agreed to a lockout. The union alleged that the employers had conspired to lockout union employees to restrain and monopolize trade and to force the local to agree to their negotiating demands.

117. The local bargained collectively with the Mechanical Contractors Association, a multi-employer collective bargaining agent for mechanical contracting firms. Only one of the defendant firms, however, belonged to the association. The other defendant employers competed in the national market and negotiated national collective bargaining agreements with the local's parent union. Under the national agreements, member employers were permitted to stop work and lock out employees in the event that the union instituted an area strike over local contract negotiations.

118. 1981-1 Trade Cas. (CCH) at 76,153. The court noted that a collective bargaining agreement, even more than other agreements, contemplates a continuing relationship within the functional framework created in the agreement. *Id.*

119. *Id.* at 76,155.

rate when the agreement at issue constitutes a direct restraint on competition in a business market.<sup>120</sup> When a restraint on the business market has substantial anticompetitive effects that would not follow naturally from elimination of competition over wages and working conditions, the conduct causing the restraint is not exempt from the antitrust laws.<sup>121</sup> The courts have examined this nexus somewhat circuitously by determining whether the bargaining subject causing the restraint on trade is so intimately related to a mandatory subject of bargaining<sup>122</sup> that it should be protected against antitrust liability.<sup>123</sup> Thus, an agreement as to a nonmandatory subject that substantially restrains competition in the business market is not exempt from antitrust scrutiny.<sup>124</sup>

When employers within a multi-employer unit agree upon mandatory bargaining subjects, assuming that the nonstatutory exemption otherwise attaches to them, their agreement should remain immune from antitrust laws.<sup>125</sup> For example, an agreement by employers on wage terms that they will bargain for during negotiations with the union, although an agreement eliminating competition over wages, should nevertheless be exempt from antitrust attack.

A lockout agreement among members of a multi-employer bargaining unit, however, should be viewed separately.<sup>126</sup> An agreement to lockout ob-

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120. In *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), the Court warned that even when a goal is legitimate, the methods used to reach the goal are not automatically immune. *Id.* at 625; see *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797, 806-11 (1945).

121. *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 625 (1975).

122. Labor Management Relations Act § 8(d), 29 U.S.C. § 158(d) (1982), obligates an employer to confer in good faith with respect to wages, hours, and other terms and conditions of employment. In *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), the Supreme Court explained for the first time that matters constituting "wages, hours, and other terms and conditions of employment" are "mandatory subjects" of bargaining. A refusal to bargain on a mandatory subject is an unfair labor practice under Labor Management Relations (Taft-Hartley) Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982). For a discussion of specific matters that are mandatory subjects of bargaining see C. MORRIS, *supra* note 26, at 772-844.

123. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 707 (1965); see *supra* note 86. Whether an agreement relates to a mandatory subject of collective bargaining is to be determined solely under federal labor law. *Mackey v. National Football League*, 543 F.2d 606, 615 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). Although the Board's decision is not conclusive of antitrust liability, its involvement is significant. In *Jacobi v. Bache & Co.*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976), the court considered the applicability of an exemption to conduct governed by the Securities Exchange Act of 1934. The court found that interposition of the antitrust laws to make conduct a violation even though the conduct is approved by the regulatory agency would prevent the operation of the Exchange Act as intended by Congress and as effected by SEC regulatory activity. *Id.* at 1236. When an implied repeal of antitrust laws is necessary to make the other laws work, such implied repeal may be justified. *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963) (exemption from antitrust laws will be imposed where necessary to make Exchange Act work).

124. *Berman Enters. v. Local 333*, 644 F.2d 930, 936 (2d Cir.), *cert. denied*, 454 U.S. 965 (1981).

125. The protection does not, however, extend to agreements on nonmandatory subjects such as prices. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965); see also *American Fed'n of Musicians v. Carroll*, 391 U.S. 99, 108 (1968) (courts will not permit restraints on business markets).

126. Simply stated, a lockout occurs when an employer refuses to allow employees to work to put economic pressure on the employees and their union to force agreement with the em-

viously does not contemplate agreement with the union. The agreement is a defensive arrangement made by employer members to enhance their collective bargaining strength against the union. This arrangement may nonetheless merit exemption if it is characterized as an activity necessary to maintain a balance of strength in multi-employer bargaining. The district court in *Morris* accepted such an analysis.<sup>127</sup>

Members of a multi-employer unit may also claim, pursuant to the Supreme Court's decision in *Buffalo Linen*, that a lockout is consistent with labor goals. In *Buffalo Linen*, finding that employers were bargaining collectively as a unit, the Court reasoned that a strike announced by the union against one member employer implied that the union might strike other members of the association in the future.<sup>128</sup> Accordingly, since the threat of strike action against all members was real, the Court held the nonstruck employers legally justified in their resort to a temporary lockout of employees.<sup>129</sup>

Under the foregoing analysis, a lockout agreement among members of a recognized unit may be protected from antitrust scrutiny, not necessarily as a mandatory subject of bargaining, but as an agreement necessary to support a legitimate bargaining position.<sup>130</sup> Significantly, the Court in *Buffalo Linen* found statutory recognition of circumstances in which employers lawfully could resort to a lockout to maintain their bargaining position: when employers use the lockout as a defense to a union strike tactic that threatened the destruction of the employers' interest in bargaining on a group basis.<sup>131</sup> Given that a lockout agreement among employers is legal under the labor laws, prohibition of such agreements under antitrust law arguably would empower labor to achieve the very destruction of the unitary strength that Congress intended to sanction. Moreover, a lockout agreement represents

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ployer's position in collective bargaining or in a labor dispute. See generally Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship*, 57 CORNELL L. REV. 211 (1972).

127. *Plumbers & Steamfitters Local 598 v. Morris*, 1981-1 Trade Cas. (CCH) ¶ 63-989, at 76,155. The plaintiff local union contended that the lockout halted construction work, a fact that the court found apparent but unpersuasive. *Id.* Instead the court explained that arm's-length bargaining with the use of a strike (by the union) and a lockout (by employers) for the purpose of requiring a term in a collective bargaining agreement "does not upset the economic competitive balance and tension built into the Sherman Act." *Id.* at 76,156. The court found that labor laws, not antitrust laws, regulated the struggle between the local union and the employers' association. *Id.* The court did not, however, focus on the fact that certain of the alleged conspirators did not bargain directly with the local.

128. The Court stated that the announced strike "necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association." *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 91 (1957).

129. *Id.*

130. *Cf. NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 884 (9th Cir. 1978) (lockout in support of lawful bargaining position legal); *Inter-Collegiate Press v. NLRB*, 486 F.2d 837, 846 (8th Cir. 1973) (use of lockout in support of legitimate bargaining position not inconsistent with right to bargain collectively or right to strike), *cert. denied*, 416 U.S. 938 (1974); *Detroit Newspaper Publishers Ass'n v. NLRB*, 372 F.2d 569, 572 (6th Cir. 1967) (just as employee should not be deprived of right to strike, employers should not be deprived of the use of a lockout to support a legitimate bargaining position).

131. *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 97 (1957).

no more than a protective device in labor negotiations and thus affects the business market only temporarily and only in connection with bargaining for wages and working conditions.<sup>132</sup>

### C. *Application of Nonstatutory Exemption to Coordinated Bargaining Approaches*

The rationale for exempting from antitrust laws agreements that are formed between employers before collective bargaining with a union begins does not apply when the employers are not part of a union-recognized multi-employer bargaining unit. First, in contrast to multi-employer bargaining, no authority under federal labor laws recognizes coordinated bargaining as an important aspect of national labor policy. Second, unlike multi-employer bargaining, which necessarily occurs with union consent, the intent and effect of coordinated bargaining is to encumber the union's expectation of individualized and independent collective bargaining.

#### 1. *Coordinated Bargaining Approaches as Related to National Labor Goals*

Two requirements for the nonstatutory exemption are that the market restraint resulting from a labor agreement must advance a legitimate labor goal and that the agreement restraining trade do no more than is necessary to achieve that goal.<sup>133</sup> In contrast to multi-employer bargaining, which has been held to be important to national labor policy,<sup>134</sup> coordinated bargaining has received minimal attention from the Board and has never been classified as an important element of national labor policy. Indeed, a union's rejection of a multi-employer bargaining group undermines any claim that coordinated bargaining promotes the goals of labor law.<sup>135</sup>

Considering that employers most often pursue a coordinated approach when a union objects to bargaining with a unit of employers, the Supreme Court has suggested that antitrust goals outweigh any labor interest in agreements made outside of a recognized bargaining unit.<sup>136</sup> In *United Mine Workers v. Pennington*<sup>137</sup> the Court characterized the antitrust laws as clearly at odds with employer-union agreements that attempt to set labor standards outside the bargaining unit.<sup>138</sup> The Court suggested that application of the nonstatutory exemption extends only to mutual management-

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132. See *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 625-26 (1975).

133. *Feather v. United Mines Workers*, 494 F. Supp. 701, 714 (W.D. Pa. 1980), *aff'd in part, vacated, and rev'd in part on other grounds*, 711 F.2d 530 (3d Cir. 1983).

134. See *supra* notes 2, 95-101, and accompanying text.

135. Cf. *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d 1368, 1373 (3d Cir. 1979) (agreement outside collective bargaining relationship can put restraint on business market that undermines congressional labor policy by producing anticompetitive effects), *cert. denied*, 459 U.S. 916 (1982).

136. *United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965).

137. 381 U.S. 657 (1965).

138. *Id.* at 668.



labor conduct.<sup>139</sup> Consequently, a coordinated approach cannot claim credence as a recognized means of furthering a legitimate labor goal.<sup>140</sup>

One further implication of a union's rejection of a multi-employer unit requires discussion. Union consent to a multi-employer bargaining unit results in the union's surrender of freedom to deal independently with employers in the unit, and to a reciprocal surrender by those employers of the freedom to bargain separately with the union. This result has led to recognition of a need to safeguard unit-by-unit bargaining.<sup>141</sup> Withholding consent to a multi-employer unit preserves the union's right to separate bargaining with employers, and the union should be able to expect that the employer will meet and bargain solely in its own interests.<sup>142</sup> Employees have the right through their union to meet and confer in good faith with their employer.<sup>143</sup> This right includes prohibitions against employers from approaching the bargaining table with closed minds<sup>144</sup> and from relying on objectives of a coordinated bargaining association as grounds for refusing to compromise in a negotiation. When an employer has made a prior pledge to other employers that he will work toward certain goals, he may breach his duty to bargain in good faith. To the extent that those goals differ from the objectives an employer would set individually, he may be avoiding his duty to bargain individually with the union. Similarly, when a coordinated agreement includes promises by each employer to provide all coordinating employers with information concerning separate negotiations with the union, labor's expectation of individual bargaining is undercut.

Finally, coordinated bargaining by employers can be challenged on grounds that restrictions imposed upon the freedom of a bargaining unit to make agreements contravene labor policy.<sup>145</sup> The statutory right to bargain is diminished when the terms of a coordinated bargaining agreement restrict an individual employer from executing an agreement with the union on terms and conditions of employment.<sup>146</sup> Ceilings on wages and other uni-

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139. *Id.*; accord *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 716-17 n.19 (1981); *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 530-31 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

140. The coordinated approach stands much farther from being an agreement with a labor group as may be required for a nonstatutory exemption. Unlike the multi-employer unit approach, the coordinated employer agreement is not "preliminary" to a labor-nonlabor agreement on wages when the union has not agreed to negotiate with an employers' group.

141. Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 718 (1965).

142. See *Smith v. Pro-Football*, 420 F. Supp. 738, 742 (D. Mo. 1976) (refusing to extend exemption to arrangements imposed unilaterally by employers simply because the arrangements could be settled through mandatory collective bargaining; must become part of a collective bargaining agreement negotiated by a union in its own self-interest), *rev'd in part on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978).

143. 29 U.S.C. § 158(d) (1982).

144. *NLRB v. Southwestern Porcelain Steel Corp.*, 317 F.2d 527, 528 (10th Cir. 1963).

145. *Cf. Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 902 (5th Cir. 1974) (union will lose exemption from antitrust laws when it agrees to set wage scale with certain group of employers).

146. A union engaging in coordinated bargaining is likewise precluded from refusing to sign a contract embodying agreed terms and conditions of employment pending extension of the same contract terms to other bargaining units. See *Utility Workers Local 111*, 203

form conditions specified in a coordinated agreement restrict the freedom of individual employers to bargain with a union by binding the employers to the interests of other employers outside the bargaining unit. Moreover, the coordinated approach diminishes the union's freedom to bargain with the other employers.<sup>147</sup> In short, the inherent quality of coordinated bargaining to interfere with unencumbered bargaining between a single employer and union, coupled with the lack of recognized policy considerations favoring coordinated bargaining, strongly indicates that coordinated bargaining agreements would not receive an exemption from antitrust scrutiny.<sup>148</sup>

## 2. *Coordinated Bargaining Is Analogous to Impermissible Union-Employer Efforts to Impose Contract Terms upon Other Employers*

The legality of conduct under labor law does not necessarily validate the conduct under antitrust law.<sup>149</sup> Also, conduct that is improper under federal labor law may render an antitrust exemption unavailable. For example, if an agreement contravenes the National Labor Relations Act, the agreement may not be considered a mandatory subject of collective bargaining and, therefore, may not be eligible for an antitrust exemption.<sup>150</sup>

When an employer has a duty to bargain individually with a union because the union has objected to multi-employer bargaining, a coordinated bargaining agreement may be characterized as an attempt to impose wages and other terms upon nonunit employers.<sup>151</sup> Under this scenario, coordinated bargaining is akin to union-employer agreements within a bargaining unit that restrict terms available to employers in other bargaining units.

N.L.R.B. 230 (1973), *enforced sub nom.* NLRB v. Utility Workers, 490 F.2d 1383 (6th Cir. 1974); Standard Oil Co., 137 N.L.R.B. 690 (1962), *enforced*, 322 F.2d 40 (6th Cir. 1963).

147. See, e.g., Zimmerman v. National Football League, 632 F. Supp. 398, 406 (D.D.C. 1986) (labor exemption requires a bargained for, as opposed to unilaterally imposed, condition); Morse Bros., Inc. v. International Union of Operating Eng'rs, Local 701, 1974-2 Trade Cas. (CCH) ¶ 75,412, at 98,362 (D. Or. 1974) (union by agreement with multi-employer unit, gave up freedom to deal with individual employers).

148. *But cf.* Burbash & Wile, *supra* note 34, ¶ 11.03[2] (arguing that because coordinated bargaining arises in the course of collective bargaining, it should be protected by the nonstatutory exemption).

149. Morse Bros., Inc. v. International Union of Operating Eng'rs, 1974-2 Trade Cas. (CCH) ¶ 75,412, at 98,361 (D. Or. 1974); see Sun-Land Nurseries, Inc. v. Southern Cal. Dist. Council of Laborers, [Current] Trade Cas. (CCH) ¶ 67,180, at 63,071 (9th Cir. 1986).

150. Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980), *on remand*, 641 F.2d 90 (1981). In Feather v. United Mine Workers, 494 F. Supp. 701 (W.D. Pa. 1980), *aff'd in part, vacated, and rev'd in part on other grounds*, 711 F.2d 530 (3d Cir. 1983), however, the district court applied the exemption to an illegal labor practice when the agreement arose out of a mandatory subject of bargaining and the market restraint was reasonably necessary to accomplish the goal. *Id.* at 719.

151. See United Mine Workers v. Pennington, 381 U.S. 657, 665-66 (1965); see also Federal Maritime Comm'n v. Pacific Maritime Ass'n, 435 U.S. 40, 60 (1978) (collective bargaining agreement for nonmember use of dockworkers); Berman Enters., Inc. v. Local 333, United Marine Div., 644 F.2d 930, 936 (2d Cir.) (collective bargaining agreement clause requiring affiliates to operate under the contract), *cert. denied*, 454 U.S. 965 (1981).

Such agreements are impermissible.<sup>152</sup>

Just as an employer and union may not lawfully pressure other employers to accept certain contract terms, the antitrust laws appear to forbid a combination of employers from pressuring a union to accept the employers' common terms.<sup>153</sup> If the agreements involving the union are not exempt under the antitrust laws,<sup>154</sup> the absence of the union from coordinated bargaining agreements ensures that coordinated agreements would not be exempt. Similarly, when the purpose of a coordinated agreement extends beyond protecting area wages and working conditions towards other objectives, exemption will not be granted.<sup>155</sup> All exemptions from the antitrust laws, including the labor exemption, are narrowly construed.<sup>156</sup>

*D. Restraint of Trade Analysis of Coordinated Bargaining Agreements Under the Antitrust Laws Without Regard to Exemptions*

Should coordinated bargaining efforts not warrant the labor antitrust exemption, the general antitrust laws would apply just as though the agreements were outside the labor bargaining context,<sup>157</sup> and, under those laws, the mere combination of a union and nonlabor group is not prohibited.<sup>158</sup> Likewise, the mere fact that an agreement has some anticompetitive effects not flowing naturally from the elimination of competition over wages and working conditions does not lead automatically to invalidation of the agreement under the antitrust laws. An agreement must still be examined under traditional antitrust analysis to determine if it has a sufficiently anticompetitive effect to constitute an antitrust violation.<sup>159</sup> An agreement among employers will not violate the antitrust laws unless it has either the purpose or substantial effect of unreasonably restraining trade.<sup>160</sup>

An agreement among employers concerning wage costs and other terms that affect product price, outside the context of an exempt collective bargain-

152. See *Utility Workers Local 111*, 203 N.L.R.B. 230, 239 (1973), *enforced*, 490 F.2d 1383 (6th Cir. 1974).

153. In *James Julian, Inc. v. Raytheon Co.*, 593 F. Supp. 915 (D. Del. 1984), one defendant argued that two employers joined as "joint venturers" and therefore attained a legally sufficient collective bargaining nexus with the union, even though one of the employers was not in a collective bargaining relationship with the union. The court rejected this theory as a basis for protection from antitrust scrutiny. *Id.* at 925.

154. See *Ramsey v. United Mine Workers*, 401 U.S. 302, 313 (1971); *United Mine Workers v. Pennington*, 381 U.S. 657, 665 (1965).

155. *James Julian, Inc. v. Raytheon Co.*, 593 F. Supp. 915, 924 (D. Del. 1984).

156. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 229-30 (1979); *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11 (1976); *Pan Alaska Trucking v. International Bhd. of Teamsters*, 621 F. Supp. 800, 802 (D. Alaska 1985).

157. *Morse Bros., Inc. v. International Union of Operating Eng'rs*, 1974-2 Trade Cas. (CCH) ¶ 75,412, at 98,359-60 (D. Or. 1974).

158. *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 887 (7th Cir.), *cert. denied*, 459 U.S. 860 (1982); *Bodine Produce, Inc. v. United Farm Workers Org. Comm.*, 494 F.2d 541, 558 (9th Cir. 1974).

159. *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. Constr. Trades Council*, 670 F.2d 421, 426-27 (3d Cir.), *cert. denied*, 459 U.S. 916 (1982).

160. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 194, 303-04 (1977).

ing situation, would constitute price fixing.<sup>161</sup> Such an agreement may also be characterized as a concerted refusal to deal, as it embodies an agreement between two or more persons to do business with other individuals only on specified terms.<sup>162</sup> Nevertheless, since *Connell Construction Co. v. Plumbers & Steamfitters Local 100*<sup>163</sup> a restraint on the product market is permissible under the antitrust laws, if the restraint results from the elimination of competition on wages among employers.<sup>164</sup> A joint employer agreement to set ceilings on individual bargaining for acceptable wages, a likely element in a coordinated bargaining agreement, can be said to have no effect on the business market, a distinction made by the *Connell* court.<sup>165</sup> Accordingly, the Fifth Circuit in *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*<sup>166</sup> noted that in order for a restraint of trade to be actionable under the antitrust laws, the conduct must restrain commercial competition in the marketing of goods and services.<sup>167</sup> Without evidence of a conspiracy to restrain competition in the marketing of goods, a concerted refusal to deal with the union concerning wage rates and working conditions does not state an antitrust claim.<sup>168</sup>

Lockout agreements also come under antitrust scrutiny. As noted earlier, a practice that may be legal under the labor laws does not automatically receive immunity from the antitrust laws. A bare lockout agreement that could be condoned as simply an attempt to maintain a bargaining position with the union<sup>169</sup> may nonetheless be objectionable when the lockout decision is based solely upon the employers' agreement among themselves and not on an independent determination by each employer of its own needs and interests.

161. *Jacobi v. Bache & Co.*, 377 F. Supp. 86, 95 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231, 1236 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

162. *Mackey v. National Football League*, 543 F.2d 606, 618 (8th Cir. 1976) (citing Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531 (1958)); *see also Morse Bros., Inc. v. International Union of Operating Eng'rs*, 1974-2 Trade Cas. (CCH) ¶ 75,412, at 98,364 (D. Or. 1974) (refusal to deal resulted in anticompetitive effects).

163. 421 U.S. 616 (1975).

164. *Id.* at 622; *see supra* cases cited at note 90.

165. 421 U.S. at 622-23; *see also Newspaper Drivers & Handlers' Local 372 v. NLRB*, 404 F.2d 1159, 1162-63 (6th Cir. 1968) (agreement between employers to provide strikebreakers had no purpose or effect beyond the scope of the labor dispute; did not affect market prices or free competition), *cert. denied*, 395 U.S. 923 (1969).

166. 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

167. 690 F.2d at 532 (citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940)); *accord Berman Enters., Inc. v. Local 333, United Marine Div.*, 644 F.2d 930, 937 (2d Cir.), *cert. denied*, 454 U.S. 965 (1981); *Kennedy v. Long Island R.R.*, 319 F.2d 366, 372-73 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963).

168. It is true that a concerted refusal to deal with a union *may* result in a restraint on competition in the marketing of labor; it may have anticompetitive effects on wages and working conditions (as does the existence of a successful union itself). However, this anticompetitive effect is not enough without more to fulfill the requirements of the Sherman Act.

690 F.2d at 532 (emphasis added); *see also Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1006-07 (5th Cir. 1970) (antitrust claim dismissed; court found no conspiracy or combination although employer refused to bargain with union regarding employment conditions), *cert. dismissed*, 404 U.S. 801 (1971).

169. *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957).

In *Plumbers & Steamfitters Local 598 v. Morris*<sup>170</sup> a union challenged on antitrust grounds a lockout agreement among employers. The court held that no competitive relationship, for antitrust purposes, existed between the employers and the union.<sup>171</sup> Furthermore, the court held that the refusal to deal effected by the lockout was not the product of an anticompetitive motive.<sup>172</sup> Accordingly, the court rejected the lockout as evidence of an antitrust claim or injury. Indeed, the court affirmatively found that the objective of the lockout, to reduce labor's bargaining strength to bring the union in line with the employer's bargaining demands, was not an objective forbidden by the antitrust laws.<sup>173</sup>

When the anticompetitive effect of a combination does not reach beyond collective bargaining negotiations and associated labor relations, an antitrust claim cannot stand.<sup>174</sup> In *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*<sup>175</sup> the union complained of an employer's attempt to impede union organizing efforts. Finding that the employer's actions had no monopolistic effect upon competition in the goods and services marketplace, the court concluded that the union had no valid antitrust claim.<sup>176</sup>

In *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*,<sup>177</sup> the court held, consistent with *Amalgamated Clothing*, that unless a complainant can allege anticompetitive effects outside of the labor market, a bare claim of refusal to deal with the union will not state an antitrust claim.<sup>178</sup> Notably, in *Pratt-Farnsworth* the court found that the complaint alleged that the defendant

170. 1981-1 Trade Cas. (CCH) ¶ 63,989 (E.D. Wash. 1981).

171. Arms length bargaining with the use of strike and lockout for the purpose of requiring a term in a collective bargaining agreement does not upset the economic competitive balance and tension built into the Sherman Act. [citing *Pennington*] The natural competitive relationship between [the union and employer organization], directly connected to these organizations' "raison d'être", is not in the realm of commercial competition. Rather it is in the realm of pure economics—the historical struggle between management and labor with each attempting to maximize its own interests. The labor laws and not the antitrust laws regulate this struggle.

*Id.* at 76,156 (emphasis in original).

172. The court stated:

Assuming Plaintiff could prove an agreement, that agreement, Plaintiff maintains, was an "agreement in anticipation of and for the purpose of forcing" the union to accede to negotiating demands. *Both the object and effect of such an arrangement would be lawful under the Sherman Act.* . . . Plaintiff alleges the effect of the concerted activity was to halt construction work at Hanford. This, of course, is a necessary effect of a lockout. It is a tautology to assert that a lockout halted work and this is not an effect Congress prohibited by enacting the Sherman Act.

*Id.* at 76,155 (emphasis added).

173. *Id.*

174. *Amalgamated Meat Cutters v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979) (employer replaced striking union employees with personnel provided by wholesale food supplier); see also *Kennedy v. Long Island R.R.*, 319 F.2d 366 (2d Cir.), cert. denied, 375 U.S. 830 (1963) (employers' agreement for strike insurance plan alleged to have anticompetitive effect on labor market was not concern of the antitrust laws).

175. 475 F. Supp. 482 (S.D.N.Y. 1979), vacated as moot, 638 F.2d 7 (2d Cir. 1980).

176. 475 F. Supp. at 490.

177. 690 F.2d 489 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983).

178. 690 F.2d at 534.

employers not only refused to deal with the union, but also refused to deal with contractors who used union workers.<sup>179</sup> The defendants' alleged conduct toward the contractors constituted direct anticompetitive action, and, thus, supported an antitrust claim.<sup>180</sup> Even conceding that the purpose of the agreement was only to impose a restraint upon the labor market, which was legal, the court followed *Connell* and focused on the means by which the restraint was imposed.<sup>181</sup> Since the method used to restrain the labor market also restrained commercial competition, an antitrust violation existed.<sup>182</sup>

### III. CONCLUSION

In summary, a union-recognized and Board-regulated multi-employer collective bargaining unit is a deserving candidate for the benefits of the non-statutory exemption from antitrust scrutiny. To grant the exemption to the collective bargaining unit would be consistent with and in furtherance of national labor goals and policies; to deny the exemption would contravene these policies.

Yet even if the exemption applies, the nature of the agreement must be evaluated to ensure that its terms are intimately related to permissible bargaining subjects. As long as the agreement concerns mandatory subjects of bargaining, it likely will not lose the exemption. Under a sympathetic view, even a lockout agreement among members of a union-sanctioned employer bargaining unit could be viewed as a unified employer response to a threat by the union and a protective activity essential to maintaining the balance of bargaining strengths.

On the other hand, a coordinated combination of employers who are bound to bargain individually with the union will not likely receive nonstatutory exemption from antitrust liability absent union consent to the combination. Nevertheless, if a coordinated employers' agreement can be characterized as a combination restraining only collective bargaining for wages and other terms of employment, the uncertainty of the applicability of an exemption may be immaterial because the restraint itself may not state an actionable antitrust claim.

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179. *Id.* at 534-35.

180. *Id.* The court explained that the defendants' alleged conduct affected competition by reducing the number of jobs available for contractors who utilized union workers. *Id.* at 534.

181. *Id.* at 535.

182. *Id.*

