THE *ALLEN BRADLEY* DOCTRINE: AN ACCOMMODATION OF CONFLICTING POLICIES

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Recent developments indicate an increased concern on the part of the public, the legal profession, and law enforcement agencies in the antitrust prosecution of labor unions.[1] These developments again raise the question of what part, if any, the antitrust laws are to play in the regulation of labor relations.

Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers[2] is the landmark case on the scope of the application of antitrust laws to labor unions. Its doctrine is an accommodation of the conflicting policies of the antitrust laws, which discourage the growth of economic power among commercial interests, and the labor laws, which encourage the expansion of labor union economic power.

The labor exemption to the antitrust laws, allowing unions to undertake activities which would violate the antitrust laws if undertaken by employers, was the initial congressional accommodation of these conflicting policies.[3] *Allen Bradley* spotted a flaw in this accommodation, *i.e.*, the combination of employers with unions to use the labor exemption as a shield for management's illegitimate schemes. In formulating a theory to correct this defect, *Allen Bradley* and subsequent cases were faced with the problem of distinguishing between legitimate labor agreements which incidentally benefit some employers and situations in which the labor exemption is used by employers as a shield. Now, more than sixteen years after the *Allen Bradley* decision, there is still the widest possible disagreement on the meaning and applicability of its doctrine.

Accordingly, the main thrust of this Article will be an exploration of the content of the *Allen Bradley* doctrine—to harmonize what

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[1] The National Debate topic is *Resolved that Labor Organizations Should Be Under the Jurisdiction of Antitrust Legislation.* The Association of American Law Schools at its recent convention devoted one of its round tables to the subject, *Labor Unions and the Antitrust Laws.* The Antitrust Division has presently in litigation or prosecuted to judgment within the past year no less than eight cases involving unions, not to mention many cases brought by private parties and the Federal Trade Commission.

[2] 325 U.S. 797 (1945).

[3] See note 12 *infra* and accompanying text.

at first seem to be the conflicting pronouncements of the cases already decided and to extrapolate from those cases guidelines for the future development of the doctrine.

I. PRE-*Allen Bradley* HISTORY

From the point of view of labor unions, the period before the passage of the Norris-La Guardia Act may be looked upon as one long era of judicial anti-unionism. Common law doctrines were used to enjoin strikes and boycotts.[4] Attempts by state legislatures to limit these doctrines were often so narrowly interpreted as to leave the law unchanged.[5] The first federal antitrust legislation, the Sherman Act, was almost immediately applied to labor unions.[6] The Sherman Act cases were followed within a few years by the labor exemption provisions of the Clayton Act, but the exemptions were strictly interpreted, leaving unions still subject to antitrust prosecution in many important situations.[7] In 1930, however, Congress passed the Norris-La Guardia Act which broadly defined labor disputes, expanded the exemption, and repudiated much judge-made labor law.[8] The years following saw the large-scale growth of industrywide "international" unions.

The scope of the new labor exemption was considered in *Apex Hosiery Co. v. Leader*[9] and *United States v. Hutcheson*.[10] In the *Apex* case, the union activity had a substantial effect upon shipments in interstate commerce. Nevertheless, the Court held that not all restraints upon the flow of goods were covered by the Sherman Act; to be within the purview of that act a restraint must have a substantial effect upon the market forces which determine the competitive price of the goods involved.[11] Since the restraint imposed by the union was not of sufficient magnitude to affect the price of hosiery, there was no violation of the Sherman Act.

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4 See MATHEWS, LABOR RELATIONS AND THE LAW 635 (1954).

5 See, *e.g.*, Barr v. Essex Trades Council, 53 N.J. Eq. 101, 30 Atl. 881 (Ch. 1894); People *ex rel.* Gill v. Smith, 5 N.Y. Crim. 509 (Sup. Ct. Spec. Term 1887), *aff'd sub nom.* People *ex rel.* Gill v. Walsh, 6 N.Y. Crim. 292 (Sup. Ct. Gen. Term), *aff'd mem.*, 110 N.Y. 633, 17 N.E. 871 (1888); Brace Bros. v. Evans, 5 Pa. County Ct. 163 (1888).

6 Loewe v. Lawlor, 208 U.S. 274 (1908).

7 *E.g.*, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Alco Zande Co. v. Amalgamated Clothing Workers, 35 F.2d 203 (E.D. Pa. 1929).

8 Norris-La Guardia Act § 13(a), 47 Stat. 73 (1932), 29 U.S.C. § 113(a) (1958). See Note, 70 YALE L.J. 70, 73-76 (1960).

9 310 U.S. 469 (1940). The *Apex* opinion does not expressly overrule previous interpretations of the labor exemption provisions of the Clayton Act, but it does reflect the new attitude.

10 312 U.S. 219 (1941).

11 310 U.S. at 512-13.

The *Hutcheson* case involved a jurisdictional dispute in which the union resorted to strike, picketing, and secondary boycott. Although the decision might have been based on the *Apex* rule, the Court chose much broader grounds, stating the scope of the new labor exemption in the following terms:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 [Clayton Act] 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.[12]

Two subsequent per curiam opinions by the Court cast further light on this expansive reading of the labor exemption. In *United States v. International Hod Carriers Council*,[13] the union had attempted to force employers to refrain from using laborsaving devices; in *United States v. American Fed'n of Musicians*,[14] the union had, with the forced cooperation of certain radio stations, attempted to eliminate all music of nonunion musicians as well as all recorded and transcribed music from the airwaves. In both instances the dismissal of antitrust prosecutions was affirmed by the Supreme Court.

These cases established two basic principles. First, unions acting alone and in their own self-interest are not subject to antitrust prosecution, even if the restriction they impose has an important effect upon the volume and type of goods moving in commerce.[15] Second, unions, at least in some cases, can enlist the aid of business interests to further the interests of their membership.

II. THE *Allen Bradley* CASE

Allen Bradley was the first case to deal with the reference in *Hutcheson* to a union combining with nonlabor groups. The union signed agreements with electrical contractors obligating them to buy equipment only from local manufacturers under contract with the union. It also signed agreements with the electrical manufacturers re-

[12] 312 U.S. at 232.

[13] 313 U.S. 539, *affirming* United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill. 1941).

[14] 318 U.S. 741 (1943), *affirming* 47 F. Supp. 304 (N.D. Ill. 1942).

[15] The decision of the district court in *American Fed'n of Musicians* was based on the *Hutcheson* case and the opinion did not deny that there was a substantial restraint upon commerce. The *Hod Carriers* decision by the district court, based as it was on *Apex*, might seem to deny a substantial effect on commerce. Even by union admission, however, the volume of shipment of the devices into Chicago was reduced, and the case was decided on the basis of a demurrer to the government indictment which charged that the labor-saving devices in question had been eliminated from the Chicago market.

quiring them to deal only with union contractors. Gradually the system of bipartite agreements expanded into a tripartite conspiracy to control prices and insulate the market from outside competition.[16]

In considering the antitrust implications of this arrangement the Court found it necessary to reconcile two declared congressional policies:

> The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.[17]

The Court assumed that the union agreements with the manufacturers and contractors would have been unobjectionable standing alone. In this case, however, the collective agreements were part of a larger program in which the union, contractors, and manufacturers had conspired to monopolize business in the area. Under such circumstances the Court refused to apply the exemptions of the Clayton and Norris-La Guardia Acts,[18] reasoning that "if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves." [19]

III. Interpretations of the *Allen Bradley* Doctrine

Decisions since *Allen Bradley* have done little to clarify the import of the doctrine. Attorneys drawing up complaints under it have been encouraged to assert a broad range of allegations, and the facts are usually sufficiently ambiguous to prevent the dismissal of any of them. Presented with such a barrage of charges, the courts have usually failed to handle the problem with precision. Instead, the issue is generally posed so as to state the conclusion; the formulation in *Anderson-Friberg, Inc. v. Justin R. Clary & Son*[20] is typical:

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[16] 325 U.S. at 800.

[17] *Id.* at 806.

[18] *Id.* at 809.

[19] *Id.* at 810.

[20] 98 F. Supp. 75, 82 (S.D.N.Y. 1951). See also Jewel Tea Co. v. Local Union, 274 F.2d 217 (7th Cir. 1960); Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46, 55 (8th Cir. 1958); California Sportswear & Dress Ass'n, 54 F.T.C. 835 (1957). Most decisions under the doctrine were made prior to trial, purely on the basis of the allegations. See United States v. Employing Lathers Ass'n, 347 U.S. 198 (1954); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); United Bhd. of Carpenters v. United States, 331 U.S. 395 (1947); United States v. Hamilton Glass Co., 155 F. Supp. 878 (N.D. Ill. 1957). Even when the case went to trial, however, the results often failed to supply any precise criteria. See Adams Dairy Co. v. St.

> It would seem that immunity from injunctive action is dependent upon a factual determination. If there is conspiratorial action as proscribed by the *Allen Bradley* case, it would not be protected by the Norris-La Guardia or Clayton Acts. On the other hand, if it be found that the union was acting in its own self-interest and for the betterment of its members, free and independent of a combination with non-labor groups intent upon violating the anti-monopoly laws, it would be immunized against injunctive action.

The failure of the courts to delineate exact bases of decision has permitted advocates and commentators to adopt a wide variety of positions by selecting particular language from the opinions. Those who favor broad application of the antitrust laws to unions argue for an expansive reading of *Allen Bradley:* that once a union combines with business groups, it will be subject to antitrust prosecution. While two district court cases [21] lend support to this interpretation, the courts have generally rejected this contention either on the theory that there must be an employer benefit or because some undefined further element is required.[22]

A less extreme position is that an employer-union agreement is subject to prosecution on the same basis as an employer conspiracy

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Louis Dairy Co., *supra,* involving an allegation of conspiracy based upon an industry-wide agreement that set higher piece rates on St. Louis dairy routes delivering more than 40,000 units. Adams, the only dairy making deliveries of over 40,000 units, charged that the purpose of the wage rate was to eliminate his cut-rate business. The jury was charged that if the defendant dairies had signed the agreement without any understanding, tacit or expressed, that Adams' business was to be hurt thereby, there was no violation. The jury found for defendant dairy companies and union. The court's characterization of the significance of the verdict, 260 F.2d at 55, was: "Implicit in the jury's finding of no conspiracy among the appellees, is a determination that the union did not conspire with non-labor groups that, as a matter of fact the union acted alone in seeking legitimate labor objectives." This statement implies that the jury had determined that the union had never discussed its demands with business groups yet clearly it had at the bargaining table. *Id.* at 50-51. The point is that this kind of getting together is not categorized by the court as "conspiring," but why it is not is never made explicit. See text accompanying notes 40-47 *infra* for a possible explanation of the unenunciated reasoning behind the court's position in this and similar cases.

Actually, however, a case involving a jury verdict probably poses the least doctrinal confusion, since some decision as to what constitutes a violation must be made in presenting the matter to the jury. In most of the nonjury cases not only is it unclear why certain facts involve a violation, but it is not even clear which facts constitute a violation. A particularly clear illustration of how the judges' factfinding process may obviate the necessity for precise conclusions of law is United States v. Employing Plasterers Ass'n, *supra,* in which the facts as alleged involved a clear violation, but the facts as ultimately found involved clearly protected activity. See 347 U.S. at 188, 190; 138 F. Supp. 546 (N.D. Ill. 1956).

[21] United States v. Hamilton Glass Co., 155 F. Supp. 878 (N.D. Ill. 1957); United States v. Milk Drivers Union, 153 F. Supp. 803 (D. Minn. 1957). Note that even in these cases, although the opinions do not emphasize it, there was substantial benefit to the employers.

[22] See Greenstein v. National Shirt & Sportswear Ass'n, 178 F. Supp. 681 (S.D. N.Y. 1959), *appeal dismissed,* 274 F.2d 430 (2d Cir. 1960); Pevely Dairy Co. v. Milk Wagon Drivers Local, 174 F. Supp. 229 (E.D. Mo. 1959), *appeal dismissed,* 283 F.2d 519 (8th Cir. 1960); cases cited note 20 *supra.*

whenever some benefit to some or all of the employers can be found.[23] There are a number of ambiguous cases which may be interpreted to hold that while some employer benefit is necessary, even employer benefit incidental to maintaining union standards is enough to bring the case within *Allen Bradley*.[24]

The most extreme pro-union position propounded is that the *Allen Bradley* doctrine applies only when the employer instigates the conspiracy for his own benefit and the union merely "aids and abets" the business interest. While this interpretation ignores the facts of the *Allen Bradley* case,[25] it is supported by language in the opinion of the Supreme Court and that of the court of appeals on remand.[26] In *California Sportswear & Dress Ass'n*,[27] the hearing examiner interpreted the *Allen Bradley* opinion as indicating that the union was only ancillary to an employer conspiracy. Professor Cox states that since

[23] Attorneys connected with the Antitrust Division took this position in interviews I had with them in New York during the period August 1960-January 1961.

[24] Both Anderson-Friberg Inc. v. Justin R. Clary & Son, 98 F. Supp. 75 (S.D. N.Y. 1951), and United Bhd. of Carpenters v. United States, 330 U.S. 395 (1947), involved attempts to eliminate low wage competition, and seem to indicate that such restrictions may involve violations of the Sherman Act. The better interpretation, however, is that these cases were allowed to go to trial because the restrictions could have gone beyond merely eliminating low wage competition. Thus, the court in *Anderson-Friberg* stated that if the union was acting "free and independent of a combination with non-labor groups intent upon violating the anti-monopoly laws, it would be immunized against injunctive action." 98 F. Supp. at 82. An employer group could hardly be said to be "intent upon violating the anti-monopoly laws" if all it asked from the union was to be protected from competition based upon labor standards lower than those to which it was agreeing. A court of appeals opinion in the *Carpenters* case indicates that it was alleged that the restrictions were used to eliminate not merely low wage competition, but all competition from outside the San Francisco area. Lumber Products Ass'n v. United States, 144 F.2d 546, 548 (9th Cir. 1944). In Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters, 274 F.2d 217 (7th Cir.), *cert. denied*, 362 U.S. 936 (1960), the only employer benefit alleged was protection from a new technological technique for those who could not afford it, a benefit which probably could have been alleged in the *Hod Carriers* case, or in any case in which the union attempted to limit the introduction of new machinery in order to protect the jobs of its members. The court of appeals indicated, however, that at trial, a lower court might investigate the reasons for the restrictions. Perhaps this indicates that if the restriction is genuinely in the union interest and not a *quid pro quo* offered to the employers for other reasons, the case will be held to be outside *Allen Bradley*.

[25] In most of the cases in which a violative union-management conspiracy was found, it seems likely that the union was the instigator of the conspiracy. See Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797 (1945); United Bhd. of Carpenters v. United States, *supra* note 24; United States v. Employing Lathers Ass'n, 347 U.S. 198 (1954). The *Allen Bradley* case is strongest on this point since it states unequivocally that the union started the conspiracy. The other opinions might be interpreted as indicating that the jury might infer that the conspiracy was instigated by the employer.

[26] The Supreme Court in *Allen Bradley* posed the question as whether the unions had lost their immunity from antitrust prosecution by aiding and abetting a management conspiracy. Most of the opinion speaks in terms of preventing the use of the union exemption as a shield for management conspiracies. The court of appeals emphasized this language when it reviewed the district court opinion on remand, and criticized the district court for its excessive concern with who benefited from the conspiracy and for missing "the real thought which the Supreme Court expressed when it condemned the actions of the union in endeavoring to 'aid and abet business men who are violating the Act.'" 164 F.2d at 74.

[27] 54 F.T.C. 835, 839 (1957).

"a union does not violate the antitrust laws by negotiating parallel restrictive agreements with competing business firms . . . , an association of employers which bargains as a unit ought to have the same privilege . . . ." [28]

Another position which favors the unions is that *Allen Bradley* applies only where the conspiracy is concerned directly with price fixing and other product market controls. This theory is supported by the many references in the *Allen Bradley* opinion to the importance of direct price fixing and production controls.[29] Nor are subsequent cases inconsistent with this position.[30] A serious trouble with this criterion, however, is that the antitrust lawyer and the labor lawyer have very different conceptions of what constitutes price fixing.[31]

Probably the most restrictive interpretation of *Allen Bradley* supported by reasonable authority is that the doctrine applies only when the union is not acting in the interests of its members. This is a clear misunderstanding; the complex distinctions developed in that case would be unnecessary if the situation did not involve a "labor dispute" within the meaning of the Norris-La Guardia Act.[32] Many courts,

[28] Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 271 (1955). Cox cites for this statement Douds v. Local 28, Sheet Workers Ass'n, 101 F. Supp. 970 (E.D.N.Y. 1952) and Dodd, *The Supreme Court and Organized Labor*, 1941-1945, 58 HARV. L. REV. 1018, 1051 (1945). In neither of these sources, however, is the possibility of implying a conspiracy considered.

[29] In the *Allen Bradley* opinion there is at least one, and sometimes several references to price fixing and production control or elimination of competition on each page of the opinion from page 808 through page 811. 325 U.S. at 808-811.

[30] No union has been convicted under the *Allen Bradley* doctrine without an explicit mention of direct price fixing as one of the elements of the offense. See, *e.g.*, Local 175, Int'l Bhd. of Elec. Workers v. United States, 219 F.2d 431 (6th Cir. 1955), *cert. denied*, 349 U.S. 917 (1955); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

[31] The antitrust lawyer has come to regard price fixing as including not only a direct setting of price by agreement among competitors, but a host of less direct methods aimed at stabilizing prices. See, *e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936). Under such a view, even an attempt to stabilize wages might be regarded as price fixing. The label, therefore, does not solve the problem. See text accompanying notes 48-54 *infra* for a more sophisticated analysis.

[32] Section 13(c) of the Norris-La Guardia Act defines "labor dispute" in extremely broad terms, 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1958). Nevertheless, the courts have sometimes found it necessary to deny the protection of that act (and of the labor exemption to the antitrust laws) on the ground that there was no "labor dispute." The simplest case is where a group of employers, acting independently of the union, seeks to invoke the protection of the labor exemption. United States v. Women's Sportswear Ass'n, 336 U.S. 460 (1949) seems to be this kind of case, at least in the view of the Supreme Court. The problem becomes more difficult where one cannot so easily distinguish between a bona fide labor union and an association of entrepreneurs. *Compare* Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959) *and* NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) *and* Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940) *and* Aetna Freight Lines v. Clayton, 228 F.2d 384 (2d Cir. 1955), *cert. denied*, 351 U.S. 950 (1956) *and* Mitchell v. Gibbons, 172 F.2d 970 (8th Cir. 1949) (where the courts found a labor dispute), *with* Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942) *and* Ring v. Spiner, 148 F.2d 647 (2d Cir. 1945) *and* United States v. Fish

however, have posed the existence of a labor dispute as the alternative to *Allen Bradley*.[33]

Thus one can find in the language and the holdings of the cases interpreting the *Allen Bradley* doctrine support for almost any position. Not only do the cases fail to delineate the exact bases of decision in the close cases, but even the most extreme positions have strong support in the language of the opinions. The theories discussed, then, would seem to err in attempting to extract fine distinctions from these cases. The approach recommended here is to return to the policy conflict posed in the *Allen Bradley* case and attempt to isolate various significant criteria for distinguishing the cases in terms of the overall policies.

IV. THE *Allen Bradley* DOCTRINE: UNDERLYING POLICIES AND FACTORS CALLING FOR ITS APPLICATION

It has been indicated that the *Allen Bradley* doctrine is a refinement of the accommodation of policies made by exempting labor unions from the antitrust laws [34] and that this secondary accommodation was made to cover an obvious loophole whereby employers who cooperated with unions could use the labor exemption as a shield for their own schemes. In examining the principles behind the *Allen Bradley* doctrine, then, it is essential to keep in mind first that unions are exempt from the antitrust laws, and second, that the purpose of the *Allen Bradley* refinement is to prevent employers from availing themselves of the labor exemption.

Clearly, the doctrine must involve some employer benefit. Moreover, since almost all union activity benefits some employers, the bene-

Smokers Trade Council, 183 F. Supp. 227 (S.D.N.Y. 1960) (where they found none). The distinctions made are not very satisfying, and the problem requires a good deal of rethinking. The area, although important, is peripheral to our main interest, *i.e.*, limitations on acknowledged bona fide labor unions.

Another area of confusion is represented by Bakery Sales Drivers Local v. Wagshal, 333 U.S. 437 (1948) and American Fed'n of Musicians v. Stein, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954). In both cases the courts ruled that the Norris-La Guardia Act did not apply to the activities of an unquestionably bona fide labor union since there was no labor dispute. They implied that the union as an entity had no disagreement with the employers, but that certain leaders of the union were out to "get" the employers involved. This is never clearly stated, however, and the idea seems to conflict with the decision in Hunt v. Crumboch, 325 U.S. 821 (1945), in which a union was allowed to put a partnership out of business even though the union activity was the result of personal antagonism arising from the shooting of one of the union members. This undefined doctrine has great potential significance, since it could restore the era before Norris-La Guardia and *Hutcheson* when courts were free to pass upon union objectives. Since only two such cases could be found, however, and these are infrequently cited, their facts were probably extreme.

[33] See, *e.g.*, Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46, 55 (8th Cir. 1958); California Sportswear & Dress Ass'n, 54 F.T.C. 835 (1957). *But see* United States v. Milk Drivers Union, 153 F. Supp. 803 (D. Minn. 1957).

[34] See text accompanying notes 2-3 *supra*.

fits involved must be something more than the incidental employer benefit from normal trade union activity. In other words, the benefit must arise from the normal commercial interests of the employer, not from the fact of union organization.

Once an employer has been organized, he has a whole new congeries of interests arising out of the situation. He would like to see other employers organized, paying union wages, and complying with a union shop. If this kind of employer interest brought a case within the *Allen Bradley* doctrine, there would be little left of the labor exemption. The *Allen Bradley* type of situation involves more than incidental employer benefit; the union in pursuing its own goals may be expected to be seeking to assure employer cooperation by furthering the employers' monopolistic ambitions.

It should also be noted that the determination as to whether a particular case comes within the *Allen Bradley* doctrine must be made by examining the economic realities underlying the formal arrangements. A demand for higher wages may be a tool for enabling employers to circumvent the antitrust laws,[35] while apparent price fixing may upon examination be no more than a legitimate exercise of union power.[36] Interpretation of the *Allen Bradley* doctrine must be realistic and flexible in order to preserve the labor exemption without undermining the basic structure of the antitrust laws. Were courts to focus on form, unions and employers could circumvent the doctrine by having the union phrase its demands in terms of normal trade union goals; on the other hand, unions might be prevented from using the most effective method of seeking their legitimate goals in situations where the formal arrangements had the appearance of a per se violation.[37]

Although a good flexible rule cannot be expressed in terms of a fixed set of standards to be mechanically applied, certain criteria relevant to a decision under the *Allen Bradley* doctrine can be gleaned from the cases and the economic situations involved.

A. Economic Effects of the Conspiracy

While not every economic effect is sufficient to bring a union within the *Allen Bradley* doctrine, the *Allen Bradley* case itself indicated that certain economic results are indicative of the kind of con-

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[35] See Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (8th Cir. 1958).

[36] See California Sportswear & Dress Ass'n, 54 F.T.C. 835 (1957).

[37] See discussion of *California Sportswear* case, notes 51-53 *infra* and accompanying text.

spiracy which falls within the doctrine.[38] Subsequent cases suggest that a violation may be found if the action taken eliminates a particular unwanted competitor, provides a barrier to new entry, or substantially reduces the vigor of competition among the management groups involved. While in particular situations such economic effects may be no more than the by-products of legitimate union activity, without them there is lacking the element of employer benefit which is the first requisite to a finding of union action shielding management violation.

1. Elimination of Competitors and Establishment of Barriers to Entry

A barrier to entry can result as easily from legitimate trade union activity as from an attempt to shield employers in the exercise of monopoly power.[39] Unions eliminate competitors every day because of failure to meet union standards. In the *Musicians*[40] and *Hod Carriers*[41] cases, whole industries were shut out from certain markets by the elimination of labor saving devices. Nevertheless, when there is a genuine union interest involved, such effects do not bring the case within the *Allen Bradley* doctrine.[42]

When, however, the elimination of a competitor or the creation of a barrier to entry is the sole motive for the union's action—the alleged union interest being only a sham—courts will find an antitrust violation. In *Philadelphia Recording Co. v. Manufacturing Photo-Engravers Ass'n*,[43] the court granted an injunction, finding it perfectly clear that the union prevented plaintiff from doing night work, not because the union felt that this was in the interest of its members, but because of pressure from the employers' association. In *Anderson-Friberg, Inc. v. Justin R. Clary & Son*,[44] the union effectively excluded from the New York market Vermont fabricators whose wages and conditions of employment did not meet New York standards. The court ruled that the activity was protected if the union was doing it in

[38] The Court in *Allen Bradley* repeatedly stressed the price-fixing and production control aspects of the conspiracy. The Court noted that independent union action might have resulted in higher prices and individual refusals to deal without violating the antitrust laws. 325 U.S. at 809-11. The Court never stated, however, that independent union action directed to price fixing and production control would be legal. In any event, it would seem to be a fair interpretation of the opinion that price fixing and production control are at least indicative of a possible violation.

[39] For example, a union-established wage rate may pose a barrier to entry to employers who cannot afford to meet that wage.

[40] United States v. American Fed'n of Musicians, 47 F. Supp. 304 (N.D. Ill. 1942), *aff'd per curiam*, 318 U.S. 741 (1943).

[41] United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill.), *aff'd per curiam sub nom.* United States v. International Hod Carriers Council, 313 U.S. 539 (1941).

[42] In Hunt v. Crumboch, 325 U.S. 821 (1945), this principle was carried so far as to allow the union to eliminate an employer from competition because of personal animosity.

[43] 155 F.2d 799 (3d Cir. 1946).

[44] 98 F. Supp. 75 (S.D.N.Y. 1951).

the interest of its members, but was a violation if the union was merely helping a group of employers achieve monopoly power. Finally, in *Adams Dairy Co. v. St. Louis Dairy Co.*,[45] the court found a cause of action in an allegation that the union was demanding a new wage schedule solely to drive plaintiff out of business because his efficient methods were hurting the employer association; but the jury found for the union, presumably on the ground that the union was seeking the new wage schedule in the interest of its members.[46]

This category of violation must, of necessity, be kept extremely limited. Almost anything a union does can tend to hurt a competing employer or to bar entry by others. To find a violation whenever union activity has an economic effect of this sort might destroy the labor exemption. But to allow unions to help employers drive unwanted competitors out of the market would dangerously undermine the antitrust laws. The distinction between these two types of situations depends upon union intent. Since the *Allen Bradley* doctrine is an exception to a general legislative policy of exempting unions from the antitrust laws, courts should be slow to brand the stated union objective a "sham" or "pretext." [47]

2. Price Fixing

Price fixing by unions has been one of the major concerns of those who advocate greater restraint upon unions through application of the antitrust laws. Increased regulation of direct union control of prices in the product market has received widespread support.[48] The appeal of this formula, however, rests upon its deceptive simplicity. If the cases were reduced to specific fact situations, there no doubt would be wide disagreement as to the application of the formula to each.

To the antitrust lawyer price fixing means more than a direct agreement among competitors to charge the same price and might well include an attempt to standardize wages throughout an industry.[49] Clearly this is not the kind of "price fixing" which makes a union suspect under the *Allen Bradley* doctrine. A rise in wages and a

[45] 260 F.2d 46 (8th Cir. 1958).

[46] See note 20 *supra*.

[47] The small number of cases decided under this theory would seem to indicate that it has not been abused.

[48] See INDEPENDENT STUDY GROUP FOR THE COMMITTEE FOR ECONOMIC DEVELOPMENT, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY (1961). The Study Group suggests that further legislation is necessary to curb direct union control of prices and production but indicates that such legislation should not be within the framework of the antitrust laws. Considering the makeup of the Study Group, this suggestion tends to reinforce my own observations that the desire for further legislation concerning this problem has spread far beyond those persons who might be considered anti-union.

[49] See note 31 *supra*.

betterment of working conditions may occasion a rise in prices or a decrease in production, but the cases decided under *Allen Bradley* clearly state that some sort of direct and substantial employer benefit is necessary to a finding of violation.[50] These cases emphasize such overt aspects of employer conspiracy as price fixing, rigged bidding, and division of territory. These elements alone do not delineate the area of unprotected union activity but they are indicative of the kind of economic effect that courts look for to find a violation—the type of substantial elimination of competition that would result from an agreement among competitors to maintain a particular price or to refrain from competing with each other for orders.

A good illustration of this distinction is the *California Sportswear* case[51] which concerned protected activity very close to the line of violation. The case involved a collective bargaining agreement which required clothing manufacturers to pay for all contract work done, an amount sufficient to cover union wages plus a reasonable amount for overhead. Had the employers on their own joined in such an agreement, it would have been branded price fixing. Nevertheless, the opinion of the hearing examiner states categorically: "There is no evidence in the record to show that the provisions of the agreement relating to payment of contractors has resulted in any price fixing . . . ."[52] The opinion then analyzes the situation:

> The agreements provide for the payment to the contractor of a "reasonable amount" for his overhead. However, there is no agreement among the employer associations fixing this amount. On the contrary, the record establishes that the amount of such overhead is a matter for individual bargain-

[50] This conclusion is a result more of an examination of the facts and holdings of the cases than of the explicit language. In Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-04 (1940) (dictum), the Court stated that elimination by the union of competition among employers based on wages and working conditions did not violate the Sherman Act. Since then, however, this point seems more taken for granted than explicitly stated. Almost all of the cases decided under *Allen Bradley* involved a substantial disruption of commerce and a benefit to some employer group, yet the Court never found these elements alone sufficient to support a finding of violation. In United States v. American Fed'n of Musicians, 47 F. Supp. 304 (N.D. Ill. 1942), *aff'd per curiam*, 318 U.S. 741 (1943) and United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill.), *aff'd per curiam sub nom.* United States v. International Hod Carriers Council, 313 U.S. 539 (1941), whole industries were eliminated from competition in certain markets to the benefit of competitor employers, but the Supreme Court upheld findings of no violation. In Davis Pleating & Button Co. v. California Sportswear & Dress Ass'n, 145 F. Supp. 864 (S.D. Cal. 1956), the court found no employer benefit in the elimination of non-union contractors. In Anderson-Friberg, Inc. v. Justin R. Clary & Son, 98 F. Supp. 75 (S.D.N.Y. 1951), elimination of Vermont competitors and benefit to New York producers was obvious, yet the determination of violation turned upon whether the union was acting in its self-interest. See also discussion of California Sportswear & Dress Ass'n, 54 F.T.C. 835 (1957) notes 51-53 *infra* and accompanying text.

[51] 54 F.T.C. 835 (1957).

[52] *Id.* at 870.

> ing between each jobber or manufacturer and his contractors. Not only is there no evidence of any uniformity of price among contractors, but there is affirmative credible testimony that the prices charged by a given group of contractors producing the same style garment for the same jobber actually differ.[53]

This demonstrates that the courts look for price uniformity, not merely price rise, and decreased competition, not merely decreased production. These are results that employer groups would seek if they were to conspire without the union. Employer benefit under *Allen Bradley* is not merely a by-product of normal trade union objectives.

Even union-induced price uniformity may not, in all instances, be indicative of possible violation of the *Allen Bradley* doctrine. Price uniformity may result from legitimate trade union activity if the product market is oligopolistic. Also, certain prices may be so clearly related to wages that the union should have a right to control them to prevent the undermining of the union scale.

Companies in an oligopolistic industry tend in any case toward uniform price policy. If costs are standardized price uniformity becomes more likely. Since labor costs are an element of total cost, the imposition of uniform labor standards will reinforce this tendency. Were such an effect to subject the union to antitrust prosecution, collective bargaining would be a dead letter in oligopolistic industries. In such circumstances the union is not using its exemption to protect management interest but to protect its own interests. The fault, if any, lies in the market structure which allows only a few employers to dominate the industry.

It has been argued that certain prices are so closely related to wage rates that unions must be able to control them in order to control wages. There is some authority for allowing the union to control prices when the price is paid directly to an employee and reduction of the price is a means of undermining the union wage scale. In an illustrative case, the union was permitted to fix the rates paid for the rental of trucks driven by the owner because the trucker was in effect getting a rebate on the union wage scale by paying the owner-driver less rental for his truck.[54]

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[53] *Ibid.*

[54] Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959). The *Oliver* case involved state antitrust laws, rather than federal antitrust laws. The Court's reasoning that the collective bargaining agreement was obviously fixing wages, not prices, seems equally applicable to a case brought under the federal antitrust laws.

It has been argued that this principle should be extended to the price charged by the contractor in the garment trades. The justification for this position is the "auction block" system by which contractors who are primarily only suppliers of labor are played off against each other, indirectly driving down wage rates. See

B. Employer Participation

The *Allen Bradley* doctrine is concerned with the labor exemption being used to shelter employer violations from the antitrust laws. Therefore, the employer participation in a conspiracy found to violate the antitrust laws under the doctrine must itself amount to a violation independently. The employer activity must be of the kind that business interests would be likely to undertake in the absence of the union rather than mere cooperation with the union in the achievement of typical union goals.

1. Activity Amounting to a Violation

The employer activity in violation of the antitrust laws may be a conspiracy among several employers, either express or implied, or an attempt by a single firm to monopolize the product market with the aid of the union. The usual method of establishing a violation is to find an overt conspiracy among the employers. This was the situation in *Allen Bradley*—the employers had set up an elaborate price fixing mechanism which clearly would have been a violation absent union participation;[55] the same was true of the employer action in most of the cases based on *Allen Bradley*.[56]

The conspiracy among employers could be implicit as well as explicit, but no case has yet been brought on a conspiracy theory which

I.L.G.W.U. MONOGRAPH, THE OUTSIDE SYSTEM OF PRODUCTION IN THE WOMEN'S GARMENT INDUSTRY IN THE NEW YORK MARKET; Brief for Respondent Union, California Sportswear & Dress Ass'n, 54 F.T.C. 835 (1957). The inequities of the auction block system were recognized by a special committee appointed by the Governor of New York to study the problem. GOVERNOR'S ADVISORY COMMISSION, CLOAK, SUIT AND SKIRT INDUSTRY, NEW YORK CITY FINAL RECOMMENDATIONS (1926). The special position of the garment trade contractor has also been recognized in labor legislation. See National Labor Relations Act, 73 Stat. 543-44 (1959), 29 U.S.C.A. § 158(e) (Supp. 1962). So far, however, there has been no specific recognition of a union right to control contractor price, except in the limited circumstances of the *Oliver* case, *supra*, in which the payment was made directly to the employee who happened incidentally to be a contractor of equipment. See 358 U.S. at 293. The courts may well be justified in making an exception for the garment industries, but they should make clear that they are making an exception. Any such exception should not be allowed to obscure the basic distinction between price fixing and wage stabilization.

[55] "Quite obviously, this combination of businessmen has violated both §§ 1 and 2 of the Sherman Act, unless its conduct is immunized by the participation of the union." 325 U.S. at 800. (Footnote omitted.)

[56] In Local 175, Int'l Bhd. of Elec. Workers v. United States, 219 F.2d 431 (6th Cir.), *cert. denied*, 349 U.S. 917 (1955), and Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954), there were elaborate systems of rigged bidding. In Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (8th Cir. 1958), and in Philadelphia Recording Co. v. Manufacturing Photo-Engravers Ass'n, 155 F.2d 799 (3d Cir. 1946), there were charges that businessmen got together to drive a price cutter out of business. In Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters, 274 F.2d 217 (7th Cir.), *cert. denied*, 362 U.S. 936 (1960), it was charged that employers joined together to block a new and more efficient form of competition.

did not involve a number of employers openly acting through an association. At least one commentator [57] has taken the position that the employer conspiracy requisite to a finding of violation under *Allen Bradley* cannot be implied, but none of his reasons are persuasive. A conspiracy is "implied" only because the conspirators were careful enough not to leave any overt evidence; it is no less a conspiracy than an explicit one. Under *Allen Bradley* it is just as essential to protect antitrust policy against covert employer conspiracies hiding behind the labor exemption as it is to guard against open conspiracies using the same shield.[58]

Two recent cases [59] hold that the employer violation which the union aids and abets can be an attempt to monopolize under section 2 of the Sherman Act as well as a section 1 conspiracy. In both cases it was alleged that the unions made costly demands upon all employers except a favored few. In one case, the favored employers attained a considerable degree of monopoly power, and in both cases it was alleged that the business of the defendants had been considerably increased at the expense of the complainants. Extension of this doctrine to such cases is appropriate. It is just as important to prevent the use of the labor exemption to foster monopoly as to foster conspiracy.

2. Business Activity in the Absence of Union Organization

To justify application of the *Allen Bradley* doctrine the employer interest must also be such that the business participants would be likely to pursue absent the union. There must be more than the elimination of competition caused by ordinary union demands. Dictum to this effect in the *Apex* case [60] is supported by the findings of no violation

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[57] Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955).

[58] The corollary of this point is also true. The fact that agreement among employers is expressed does not mean that there is an employer conspiracy within the meaning of the *Allen Bradley* doctrine. Otherwise, all wage negotiations through an association would be illegal. Whether the courts will extend the doctrine of implied conspiracy as far in this area of the law as it has been extended in other areas is another problem. In Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939), the Court implied a conspiracy from individual agreements to participate in a plan with knowledge that competitors were agreeing to the same plan. The courts may be reluctant to extend such a theory to the area of labor relations, since this might result in branding industry-wide collective bargaining demands as illegal conspiracies. However, such an extension may be justified where the result of acceding to the demand is price fixing in the narrow sense in which we have defined it above.

[59] United States v. Bitz, 179 F. Supp. 80 (S.D.N.Y. 1959); United States v. Hamilton Glass Co., 155 F. Supp. 878 (N.D. Ill. 1957).

[60] 310 U.S. at 503-04. Actually the holding in *Apex* was based upon a finding that the union action involved had no effect at all on the market price of the goods being produced.

in the *Hod Carriers*[61] and *Musicians*[62] cases, in which competition was greatly reduced by the elimination of labor saving devices with the cooperation of employers. In a case involving agreements to deal only with unionized contractors, the court found no violation on the ground that the agreement afforded no benefit to the employers.[63] This could only have meant no benefit of the kind contemplated by the *Allen Bradley* doctrine, since many of the employers involved gained protection from low wage competition. Finally, in the *California Sportswear* case,[64] the FTC found that a scheme sponsored by the union and joined by employer groups that put a floor under prices was not illegal price fixing because it had no more economic effect than that usually incident to standardization of wages and working conditions.

In all of the above cases the activity would have amounted to a clear violation of the antitrust laws had the employers acted alone. With the labor exemption involved, however, something more was required. No violation was found because the economic effect was no more than that normally incident to standardization of wages and working conditions. It was not the kind of activity which the employers would have been likely to undertake in the absence of union organization.

C. Union Interest

It must be remembered that *Allen Bradley* was not a limitation upon union power as such. The doctrine was not designed to reopen the practice which the Supreme Court had ended with the *Hutcheson* case of judicial determination of the legitimacy of labor objectives. Labor unions, so long as they acted alone and in their own self-interest, were to be exempt from the application of the antitrust laws. Management groups, however, must not be permitted to use the labor exemption to evade prosecution for their own violations. In distinguishing between these two prototype situations, the courts look behind the verbal claims of union and management groups to determine what the parties are actually seeking to accomplish.

1. Union Interest a Pretext

It would seem clear that labor activity should not be protected from antitrust sanctions when the union interest alleged is merely a

[61] United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill.), *aff'd per curiam sub nom.*, United States v. International Hod Carriers Council, 313 U.S. 539 (1941).

[62] United States v. American Fed'n of Musicians, 47 F. Supp. 304 (N.D. Ill.), *aff'd per curiam*, 318 U.S. 741 (1943).

[63] Davis Pleating & Button Co. v. California Sportswear & Dress Ass'n, 145 F. Supp. 864 (S.D. Cal. 1956).

[64] 54 F.T.C. 835 (1957).

sham. The matter, however, is never so simple. Whatever the pretext given by the union for its action, there must have been some basic motive behind the action taken. If this motive did not somehow relate to the interests of the union members, there would be no "labor dispute," and the question could be decided without reference to the *Allen Bradley* doctrine.[65] Accordingly, whenever the *Allen Bradley* doctrine is invoked, the union must be attempting to protect the interests of its members in some manner which is forbidden. Judicial use of the terms "sham" and "pretext" to describe the union interest obscures the true decision that the union's methodology is unlawful.

2. Forbidden Methods of Achieving Union Goals

The interests which unions seek to protect in any labor dispute are usually much the same. Unions traditionally seek to better wages and working conditions and to protect the job security of their members. Not only is the pursuit of these interests protected, but the union can generally choose any method it wishes to achieve its goals. The union can seek to prevent the use of nonunion labor, to put nonunion employers out of business and to dispense with technological innovations which would reduce the number of employees needed. Under the *Allen Bradley* doctrine, however, certain methods of protecting the interests of union members are prohibited because they involve use of the labor exemption to protect management schemes that violate the antitrust laws. These prohibited means of furthering union interests may be characterized as *quid pro quo*, mixed objectives, and forbidden strategy.

In the *quid pro quo* situation, analytically the simplest of the three, the union makes an exchange with management; in return for some union benefit the union will help the employer gain control of the product market. Very often the employer would be unable to confer the desired union benefit without achieving some sort of monopoly power. The employer, for example, may be unable to pay a higher wage unless he can extract a higher price. But the *Allen Bradley* principle forbids the union to further the interests of its members by helping an employer group to gain monopoly power in a product market. The *quid pro quo* concept is illustrated by *Local 75, Int'l Bhd. of Elec. Workers v. United States*,[66] and *Las Vegas Merchant Plumbers v. United States*.[67] Both cases involved a non-competitive allocation of contracts and rigged bidding. Convictions of criminal

[65] See note 32 *supra*.

[66] 219 F.2d 431 (6th Cir.), *cert. denied*, 349 U.S. 917 (1955).

[67] 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

conspiracy were upheld without discussion of what benefit the unions expected, signifying that an employer's help to the union as a *quid pro quo* does not justify this kind of union-employer scheme. Similarly, in *United Bhd. of Carpenters v. United States*,[68] a cause of action was found in an allegation that the union had contracted to help the management association achieve a local monopoly in return for higher wages. The union in the *Allen Bradley* case provided the employers with both a sheltered market[69] and a scheme for price control within that market. The ultimate goal of the union in these cases was to help its members; otherwise there would have been no "labor dispute" and no *Allen Bradley* issue. The courts focused on the union's means which benefited the employer and ignored the end of furthering union interests. This implies that certain methods of helping union members are not to be protected; specifically, the union may not help the employer gain monopoly power in the product market notwithstanding concomitant satisfaction of union demands.

The mixed objectives situation is a variation of the *quid pro quo*. Here the union has deliberately chosen an illegal, in preference to an available legal, means to the union objective in order to confer an anti-competitive benefit upon the employer and thus insure his support. The *Allen Bradley* case is the best illustration. The Court recognized that the union might have achieved the same results through legitimate collective bargaining with each of the employers. Instead the union chose to enter an elaborate conspiracy that included price fixing machinery in order to make the total scheme more palatable to the employers. *Allen Bradley* held that a union may not offer inducements to management which are the sort of anti-competitive arrangements which the employers would be likely to seek on their own accord.

"Forbidden strategy" refers to achieving union goals by methods that have such inevitable anti-competitive efforts that unions are not free to choose them, even if they have no intention of aiding management. A union may, for example, seek to protect the job security of its members by limiting the entry of new firms into the industry. The argument for applying the *Allen Bradley* doctrine in these situations is that the employer benefits involved are precisely the kind which the employers would seek independently. However, such an application of the doctrine would interfere with union strategy in situations in which the union is not seeking to foster management interests. The courts have avoided decision of this issue by finding either that the union's real purpose is to benefit a group of employers or that there

[68] 330 U.S. 395 (1947).

[69] The term "sheltered market" is used in this Article to denote a local market in which local producers are protected from outside competition.

was no antitrust violation at all. Dictum in *Allen Bradley* indicates that the union might be able to seal off a market through parallel agreements with individual employers without violating the antitrust laws.[70] To date, however, no case has explicitly upheld the right of a union to exclude all new employers from a product market. Theoretically, the courts could decide either way, but the issue may be rendered moot by the enforcement of the secondary boycott provisions of the labor law.[71] Unions have traditionally achieved sheltered markets through secondary boycotts and hot cargo clauses. In the *Allen Bradley* case, the union was able to control the market by refusing to install any equipment not manufactured by its members.[72] In many other cases involving the doctrine, the union used its power over local contractors to exclude out-of-state equipment and supplies.[73] Under present labor law, however, a union may not coerce an employer to refuse the products of another nor even secure a binding voluntary agreement from him to use only union-made products in the future.[74] The employer may voluntarily agree not to use blacklisted products, but the *Allen Bradley* doctrine greatly limits the inducements which the union can offer. And although some employers are likely to respond voluntarily or through habit to the union's demand, generally this is not likely to be enough to achieve a sheltered market.[75]

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[70] 325 U.S. at 809.

[71] Sections 8(b)4B and 8(e) of the National Labor Relations Act, 73 Stat. 543-44, 29 U.S.C. § 158 (Supp. I, 1959). Here again, however, the garment trades constitute a special case since they are specifically exempted from these provisions. There is also a narrow exemption for the construction industry. The relation of these exemptions to the overall pattern of judicial abstention from the "forbidden objective" type of case is not clear. There is no developed doctrine of preemption, but there is a judicial reluctance to enter an area where the antitrust doctrine is of questionable applicability, if the problem can be handled adequately by the labor law. Nevertheless, it would be an obvious frustration of congressional intent in making these exemptions if the industries were thereby subjected to greater antitrust prosecutions.

[72] 325 U.S. at 799-800.

[73] See, *e.g.*, United Bhd. of Carpenters v. United States, 330 U.S. 395 (1947); United States v. Hamilton Glass Co., 155 F. Supp. 878 (N.D. Ill. 1957); Anderson-Friberg, Inc. v. Justin R. Clary & Son, 98 F. Supp. 75 (S.D.N.Y. 1951).

[74] Clearly, a union attempt to secure employer cooperation by offering price control as part of the overall scheme would invoke the *Allen Bradley* doctrine.

[75] It will be interesting to observe the developing application of labor law to this type of situation. National Labor Relations Board General Counsel Stuart Rothman has indicated that he intends to use section 8(e) in restraint of trade situations. NLRB Press Release No. R-823, December 4, 1961. This situation, however, is not the sheltered market situation discussed here, but rather an attempt by the union to limit the replacement of employees, by so-called independent contractors who serve the same economic function as employees. The better reasoning on the antitrust implications of this sort of case would seem to be that the union, in attempting to prevent the undermining of wages and conditions by hiring what are essentially low-wage employees, is engaging in protected activity. See Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940). *But cf.* United States v. Milk Drivers Union, 153 F. Supp. 803 (D. Minn. 1957). Of course if bona fide independent contractors were involved, there would be no labor dispute under the Norris-La Guardia Act, and the union would clearly be subject to

The concept of forbidden strategy would aggravate the problem of judicial regulation of labor relations through the antitrust laws. The union would be subject to prosecution, not because it sought to further its goals by assisting employers, but simply because the methods it chose inevitably led to monopoly. These methods have been strongly criticized even within the labor movement.[76] However, it is probably best that this sort of union activity should be regulated, if at all, through the labor law, rather than the antitrust laws, since management interests are only incidentally involved. The secondary boycott and hot cargo provisions of the labor law have already substantially retarded the use of these techniques to achieve union goals. As unions become more accustomed to these limitations in the labor law, they hopefully will abandon the sheltered market methodology of union activity.

V. Patterns of Antitrust Violation

The many factors to be considered in determining whether there has been a violation under *Allen Bradley* are interrelated. In terms of these factors, violations of the antitrust laws may be placed into one of two categories: first, instances in which the union helps an individual employer or a group of employers obtain some degree of control over the supply and/or price of a product in a particular market; and second, when the union aids an employer group by coercing or eliminating a particular competitor who is regarded as a trouble maker by the others.

The first of these two categories is exemplified by the *Allen Bradley* case and a number of cases decided under it. The type of benefit offered to the conspiring employers is a market sheltered from outside competition and yielding relative price uniformity among included competitors. The union may have regarded this as an essential *quid pro quo* for a union benefit, or it may have deliberately chosen a more

antitrust prosecution. See cases cited note 33 *supra*. In any event, the labor provisions would be applicable to the sheltered market situation, if the General Counsel should desire to attempt to correct this situation through the labor law. *But see* note 79 *infra* and accompanying text.

Section 8(e) provides only a very limited damage remedy, available only in the unusual case in which a secondary boycott is used to enforce a hot cargo provision. This limitation is probably not serious, however, since a study of the cases indicates that a demand for damages against a union under the antitrust laws is extremely rare, if not totally non-existent. The usual remedy sought is injunction.

[76] Usually these cases involve not merely an attempt to preserve union standards, but a scheme for preserving the jobs of the members of a local union—often at the expense of members of other unions or even members of other locals of the same international union—by securing a local monopoly for their employers. A number of union officials have indicated privately that they would not be unhappy at the elimination of this sort of practice, although they would prefer it to be accomplished by private action within the labor movement.

anti-competitive approach in preference to other possible means in order to secure the support of the employers involved. This pattern accounts for the great majority of violations found under *Allen Bradley*.

The second pattern is typified by such cases as the *Philadelphia Recording Co.* case.[77] The benefit to the employer is the elimination of an undesirable competitor, often a price cutter. There is no measurable effect upon prices or level of production, although the elimination of the price cutter may well forestall a general lowering of prices. The union is not directly interested in eliminating or coercing the particular competitor, but it does so either to maintain a good relationship with the other employers or to secure some particular benefit which the employers are willings to offer.

Although these two models are relatively simple to understand in theory, the problems of classification may be very great. The distinction between price fixing and standardization of wages and working conditions is relatively clear conceptually, but often the factual situations defy line-drawing. When prices are so closely related to wages that a union may control them[78] the analysis assumes another complex dimension. Similarly, the concept of a union helping a management group to eliminate an unwanted competitor is easy to state, but to distinguish between a conspiracy to eliminate a competitor and such elimination which occurs as the by-product of legitimate trade union activity may be extremely difficult in practice.

VI. Labor Law and Antitrust Law

It has already been suggested[79] that in some cases the more difficult doctrinal problems of applying the antitrust laws to labor unions might be solved by labor law. It may occur to some parties who attempt to extend this reasoning that section 8(b)(4) and 8(e) of the National Labor Relations Act have indeed rendered moot the whole issue of the *Allen Bradley* doctrine. Not only is this untrue, but the two sets of laws may well prove complementary; the labor law is primarily directed to situations in which cooperation is secured by the use of economic force, while the antitrust laws are primarily concerned with situations in which employer cooperation is secured by offering monopolistic inducements. Since these sections apply only when the union has to use strike or threat of strike in support of its goals, they would come into play when employers refuse to cooperate voluntarily in the scheme. The union may attempt to set up a sheltered market

[77] 155 F.2d 799 (3d Cir. 1946).

[78] See note 54 *supra* and accompanying text.

[79] See notes 71-76 *supra* and accompanying text.

in an area where the employers involved are so small, fragmented, and highly competitive that to the individual employer, the benefit from the overall scheme would be negligible. Or the union may be so strong that it would take all the monopoly profits for itself. In such cases, 8(b)(4) and 8(e) could hardly be said to preempt the area regulated by the antitrust laws, but rather would fill a gap where the application of those laws would be considered, at least highly questionable. True, these cases are extreme, but there are elements of them in any situation in which the union uses economic power to persuade employers to accept its scheme. Sections 8(b)(4) and 8(e) are primarily applicable to those elements of the overall scheme to which the *Allen Bradley* doctrine would not apply.

On the other hand, the *Allen Bradley* doctrine relates to situations in which employer cooperation is consensual. When an employer voluntarily agrees to stop trading with another employer, sections 8(b)(4) and 8(e) are inapplicable. Thus, if in the *Allen Bradley* case all local manufacturers had voluntarily agreed with all the local contractors, on urging of the union, that they would deal only with each other, these sections would be inapplicable to the scheme. True, in most situations there will usually be a few mavericks who will not go along. The law may well prefer, however, to destroy the entire scheme, including its voluntary elements, by invoking the antitrust laws through the *Allen Bradley* doctrine, rather than merely to chip away at the scheme by protecting those who choose not to cooperate.

VII. Conclusion

Allen Bradley is an attempt to resolve a problem which naturally occurs when one group is allowed to use economic power in a way forbidden to another group: how to prevent the group permitted to use the power from selling it to the other group. The problem is complicated in the *Allen Bradley*-type situation by the difficulty of distinguishing between the cases in which the union is seeking to help the employer, and those in which it is seeking only its own benefit; most union actions benefit some employers, and in most cases some justification can be found for union action in terms of labor objectives.

In previous attempts to define the *Allen Bradley* doctrine, courts, advocates, and commentators have adopted various interpretations. The courts have been preoccupied with highly conceptual formulations and have failed to state precise criteria applicable to particular fact situations. Advocates and commentators, on the other hand, have frequently attempted to apply these conceptual statements as if they were precise formulations of criteria. The resultant variation in

theories depends upon which particular language was chosen as most significant.

In place of this emphasis upon language, I have suggested both a different approach and a different set of solutions. The approach is to reexamine the nature of the accommodation made by *Allen Bradley* and then to judge specific fact situations, not in terms of judicial statements, but in terms of the nature and purpose of the *Allen Bradley* distinction. The problem of deciding cases under *Allen Bradley* thus becomes one of balancing the factors which I have categorized broadly as economic effect, employer participation, and union interest. Certain factors, such as price uniformity, are indicative of likely antitrust violation, and these factors often group themselves into patterns of violation. These patterns generally follow one of two models, either the sheltered market situation of the *Allen Bradley* case, or the elimination of a cut-rate competitor as in the *Philadelphia Recording Co.* case. Both models present their own problems. In the sheltered market situation the economic effects must be closely scrutinized to determine whether marginal competitors are being excluded by the imposition of labor union standards or whether employers are being sheltered from all competition. When a particular competitor is eliminated, union interest must be scrutinized to determine whether the elimination was only an accidental by-product of legitimate union activity.

This analysis does not solve all of the theoretical and practical problems. Nevertheless, it is hoped that this Article has established a useful framework for presenting and evaluating the varying points of view so that disagreements will no longer be voiced in terms of verbal formulations which ignore the policy bases of the *Allen Bradley* decision.