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THE ANTITRUST EXEMPTION OF LABOR UNIONS
CONSIDERED IN CONJUNCTION WITH UNFAIR
LABOR PRACTICES WHICH RESTRAIN
INTERSTATE COMMERCE

William H. Crabtree*

This article will discuss the antitrust exemption accorded labor unions. It will also relate the provisions of Federal law defining as unfair labor practices labor conduct which restrains interstate commerce.

DEVELOPMENT OF THE ANTITRUST EXEMPTION
ACCORDED LABOR UNIONS

The present antitrust exemption does not accord labor unions a blanket exemption for offenses committed under the Sherman Act. There is still a specified area in which unions can be held accountable.

Even before the enactment of the Clayton and Norris-LaGuardia Acts not all union activities which adversely affected commerce were subject to the restraint of the Sherman Act. Only those union activities resulting from a combination and conspiracy to restrain interstate commerce were prohibited by the Act. This elementary observation is made since many of the union strikes in the early period of the labor movement were for the purpose of organizing the workers in an entire industry and bringing them into the membership of the union. One of the essential features of those strikes was the attempt to eliminate the competition of non-union goods. This was often accomplished through the employment of a secondary consumer boycott, which frequently had the effect of restraining interstate commerce.

The earlier strikes of labor unions, taking the form of work stoppages until the employer accepted the union's demand for better wages and conditions of employment, clearly resulted in a stoppage of production. There is a doubt, absent a specific intent to restrain interstate commerce, whether this activity would violate the Sherman Act.

The Sherman Act was passed in 1890. In 1908 it fully applied to the activities of a labor organization in the famous *Danbury Hatters* case (*Loewe v. Lawler*).¹ The Supreme Court held that a combination of labor organizations and the members thereof to compel a manufacturer to unionize his shop through the employment of a boycott, which prevented the sale of his products in the other states, was a combination in restraint of commerce within the meaning of the act.

Congress as the result of this and other decisions was asked to

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¹ 208 U.S. 274 (1908).

exempt unions from the coverage of the antitrust laws. In 1914, six years after the *Danbury Hatters* decision, Congress passed the Clayton Act.

The Clayton Act amended the Sherman Act in three respects, which have been important to labor. First, the Clayton Act permitted private parties to secure injunctions against continued violations of the Sherman Act (many proceedings against labor unions have been based upon private injunction suits). Secondly, it purported in Section 20 to regulate the issuance of injunctions in labor cases. Thirdly, in Section 6 it appeared to state the position of organized labor under the Sherman Act (the labor of a human being is not a commodity or article of commerce).

Section 6 of the Clayton Act, although it was hailed as labor's Magna Carta, did little to shield union activities from the full prohibitions of the Sherman Act.² Section 6 did little more than give Congressional acknowledgment to the fact that labor unions by their existence and operation were not offenses under the Sherman Act. The same is true of a business concern which pursues a legitimate business objective. It is a combination but it is not an unlawful combination in restraint of trade.

Section 20 of the Clayton Act was intended in cases growing out of a labor dispute to "eliminate government by injunction."³ In no case be-

² Section 6 is now codified as 15 U.S.C. 17, which reads as follows:

Antitrust laws not applicable to labor organizations

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, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, Sec. 6, 38 STAT. 731.

³ Section 20 is now codified as 29 U.S.C. 52, which reads as follows:

Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether single or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 STAT. 738.

tween "an employer and employees, or between employers and employees...or between persons employed and persons seeking employment,...growing out of a [labor] dispute..." was the Court authorized to issue an injunction which prohibited "any person or persons...from terminating any relation of employment, or from ceasing to perform any work...or persuading others by peaceful means so to do..."

In 1921 the Supreme Court interpreted the Clayton Act in the case of *Duplex Printing Press Company v. Deering*.⁴ In this case the union employed a secondary boycott in an attempt to unionize complainant's factory. In conjunction with its strike efforts, the union brought pressure to bear on the manufacturer's customers. Through the employment of a secondary boycott the union interfered with the purchase and installation of complainant's printing presses in the other states.

The Supreme Court held that the Clayton Act was not intended to legalize a secondary boycott. The terms of the statute defining a labor dispute ("a dispute concerning terms and conditions of employment") was construed to confer the special privilege created by the statute only on those employees who were actually parties to the labor dispute. Thus, the statute was not broad enough to immunize participation in a secondary boycott in which the manufacturer's customers were threatened and warned not to purchase or install the articles of interstate commerce. Section 20, the Court stated, imposed "an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the antitrust laws, a restriction in the nature of a special privilege or immunity to a particular class. . . ."⁵ But this privilege, according to the Court's interpretation, extended only to the parties "affected in a proximate and substantial . . . sense by the cause of dispute."⁶

In 1927 the Supreme Court in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn. of North America*⁷ had before it a union restraint of trade in which union stonemasons refused to work on stone imported from out of state which had been quarried by non-union labor. This was an attempt to force building contractors to purchase only stone quarried by union labor. As an organizational "union tactic" this might appear to be a legitimate union objective—the elimination of competition from the non-unionized segment of the industry. However desirable the results might have been, the Court looked upon it as a strike "directed against the use of the product in other states with the immediate purpose and necessary effect of restraining future sales and shipments in interstate commerce. . . ."⁸

The Court relied upon the reasoning in *Coronado Coal Co. v. United Mine Workers*, wherein the Court stated:

The mere reduction in the supply of an article to be shipped in

⁴ 254 U.S. 443 (1921).

⁵ *Id.* at 471.

⁶ *Id.* at 472.

⁷ 274 U.S. 37 (1927).

⁸ *Id.* at 48.

interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be a restraint or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.⁹

This case might have been decided without reference to the Clayton Act. Its reasoning seems to stem from the proposition that a work stoppage, executed by a combination of employees, is illegal if the purpose is to restrain interstate commerce. Thus, work stoppages for higher wages and better conditions of employment, which are not intended to restrain interstate commerce, would probably be lawful after a repeal of the Clayton Act. The same would be true of a repeal of the Norris-LaGuardia Act.

Language to this effect is found in *Apex Hosiery Co. v. Leader*,¹⁰ decided in 1940 after the enactment of both the Clayton and the Norris-LaGuardia Acts. Therein the Court stated:

A second significant circumstance is that this Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services and finally this Court has refused to apply the Sherman Act in cases like the present in which local strikes conducted by illegal means in a production industry prevented interstate shipment of substantial amounts of the product but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way. (Citing cases).¹¹

The Clayton Act, within the strict employee-employer "labor dispute" interpretation of the *Duplex* case, gave labor a limited exemption from the antitrust laws. It did not give labor complete freedom to engage in almost every sort of strike or boycott activity that it deemed appropriate. Labor did not obtain its fullest degree of freedom until after the enactment of the Norris-LaGuardia Act in 1936 and Justice Frankfurter's decision in 1941 in *United States v. Hutcheson*.¹²

The Supreme Court's refusal to give a broad interpretation to the Clayton Act, plus the excessive use of injunctions in labor cases, prompted the passage of the Norris-LaGuardia Act in 1932. Section 4 (specified labor practices which are non-enjoinable) and Section 13 (a broader definition of a "labor dispute") were the sections of the Act which

⁹ *Ibid.*

¹⁰ 310 U.S. 469 (1940).

¹¹ *Id.* at 495-497.

¹² 312 U.S. 219 (1941).

all but gave labor *carte blanche* in waging economic warfare. Section 13¹³ gave a much broader definition to the term "labor dispute" than the definition contained in Section 20 of the Clayton Act. In this section Congress gave complete recognition to the "stranger" type of union activity, such as the secondary boycott prohibited in the *Duplex* case, by which labor could organize entire industries and establish uniform union standards.

Section 4 prohibits injunctive restraint of any of the "self-help" techniques growing out of a "labor dispute."¹⁴ The "self-help" activities which were thus immunized from injunctive restraint are:

- (1) Concerted refusals to work,
- (2) Joining or remaining in a union,
- (3) Supporting a union or strikers financially when the supporter

¹³ The definition of a "labor dispute" in Section 13 is now codified as 29 U.S.C. 113 (c) which reads as follows:

The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

Three years later in the Wagner Act, Congress gave a similar breadth to the definition of a "labor dispute." This is now contained in 29 U.S.C. 152 (9) which reads as follows:

The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

¹⁴ Section 4 is now codified as 29 U.S.C. 104 which reads as follows:

Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
- (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
- (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
- (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
- (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
- (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 STAT. 70.

- is interested in the labor dispute involved,
- (4) Lawfully aiding anyone interested in a labor dispute, who is party to a law suit,
 - (5) Publicizing a labor dispute and its details, "whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence"—a fairly comprehensive cover-all for picketing.
 - (6) Assembling peaceably to organize or promote labor disputes,
 - (7) Stating an intention to do any of the above things, and
 - (8) "Advising, urging, or otherwise causing or inducing without fraud or violence" the things detailed above, regardless of any antiunion promises.¹⁵

The full significance of labor's immunity from the antitrust laws after the enactment of the Norris-LaGuardia Act was at once apparent in the opinion of Justice Frankfurter in *United States v. Hutcheson*.¹⁶ While still a professor at Harvard Law School, Frankfurter reputedly prepared the draft of the bill which was later introduced by Senator Norris and Congressman LaGuardia.

It is interesting that the *Hutcheson* case also involved a boycott which was similar to the boycott employed in the *Duplex* case. In the *Hutcheson* case two unions, the Carpenters Union and the Mechanics Union, claimed the right to perform labor on a construction project for Anheuser Busch, Inc., in St. Louis, Missouri. The Carpenters Union called a strike, picketed Anheuser Busch and requested through circular letters and official publications that union members and their friends in other states refrain from buying Anheuser Busch beer.

The Supreme Court, speaking through Justice Frankfurter, held that Congress in passing the Norris-LaGuardia Act restored "the broad purpose which [it] thought it had formulated in the Clayton Act. . . ."¹⁷

This was accomplished by "infusing into [the Clayton Act] the immunized trade union activities as redefined by the [Norris-LaGuardia] Act."¹⁸ These redefined trade union activities were held to be legal, because Section 20 of the Clayton Act "removes all such allowable conduct from the taint of being 'a violation of any law of the United States,' including the Sherman Law."¹⁹ The Norris-LaGuardia Act, the opinion stated, "explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* . . . case, to an immediate employer-employee relation."²⁰

Thus, the result of the *Hutcheson* case was to make a large area of union activity, including activity previously declared illegal under the Sherman Act, lawful in addition to being non-enjoinable. This process of statutory construction (the Norris-LaGuardia Act had no provision similar to Section 20 of the Clayton Act declaring that the specified conduct

¹⁵ CHARLES O. GREGORY, *LABOR AND THE LAW*, 187 (2d revised ed. 1958).

¹⁶ 312 U.S. 219 (1941).

¹⁷ *Id.* at 236.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Id.* at 231.

was not to "be considered or held to be violations of any law of the United States") was characterized by Justice Roberts in his dissenting opinion as "a process of construction never, as I think, heretofore indulged by this court. . . ."²¹

In spite of the broad scope of the Huteson decision, labor unions today do not enjoy an absolute immunity from the antitrust laws.²² Labor's immunity does not extend to activities which are performed in concert or in combination with non-labor groups. This was clarified in 1945 in the case of *Allen Bradley Co. v. Union No. 3 International Brotherhood of Electrical Workers*.²³ In this case there was a combination and conspiracy between the electrical workers union and the electrical contractors and manufacturers in New York City which had the effect of controlling the sale and installation of all electrical equipment in the New York City area. The combination and conspiracy was perfected to a degree that all the electrical contractors agreed to purchase electrical equipment entirely from local manufacturers who hired members of the union. The manufacturers in turn agreed to confine their local sales to contractors who hired members of the union. In the words of the Court these agreements resulted in "industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control."²⁴

Thus, the Court held "Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."²⁵

In defining the area of permissive union activity, which becomes unlawful when conducted in combination with a non-labor group, the Court stated:

Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to agree to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and

²¹ *Id.* at 245.

²² In *Apex Hosiery Company v. Leader*, 310 U.S. 469 (1940), the Supreme Court held that strikers, who took possession of a hosiery factory during a protracted sit-down strike and prevented the shipment of finished hose in interstate commerce, did not violate the Sherman Act because there was no intent to restrain commerce. In this case, however, the Court pointed out that Congress, although repeatedly petitioned to exclude labor unions, "has passed no act purporting to exclude labor unions wholly from the operation of the Act. On the contrary, Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it." (310 U.S. at 487-488).

²³ 325 U.S. 797 (1945).

²⁴ *Id.* at 799-800.

²⁵ *Id.* at 808.

to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. *Apex Hosiery Co. v. Leader*, supra, 503. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.²⁶

Had the union not acted in combination with entrepreneurs, its conduct would have been lawful. The Court conceded that "the means adopted to contribute to the combination's purpose fall squarely within the 'specified acts' declared by § 20 [of the Clayton Act] not to be violations of federal law."²⁷

Thus, from an analysis of the decisions it can be stated that labor unions have been granted an immunity for participation in any of the "self-help" techniques outlined in either the Clayton Act or the Norris-LaGuardia Act, which grow out of a "labor dispute" (according to the Norris-LaGuardia definition of that term), provided the union acts in its own self-interest and not in combination with a non-labor group.²⁸

²⁶ *Id.* at 809.

²⁷ *Id.* at 807. In commenting upon the history which prompted passage of the Norris-LaGuardia Act, the Court stated:

"This Court later declined to interpret the Clayton Act as manifesting a congressional purpose wholly to exempt labor unions from the Sherman Act. *Duplex Co. v. Deering*, 254 U.S. 443 . . .; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U.S. 37. . . . In those cases labor unions had engaged in a secondary boycott; they had boycotted dealers, by whom the union members were not employed, because those dealers insisted on selling goods produced by the employers with whom the unions had an existing controversy over terms and conditions of employment. This Court held that the Clayton Act exempted labor union activities only insofar as those activities were directed against the employees' immediate employers and that controversies over the sale of goods by other dealers did not constitute 'labor disputes' within the meaning of the Clayton Act.

"Again the unions went to Congress. They protested against this Court's interpretation, repeating the arguments they had made against application of the Sherman Act to them. Congress adopted their viewpoint, at least in large part, and in order to escape the effect of the Duplex and Bedford decisions, passed the Norris-LaGuardia Act, 47 Stat. 70. . . . That Act greatly broadened the meaning this Court had attributed to the words 'labor dispute,' further restricted the use of injunctions in such a dispute, and emphasized the public importance under modern economic conditions of protecting the rights of employees to organize into unions and to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid and protection.' This congressional purpose found further expression in the Wagner Act, 49 Stat. 449. . . ." (325 U.S. at 805).

²⁸ In *Hunt v. Crumboch*, 325 U.S. 821, (1945), the Supreme Court upheld the right of a union to prohibit employment of its members by an interstate motor carrier for no reason other than the union had a grudge against the motor carrier, which was thereby forced out of business. In quoting from Frankfurter's decision in

This accords to the views of Judge Stanley N. Barnes, who while Assistant Attorney General in Charge of the Antitrust Division, stated that commercial restraints by unions may be subject to the antitrust laws:

[First, where the union engages in fraud or violence, and in the language of the *Apex* court, is intent on 'suppressing [commercial] competition, or fixing prices' of commercial products; second, where the union activity is not in the course of a 'labor dispute' within the meaning of Norris-LaGuardia (bearing on definition of this term, moreover, the recent *Hawaiian Tuna Packers* and *Columbia River Packers* cases suggest that courts may infer Congressional intent to cover those labor activities not sanctioned by Taft-Hartley which aim at direct commercial restraint); and finally, as *Allen-Bradley* indicates, antitrust may come into play where a union combines with some commercial restraint.²⁹

EFFECT OF THE WAGNER AND TAFT-HARTLEY ACTS

Labor's exemption from the antitrust laws apparently underwent no change as a result of the Wagner and Taft-Hartley Acts. However, with these acts, Congress adopted an administrative approach to the labor management problem.

Before passage of the Wagner Act in 1935, Congress had been content to remove judicial controls (injunctions) from labor management controversies. With the Wagner Act, however, Congress initiated administrative regulation of the employer by prohibiting employer interference with the organizational tactics of labor unions. Labor was in the period of its greatest organizational expansion. As previously explained, one of its most successful tactics was the suppression of competition from non-union made goods. This was often accomplished through the employment of a consumer boycott (secondary boycott), which restrained

the *Hutcheson* case, the Court stated: "Moreover, '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.'" (325 U.S. at 825).

This decision contained a violent dissent by Justice Jackson, who stated that the purpose of the union (carrying out a grudge) was "such as to remove the union's activities from the protection of the Clayton and Norris-LaGuardia Acts." (325 U.S. at 828). Jackson further stated, "with this decision, the labor movement has come a full circle. . . .

"Strikes aimed at compelling the employer to yield to union demands are not within the Sherman Act. Here the employer has yielded, and the union has achieved the end to which all legitimate union pressure is directed and limited. The union cannot consistently with the Sherman Act refuse to enjoy the fruits of its victory and deny peace terms to an employer who has unconditionally surrendered." (325 U.S. at 830-831).

²⁹ Reprint of statement of Judge Stanley N. Barnes before New York State Bar Association on January 26, 1956, in *L.A.B. L. J.*, March 1956, p. 136.

These views were substantially restated by Assistant Attorney General Victor R. Hansen on January 30, 1958, in an address before the New York State Bar Association.

interstate commerce and, until the enactment of the Norris-LaGuardia Act, was not immune under the Sherman Act.

With the Wagner Act, however, Congress abandoned its "hands off" attitude and actively intervened on the part of labor. This was accomplished by defining a series of "unfair labor practices", which were applicable only to employers—not to employees. Enforcement was placed with the National Labor Relations Board, an administrative agency. Largely because of this favorable legislation, plus the organizational activities of the CIO, industry-wide organization in the key industries was accomplished. This period of the labor movement is now mainly accomplished history.

Congress in 1947 passed the Taft-Hartley Act and revised the one-sided approach of the Wagner Act. This was accomplished by making the employer "unfair labor practices" applicable also to unions (in order to prevent union coercion of employees) and by defining a series of "unfair labor practices" specifically applicable to unions.³⁰ In addition, the Taft-Hartley Act contains an emergency injunction procedure, whereby a strike, which "imperils the national health and safety," can be restrained for a period of 80 days.³¹

One section of the Taft-Hartley Act [Section 8(b)(4)] prohibits union pressure against an employer *through his employees*, which is designed to influence the employer to stop dealing with or handling the products of a third party. It would appear that Congress intended to outlaw the secondary boycott.³² However, the Court subsequently in-

³⁰ Sections 7 and 8 of the National Labor Relations Act (Wagner Act) as amended by the Labor Management Relations Act (Taft-Hartley Act) contain these provisions. They are codified in 29 U.S.C. 157 and 158. These provisions have been amended further by Section 704, subsections (a), (b) and (c) of Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act).

³¹ 29 U.S.C. 178 *et seq.*

³² In discussing the legislative intent of the boycott provisions of the Taft-Hartley Act, "The report of the Attorney General's National Committee to study the Antitrust Laws" states:

"Against this background of possible avenues for antitrust suits, Congress in 1947 considered amendments to the National Labor Relations Act. The bill passed by the House, the Conference Committee Report notes, "contained a provision amending the Clayton Act so as to withdraw the exemption of labor organizations under the antitrust laws when such organization engaged in combination or conspiracy in restraint of commerce where one of the purposes or a necessary effect of the combination or conspiracy was to join or combine with any person to fix prices, allocate costs, restrict production, distribution, or competition, or impose restrictions or conditions, upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any unlawful concerted activity." Explaining omission of such provisions from the enacted Bill, the Conference Report continued: "Since the matters dealt with in this Section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement." The so-called boycott provisions provide in relevant part that "it shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . handle or work on any . . . materials . . . or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using . . . or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person . . ."

terpreted the so-called "boycott provisions" as not prohibiting the bringing of direct pressure against either the "secondary" employer or against employees individually. In effect, this interpretation permitted unions to continue the employment of boycott tactics and became known as the "secondary boycott loop hole" of Section 8(b)(4).

The Taft-Hartley Act also was ineffective in preventing "hot cargo" agreements between employers and the union and in preventing "recognition" or "organizational" picketing of employers already organized and under contract with a rival union.

LANDRUM-GRIFFIN AMENDMENTS

The Landrum-Griffin Act by defining additional "unfair labor practices" prohibits several union abuses which could have the effect of restraining interstate commerce. Section 704(a) of the Landrum-Griffin Act was intended to close the "secondary boycott loop hole" by clearly prohibiting the coercion of "secondary" employers or the individual inducing of employees to participate in a secondary boycott (ceasing to do business with the "primary" employer).³³ Section 704(b) of the Landrum-Griffin Act makes it an unfair labor practice for unions and employers (except in the construction and garment industries) to enter into "hot cargo" agreements.³⁴ In addition, Section 704(c) prohibits "organizational" or "recognition" picketing (a) where a rival union has already been lawfully recognized by the employer, (b) where a valid election has been held during the last twelve months, or (c) where, apart from the two foregoing circumstances, the picketing union has not filed an election petition within a reasonable time (not more than thirty days after the commencement of the picketing).³⁵

Although the Wagner, Taft-Hartley, and Landrum-Griffin Acts neither enlarged nor diminished the labor antitrust exemption, they are essential to any consideration of union activity which results in a restraint on interstate commerce.

First, the Wagner and Taft-Hartley Acts represent a departure from the philosophy of the Clayton and Norris-LaGuardia Acts (removal of injunctive controls over labor disputes) to a system of administrative regulation.

or "(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class. . . ." Moreover, it further provides that "Whoever shall be injured in his business or property by reason of any violation" of these provisions "may sue therefore . . . and shall recover the damages by him sustained and the cost of the suit." (Page 301).

³³ Section 704 (a) amends Section 8(b) (4) of the National Labor Relations Act, as amended.

³⁴ Section 704(b) adds subsection (e) to Section 8 of the National Labor Relations Act, as amended. Section 704(a) amends section 8(b) (4) (A), making it an unfair labor practice for a union to induce an individual or to threaten, coerce, or restrain an employer to enter into hot cargo agreements prohibited by section 8(e).

³⁵ Section 704(c) amends Section 8(b) (7) of the National Labor Relations Act, as amended.

Second, the provisions of the Wagner, Taft-Hartley and Landrum-Griffin Acts which define "unfair labor practices" growing out of a "labor dispute," practically speaking, now regulate the permissive area of union management strife.³⁵

Third, the Landrum-Griffin Act has extended the coverage of the Taft-Hartley Act (unfair labor practices) to prohibit some of the restraint-of-commerce union tactics which are exempt from the Sherman Act. Although these practices are still immune from the Sherman Act, they are now prohibited as "unfair labor practices."

RECENT DEVELOPMENTS

Recent cases involving combinations and conspiracies between unions and non-labor groups have not departed from the ground rules laid down in the *Allen Bradley* case. Two of these cases are pending review in the Supreme Court. In *Pennington v. United Mine Workers of America*,³⁷ the Sixth Circuit held that a conspiracy between the United Mine Workers and large coal operators to exclude small operators by increasing wages, plus stock ownership in the major companies by the union, was a violation of the Sherman Act. Similarly, in *Jewel Tea Company, Inc. v. Associated Food Retailers of Greater Chicago, Inc.*,³⁸ the Seventh Circuit held that a union-employer agreement restricting the marketing hours during which fresh meat could be sold was not an agreement pertaining to conditions of employment. Rather, it was an agreement designed to interfere with the operation of a retail business engaged in handling products in interstate commerce.

Under the Landrum-Griffin amendments, the Supreme Court has continued to consider the particular labor practice made illegal without regard to whether the conduct results in a restraint of interstate commerce. In *National Labor Relations Board v. Fruit and Vegetable Packers and Warehouse Local 760*,³⁹ the Supreme Court held that peaceful picketing at secondary sites (retail stores) for the purpose of persuading customers to cease buying products of the struck employers (fruit packers) was not a violation of the secondary boycott provision of the Act.

The Court interpreted the legislative history of the Act to show that Congress was not concerned "with consumer picketing beyond . . . the 'isolated evil' of its use to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer."⁴⁰ Rather than being concerned with the economic impact of union conduct, the Court was concerned with the specific conduct Con-

³⁵ The labor dispute definition of the Norris-LaGuardia Act was subsequently carried over into the Wagner Act. The Taft-Hartley Act narrowed to some extent the employees subject to the protection of the Act. (Supervisory employees were eliminated.)

³⁷ 325 F.2d 804 (6th Cir. 1963) Certiorari granted 377 U.S. 929, (1964).

³⁸ 331 F.2d 547 (7th Cir. 1964). Certiorari granted ____ U.S. ____, 33 LAW WEEK 3128.

³⁹ 377 U.S. 58 (1964).

⁴⁰ *Id.* at 68.

gress intended to outlaw.⁴¹

This case classically illustrates the difference in the antitrust or effect-on-commerce approach and the labor-management approach to union conduct.

CONCLUSION

Thus, the antitrust exemption which Congress bestowed by the Clayton and Norris-LaGuardia Acts, and which labor enjoyed to the fullest under the Wagner Act, has been limited by the Taft-Hartley and Landrum-Griffin Acts. This has been accomplished not by limiting the antitrust exemption, but by legislation defining and prohibiting specified unfair labor practices which Congress considered socially unacceptable.

⁴¹ Thus, in concluding, the Court stated, "While any diminution in Safeway's purchases of apples due to a drop in consumer demand might be said to be a result which causes respondent's picketing to fall literally within the statutory prohibition, 'it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of the makers.' (Citing cases.) When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." 377 U.S. at 71-72.