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Leonard L. Scheinholtz

Kenneth C. Kettering

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Exemption Under the Antitrust Laws for Joint Employer Activity

*Leonard L. Scheinholtz**
*Kenneth C. Kettering***

Mr. Gold has just finished a very lucid exposition of the current state of the law with regard to antitrust challenges to joint activities or agreements among *employees* acting alone — that is, not in concert with employers or other non-labor groups. I am going to talk about the mirror image of that topic — antitrust challenges to joint activities or agreements by *employers* acting alone and not in concert with employees. At the end of this talk, I shall also touch briefly on the recent *National Contractors Association v. National Electrical Contractors Association* case,¹ which considered an agreement between a set of employers and a union that has a special relationship to the integrity of multi-employer collective bargaining.

Preparing a talk on this subject is a little like preparing a talk on exobiology. Exobiology, as you may know, is the science of the biology of life that did not originate on Earth. Dozens of serious scientific papers on exobiology are printed every year. The problem is that exobiology is a science that does not really exist. Nobody has yet discovered any life that did not originate on Earth, and so all of those papers only try to guess at what it might look like if and when we do find some. In the same way, the law of antitrust as it pertains to joint employer activities *not* in concert with labor unions, as yet, hardly exists. Only a couple of dozen lower court cases have considered the subject thus far. Even the commentators have pretty much ignored it, except for a short section in Professor Areeda's fine antitrust treatise² and a couple of student notes.³

* Partner, Reed Smith Shaw & McClay, Pittsburgh, Pennsylvania.

** Associate, Reed Smith Shaw & McClay, Pittsburgh, Pennsylvania.

1. 678 F.2d 492 (4th Cir. 1982).

2. P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 229d, 338, 339 (1978).

3. Note, *Antitrust Law in the Labor-Management Context: The Employer as Defendant and the Union as Plaintiff*, 32 BAYLOR L. REV. 385 (1980); Note, *Cooperative Collective Bargaining Conduct Among Trade Competitors and The Nonstatutory Labor Exemp-*

Most of the familiar Supreme Court cases on labor-antitrust — *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*,⁴ *United Mine Workers v. Pennington*,⁵ *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*⁶ and *Connell Construction Co. v. Plumbers and Steamfitters Local 100*⁷ are distinguishable in a fundamental way. All involved an *agreement*, or an attempt to obtain an agreement, between a union and an employer or some other business enterprise. Each such agreement would have prejudiced the interests of some other firm. The perceived danger in each case was that the union and the agreeing firms could or did gang up in an illegitimate way against that other firm. The problem was that the union concededly had a monopoly in at least one limited area, the labor of the employees it represented, and so the court's task was to distinguish legitimate use of that monopoly power from illegitimate extension or use of that power.

That is not the case with regard to joint employer activity not in concert with a union. Without an agreement between a union and an employer, the danger of illegitimate extension or use of the monopoly power of a union is absent. The injured party will be the firms' employees, not another firm. The problem is not defining the limits of one type of collusion that is concededly legitimate in some spheres, but rather deciding whether this type of collusion is legitimate at all.

The closest analogy from among the Supreme Court's best known excursions into labor-antitrust may be its earliest, the *Apex Hosiery Co. v. Leader*⁸ and the *United States v. Hutcheson*⁹ cases, both of which analyzed the legality under the Sherman Act of joint employee activity not in concert with an employer — the mirror image of this situation. There too, the Court's main inquiry was whether joint action should be allowed at all; the Court did not simply draw lines around a concededly legitimate union monopoly. But this analogy is probably not a very helpful one, because the situation is not really symmetric for employers and employees.

All of the relevant labor laws — the Norris-LaGuardia Act,¹⁰ sec-

tion From Antitrust Liability, 9 RUT. CAM. L.J. 477 (1978).

4. 325 U.S. 797 (1945).

5. 381 U.S. 657 (1965).

6. 381 U.S. 676 (1965).

7. 421 U.S. 616 (1975).

8. 310 U.S. 469 (1940).

9. 312 U.S. 219 (1941).

10. 29 U.S.C. §§ 101-15 (1976).

tions 6 and 20 of the Clayton Act,¹¹ and the National Labor Relations Act (NLRA)¹² — were enacted for the benefit of employees, not employers. To be meaningful, those statutes require implication of antitrust immunity for broad classes of joint employee activity. But those statutes do not require immunity for joint employer activity, except where such an immunity necessarily derives from the exemption for employees — that is, except where such immunity is necessary to make effective the employees' immunity, or otherwise to make collective bargaining work.

This is not to say that the Supreme Court has never decided *any* labor-antitrust cases involving only joint employer activity. It has, twice, but not very much juice can be squeezed from those two cases. *Radovich v. National Football League*,¹³ decided in 1957, held that a football player blacklisted by the National Football League for breaking his contract had a cause of action against the league under sections 1 and 2 of the Sherman Act.¹⁴ In *Anderson v. Shipowners Association*,¹⁵ decided in 1926, the Court affirmed a judgment in favor of a seaman who challenged, under section 1 of the Sherman Act, a trade association's unilateral establishment of an employment registry and joint fixing of seamen's wages. In *Radovich*, however, the Court was mainly concerned with rejecting the extension of the baseball exemption to football; and it gave practically no analysis of the claim otherwise. In particular, the Court did not clarify the extent to which its decision depended on the fact that the employers were alleged to have conspired to restrict competition in the *product* market (the market for football exhibitions) as well as in the *labor* market (the market for football players' services).

In any case, the flood of antitrust litigation by players against professional sports leagues in the past ten years has established that a sports league is a single joint venture, not an association of competitors — a gloss that renders such cases of slight precedent for joint employer action between competitors. Furthermore, no union was on the scene in *Radovich*, and so the Court did not consider any possible exemption for concerted activities by employers in the context of labor-management relations. *Anderson*, though it may be good precedent today, was decided before the enactment of

11. 29 U.S.C. §§ 17, 52 (1976).

12. 29 U.S.C. §§ 151-69.

13. 352 U.S. 445 (1957).

14. 15 U.S.C. §§ 151-69 (1976 & Supp. IV 1980).

15. 272 U.S. 359 (1926).

the National Labor Relations Act and the Norris-LaGuardia Act and the creation of the labor exemption therefrom in the *Hutcheon* case.

We will soon get some important material to work with from the Supreme Court, however. On January 11, 1982, the Court granted certiorari in the *California State Council of Carpenters v. Associated General Contractors of California*¹⁶ case. For the first time the Court will have to consider whether there is antitrust immunity for joint employer activity against commercial firms outside the bargaining unit where there is an ultimate labor-related objective. Keep in mind, therefore, that what I say today may very well be obsolete in six months.

If I may return to my exobiology metaphor for a moment, consider that the scientific way of handling a new and difficult problem is to break it down to a simpler problem that we can analyze, and then gradually add more factors. That is the best way to approach this subject, because it breaks neatly into two categories.

The first category of joint employer activities, and the simplest to analyze, is that which takes place outside the collective bargaining context and which has nothing to do with the collective bargaining process. The purest example of this would be agreement among nonunion employers to fix or regulate wage rates, or an agreement fixing other terms and conditions of employment. Another example would be a concerted refusal to deal with certain employees or certain types of employees. Allegations of such concerted behavior have cropped up in many forms. For example, there have been challenges to the blacklisting of employees for alleged political reasons, for union activity, and even for commercial reasons, — e.g., where the blacklist is designed to prevent key employees from taking their expertise and contacts to another firm, or to punish individuals who threaten to blow the whistle on employers' joint antitrust violations or other illegal activity. Off to one side within the category of concerted refusals to deal, and probably *sui generis*, are the cases that have considered various professional sports league restrictions on players, such as ethical rules, reserve clauses, and player draft provisions.

There is a split in authority as to whether there is something special about the labor market, apart from consideration of collective bargaining, that would exempt such pure joint employer restraints in the labor market from the antitrust laws.

16. 648 F.2d 527 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 998 (1982).

Many cases dealing with joint employer activity where there is a union involved have applied an antitrust exemption on the broad ground that the antitrust laws apply only to restraints in a business market.¹⁷ Such cases are fond of quoting a passage from one of Professor Cox's articles on labor-antitrust: "No one seriously suggests that antitrust policy should be concerned with the labor market *per se*."¹⁸

On the other hand, cases dealing with joint employer activity affecting the labor market where no union is involved have generally denied any antitrust exemption to the employers.¹⁹ The activity may well be found to be legal, but not because it is exempt from scrutiny under the antitrust laws. Usually these cases state that the exemption for joint activity in the labor market extends only to joint employee activity, not joint employer activity.

The theory that the labor market is completely exempt from antitrust scrutiny has some merit. The first sentence of section 6 of the Clayton Act flatly says, "[T]he labor of a human being is not a commodity or article of commerce." It does not say that it is an article of commerce as to the employer but not the employee. Moreover, this theory finds support in the broad language of some of the Supreme Court's cases on labor-antitrust in other contexts. For example, in the *Apex Hosiery* case,²⁰ which involved an antitrust challenge by an employer to a union's sitdown strike and sabotage, the Court said without qualification: "[T]his 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*

17. See, e.g., *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America*, 431 F.2d 1004, 1007 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971); *Kennedy v. Long Island R.R.*, 319 F.2d 366, 372-73 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963); *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 482, 490 (S.D.N.Y. 1979), *appeal dismissed as moot*, 638 F.2d 7 (2d Cir. 1980).

18. *Cox, Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254 (1955).

19. See, e.g., *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970), *later opinion sub nom. Jacobi v. Bache & Co.*, 377 F. Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *Drayer v. Krasner*, 572 F.2d 348 (2d Cir.), *cert. denied*, 436 U.S. 948 (1978); *Attemose Constr. Co. v. Building & Constr. Trades Council*, 443 F. Supp. 492 (E.D. Pa. 1977); *Cesnick v. Chrysler Corp.*, 490 F. Supp. 859 (M.D. Tenn. 1980); *Nichols v. Spencer Int'l Press*, 371 F.2d 332 (7th Cir. 1967). See generally *Annot.*, 2 A.L.R. Fed. 839 (1969). But see *Taterka v. Wisconsin Tel. Co.*, 394 F. Supp. 862 (E.D. Wisc. 1975), *aff'd mem.*, 559 F.2d 1224 (7th Cir. 1977), *cert. denied*, 434 U.S. 924 (1977).

20. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

competition in the marketing of goods or services"²¹ Furthermore, there is support in the legislative history of the Clayton Act for this theory. There are several references in the floor debates, albeit rather general ones, to several legislators' views that the Act would apply to employers as well as to employees.²²

The opposing view, that the exemption for the labor market as such applies only to employees and not employers, can be supported from the very same kinds of sources, however. For example, although the first sentence of section 6 flatly excludes labor from "commerce," the second and much longer sentence deals exclusively and specifically with the rights of labor unions, and it is easy to read the first sentence as an attempt to summarize the second. *Apex* and the other Supreme Court cases containing broad language about the applicability of the antitrust laws only to commercial restraints were decided in contexts other than that of joint employer activity. Indeed, the *Anderson* case, which I mentioned at the beginning of this talk,²³ was decided after the enactment of the Clayton Act, yet held illegal a joint employer restraint in the product market. And of course, the Clayton Act and the Norris-LaGuardia Act were both passed primarily for the benefit of employees, not employers, and their legislative history is replete with statements of that purpose.

As I mentioned before, this is one of the issues the Supreme Court is faced with in *Associated General Contractors*.²⁴ The appellants' brief and several amici strongly argue the proposition that the labor market is per se exempt from the antitrust laws. The Solicitor General, who submitted a brief at the Court's behest, vigorously argues the contrary.

The second main category of joint employer activities—a step up in complexity — is that which takes place in the context of collective bargaining. The results of the cases are generally unsurprising, but it is not easy to extract coherent principles from them. At the risk of being more dogmatic than the cases may justify, I think that I can summarize where the law seems to be moving in six propositions.

First, for antitrust purposes, there is nothing special about the

21. *Id.* at 493.

22. *See, e.g.*, 51 CONG. REC. 14,333 (Aug. 27, 1914) (remarks of Sen. Thomas); 51 CONG. REC. 14,366 (Aug. 28, 1914) (remarks of Sen. Smith); 51 CONG. REC. 16,279 (Oct. 7, 1914) (remarks of Rep. Webb, floor manager).

23. *See supra* note 15 and accompanying text.

24. *See supra* note 16 and accompanying text.

labor market, at least as regards joint *employer* activity that is anti-competitive in that market. Even though section 6 of the Clayton Act, literally read, removes the labor market completely from the reach of the antitrust laws, that is probably not true. Section 6, as well as the Norris-LaGuardia Act and section 20 of the Clayton Act, only apply to *employee* combinations, not *employer* combinations. Employer combinations with regard to their employees, suppliers of labor, *prima facie* will probably be treated like combinations with regard to suppliers of any other commodity. As I have indicated, this is one of the primary issues before the Supreme Court in the *Associated General Contractors* case.

Second, the same basic principles that determine whether a supplier of goods to a firm has standing to challenge a particular restraint probably will be applied to determine whether an employee, a supplier of services, has standing to challenge that restraint. A loss of employment or potential employment or a reduction in wages probably will be held an injury to "business or property" within the meaning of section 4 of the Clayton Act. Some cases suggest, to the contrary, that an employee is not a victim of anti-trust injury unless his job is such that he bears some entrepreneurial risk, but that idea seems aberrational and probably will not survive. As with the first proposition, the *Associated General Contractors* case poses many of the issues associated with the second proposition, and we may get some definitive answers soon.

These first two propositions are sufficient to answer most anti-trust issues in any case arising outside of a collective bargaining context. The third proposition is that there is a limited exemption for joint employer activity that is within the *context of collective bargaining* and *limited to the labor market*. Its core application is the negotiation and execution of a collective bargaining agreement within a multi-employer bargaining unit. It is a purely derivative exemption, in the sense that it does not exist unless a *valid* union which is itself exempt from antitrust scrutiny is on the other side of the restrained labor market.

Fourth, the limits of this derivative exemption have never been precisely defined. It seems clear that whatever is necessary to make collective bargaining work is exempt. Although there are some aspects of the few decided cases that suggest narrower results,²⁵

25. See, e.g., *Kennedy v. Long Island R.R.*, 319 F.2d 366, 371 n.4 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963) (stresses that the strike insurance plan in issue is "purely defensive"); *Air Line Pilots Ass'n Int'l v. CAB*, 502 F.2d 453, 456 n.12 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) (strike insurance plan has no "coercive tendencies").

courts seem to have accepted what I consider to be the most sensible approach: they exempt any joint employer restraints in the labor market that are both (a) *no broader than the union on the other side of the labor market* and (b) *valid as a matter of labor law*.

Allowing employer restraints as broad as the union on the other side of the labor market makes sense because labor policy requires that the economic weapons available to employers should be equal in scope to those available to employees. Thus, it has been uniformly held that all employers negotiating with the same union and threatened by a whipsaw strike may jointly lock out employees represented by that union, even though the employers may not all be members of a multi-employer bargaining unit.²⁶

Although the cases dealing with the *terms* of union-employer agreements hold that such agreements may violate the antitrust laws even if they do not violate the labor laws,²⁷ no case of which I am aware suggests that joint employer *tactics* constituting restraints in the labor market in a collective bargaining context may violate the antitrust laws where they are valid under the labor laws. Distinguishing *terms* from *tactics* is sensible because union-employer agreements may directly injure third parties in an antitrust sense, but such tactics cannot.

Fifth, what happens to the exemption if the joint employer restraint constitutes an unfair labor practice is not completely clear, but again, this question may be answered by *Associated General Contractors*. Most cases to date have held that the labor laws displace the antitrust laws in this situation.²⁸ This displacement makes sense. Although such cases as *Connell*²⁹ and *Pennington*³⁰ held that union-employer agreements violating both the antitrust

26. *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981); *Newspaper Drivers & Handlers Local 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), cert. denied, 395 U.S. 923 (1969). See also *Amalgamated Meat Cutters & Butchers Workmen v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979).

27. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 376 (1965).

28. See, e.g., *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970), cert. dismissed, 404 U.S. 801 (1971); *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 511 F. Supp. 509 (E.D. La. 1981), aff'd in part, rev'd in part, 690 F.2d 489 (5th Cir. 1982); *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979), vacated as moot, 638 F.2d 7 (2d Cir. 1980). But see *California State Council of Carpenters v. Associated Gen. Contractors of Cal.*, 648 F.2d 527 (9th Cir. 1980), cert. granted, 102 S. Ct. 988 (1982). But see *infra* note 33.

29. *Connell Constr. Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975).

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

and labor laws are subject to sanctions under both statutes, that result should not apply here. The preemption argument is much stronger in cases involving joint employer activity against a union or employees — which is the core concern of the labor laws — than in challenges by a third party to employer-union combinations. The labor laws do have something to say about the latter situation, but only in some circumstances and only peripherally.

Lastly, none of the above applies to restraints in a *product* market rather than, or in addition to, the *labor* market. What happens if a particular restraint is a restraint *both* in a product market and in the labor market is not completely clear. This is one of the principle issues in *Associated General Contractors*. The most sensible result, in my opinion, and the one that seems most consistent with the cases, is that the exemption should apply to such a restraint if, but only if, it is affirmatively protected by those laws. An offensive or a defensive bargaining lockout would fall into that category, but a boycott of union-signatory subcontractors, for example, might not.

With this analysis in mind, let us turn to the issue of whether multi-employer bargaining lockouts are exempt from the application of the antitrust laws. The principles that govern this issue derive from the question of whether multi-employer bargaining itself violates the antitrust laws. The courts usually hold that there is nothing *per se* special about restraints by employers in the labor market,³¹ and so, unless some special exemption is created by the presence of a union, the antitrust laws would apply to multi-employer bargaining. If they did apply, it seems likely that multi-employer bargaining would violate them, because it is, in a sense, pricefixing.

Of course, no one believes that multi-employer bargaining violates the antitrust laws. On at least three occasions the Supreme Court has approved the general validity of multi-employer bargaining under the labor laws, and considered the validity of particular tactics. The *NLRB v. Truck Drivers Local 449, International Brotherhood of Teamsters (Buffalo Linen)*³² and *NLRB v. Brown*³³ cases allowed joint lockouts and temporary replacement of employees by employers within a multi-employer unit in defense to whip-saw strikes, and in *Charles D. Bonanno Linen Service v. NLRB*,³⁴

31. See *supra* note 19. But see *supra* note 17.

32. 353 U.S. 87 (1957).

33. 380 U.S. 278 (1965).

34. 102 S. Ct. 720 (1982).

decided in January of 1982, it held that a bargaining impasse does not justify an employer's unilateral withdrawal from a multi-employer unit. It is true that none of these cases involved an antitrust challenge to the employer's behavior, only a labor law challenge, but it is unthinkable that the courts would find antitrust liability to exist in these situations. In *Pennington*, the Court in dicta noted that "the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit";³⁵ in Justice Harlan's concurring opinion in *Volkswagenwerk v. Federal Maritime Commission*,³⁶ he deemed it "obvious that the employers are not violating the antitrust laws either when they confer about wage policy preparatory to bargaining or unless they sign an agreement";³⁷ and Justice Goldberg's dissent in *Jewel Tea* begins with a long hymn to multi-employer bargaining.³⁸ Hence it seems clear that an exemption of some kind exists.

The dimensions of that exemption are far from clear. It is not easy to deduce its proper scope, mainly because the theoretical justification for permitting multi-employer bargaining as a matter of labor law is not clear. The NLRA says next to nothing about multi-employer bargaining; indeed, it recognizes only "the employer unit, plant unit, or subdivision thereof."³⁹ However, multi-employer bargaining has always been allowed to take place and, in fact, predated the NLRA. As a matter of labor law, multi-employer bargaining is consensual in nature; it can take place only with the consent of all the participating employers and of the union. In general, it receives official recognition only backhandedly, through the National Labor Relations Board's refusal to permit employers or unions to withdraw from an established multi-employer bargaining structure once negotiations have begun.⁴⁰ Insofar as a rationale can be inferred, it seems that multi-employer bargaining is allowed primarily on a "countervailing power" theory—that it is only fair to allow management to present a united front to the union monopoly. This suggests that the scope of the antitrust immunity should

35. 381 U.S. at 664.

36. 390 U.S. 261 (1968).

37. *Id.* at 287 n.5 (Harlan, J., concurring).

38. 381 U.S. at 712-14 (Goldberg, J., dissenting).

39. National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1976). *Cf.* National Labor Relations Act § 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A) (1976). *See generally* Willborn, *A New Look at NLRB Policy on Multiemployer Bargaining*, 60 N.C.L. REV. 455 (1982).

40. *See* Willborn, *supra* note 39, at 463, 472-78.

be defined by a "countervailing power" theory as well. As Professor Areeda puts it, immunity should attach "regardless of the dimensions of the formal bargaining unit . . . for [any] employer combination that is no broader than the union."⁴¹ The results of the cases, if not always their reasoning, support this theory.

In the first place, it implies that the exemption only applies to employer restraints in the labor market, and only when there really is a union on the other side of the labor market. This point can be illustrated by two separate lines of cases. The first line consists of the cases which hold that employees and competing unions have a Sherman Act claim against an employer or employers who support or dominate a sham union.⁴² The second line consists of the sports-antitrust cases that suggest that player eligibility, draft, and reserve restraints adopted unilaterally by management before a union came into existence, restraints which themselves violate the antitrust laws, will not be immunized even if agreed to by a player's union unless the employers can show it was the product of arm's length bargaining with the union.⁴³ Although the justifications offered by the cases differ, the underlying idea seems to be that the employer's antitrust exemption is purely derivative, an instance of permissible countervailing power, and so there is no justification for the exemption if there is not any real monopoly power on the other side of the market to countervail.

In the second place, this "countervailing power" theory suggests that any multi-employer tactic allowable as a matter of labor law that restrains primarily the labor market will be exempt from anti-trust scrutiny. One such common tactic is the use of strike insurance. Strike insurance has a long history in the United States. At the turn of the century, trade associations promoted the creation of actual insurance companies specializing in strike insurance. There is no commercial insurance market for strike risks today. Nowadays, strike insurance normally takes the form of pooling arrangements among the members of a given industry whereby the participants agree to pay a subsidy to cover a portion of the losses

41. P. AREEDA & D. TURNER, *supra* note 2, at 200.

42. *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1162 (5th Cir. 1976); *Carpenters Dist. Council v. United Contractors Ass'n*, 484 F.2d 119 (6th Cir. 1973), *modified*, 539 F.2d 1092 (6th Cir. 1976); *International Ass'n of Heat & Frost Insulators & Asbestos Workers v. United Contractors Ass'n*, 483 F.2d 384 (3d Cir. 1973), *modified*, 494 F.2d 1353 (3d Cir. 1974).

43. *See, e.g., Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

of the strike firm or firms. One of the most bitterly fought strike insurance plans was the Mutual Aide Agreement among the major air carriers, entered into in 1958 and legislated out of existence by Congress in 1978; but while that agreement was upheld against labor law and antitrust attack before the Civil Aeronautics Board,⁴⁴ that antitrust ruling was never judicially reviewed. To my knowledge, the only judicial decision involving an antitrust challenge to a strike insurance pact was *Kennedy v. Long Island Railroad*,⁴⁵ in which the Second Circuit in 1963 upheld, under the Sherman Act and the Railway Labor Act,⁴⁶ an insurance pact among twenty-two railroads covering the fixed costs suffered by any one railroad during the course of a strike. On the antitrust point, the court relied completely on the theory that the labor market is always per se immune from antitrust scrutiny.⁴⁷ Regardless of whether one agrees with this theory, the result makes sense in terms of the more limited principles I discussed earlier.

Mutual lockout pacts are another common employer tactic that is similar in principle: the employers agree that if one of their number is struck by a union, the rest will lock that union out. Three cases have considered antitrust challenges to such pacts: *Clune v. Publisher's Association*,⁴⁸ decided by the Southern District of New York in 1963 and summarily affirmed by the Second Circuit, in which all the newspaper publishers in New York City suspended publication after the typographers' union announced a strike against only some of them; *Newspaper Drivers & Handlers Local 372 v. NLRB*,⁴⁹ decided by the Sixth Circuit in 1968, which invoked a similar situation in Detroit; and very recently, *Plumbers & Steamfitters Local 598 v. Morris*,⁵⁰ decided by the Eastern District of Washington in 1981, in which three mechanical contractors locked out the plumbers' union when, after a bargaining impasse, one contractor was struck. In all three cases the behavior was held exempt. None of these cases involved offensive lockouts, but nothing in their reasoning necessarily limits their applicability to whip-saw situations. Moreover, the cases have not distinguished between

44. See *Air Line Pilots Ass'n Int'l v. CAB*, 502 F.2d 453 (D.C. Cir. 1974), cert. denied, 420 U.S. 972 (1975).

45. 319 F.2d 366 (2d Cir.), cert. denied, 375 U.S. 830 (1963).

46. 15 U.S.C. §§ 1-7 (1976); 45 U.S.C. §§ 151-88 (1976 & Supp. IV 1980).

47. 319 F.2d at 372-73.

48. 214 F. Supp. 520 (S.D.N.Y.), aff'd mem., 314 F.2d 343 (2d Cir. 1963) (preliminary injunction denied).

49. 404 F.2d 1159 (6th Cir. 1968), cert. denied, 395 U.S. 923 (1969).

50. 511 F. Supp. 1298 (E.D. Wash. 1981).

joint action undertaken by employers who, although faced with the same union, are not members of a formal multi-employer unit. That was the situation in both the *Plumbers* and the *Newspaper Handlers* cases.

The hottest topic in this area involves antitrust attacks on employers' anti-union activities or other unfair labor practices. On a hasty reading, the cases seem to be fundamentally irreconcilable. The cases involving sham or employer-dominated unions uniformly permit antitrust attack.⁵¹ Other cases have considered antitrust challenges to alleged unfair labor practices in other contexts, and most of them apply an antitrust exemption. *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*,⁵² decided by the Fifth Circuit in 1970, rejected a challenge to an alleged conspiracy to refuse to deal with the union concerning wage rates and working conditions. *Amalgamated Clothing and Textile Workers Union v. J.P. Stevens & Co.*,⁵³ decided by the Southern District of New York in 1979, rejected an antitrust complaint by the Textile Workers' Union that recited every unfair labor practice that J.P. Stevens is alleged to have ever committed in its fight against unionization and averred that those activities had all been done in collusion with other textile manufacturers, trade associations and others. *Carpenters Local Union 1846 v. Pratt-Farnsworth, Inc.*,⁵⁴ decided by the Eastern District of Louisiana in 1981, rejected a complaint alleging that contractors' associations and their members conspired to restrain trade by use of "open shop" or "double-breasted" contractors. Contrary to the reasoning of these cases is the Ninth Circuit's decision in the *Associated General Contractors*⁵⁵ case which upheld part of a union complaint similar to that rejected in *Pratt-Farnsworth*.

Most of these cases make sense in terms of the analysis presented here. Although the sham union cases contain some language that could be read to lift the antitrust exemption entirely when an unfair labor practice is alleged, they are better read as limited to their facts, and later cases generally have so limited them. When there is no real union at all on the other side of the labor market, the "countervailing power" justification for the ex-

51. See *supra* note 42.

52. 431 F.2d 1004 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971).

53. 475 F. Supp. 482 (S.D.N.Y. 1979), *vacated as moot*, 638 F.2d 7 (2d Cir. 1980).

54. 511 F. Supp. 509 (E.D. La. 1981), *aff'd in part, rev'd in part*, 690 F.2d 489 (5th Cir. 1982).

55. 648 F.2d 527 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 998 (1982).

emption does not exist, and so the exemption should not apply, *regardless* of whether the practice is an unfair labor practice or not. The situation is different when there is a real union on the other side of the labor market.

Although *Connell*⁵⁶ and *Pennington*⁵⁷ held that union-employer agreements violating both the antitrust and labor laws were subject to both labor law and antitrust sanctions, that result should not apply to joint employer activity constituting an unfair labor practice that does *not* involve agreement with the union. Agreement with a union involves a danger of projecting the union's monopoly power in ways where the union has no legitimate interest; joint employer restraints in the labor market do not. The argument that the labor laws preempt the antitrust remedy is much stronger where the fight is only between an employer and its union, than in cases where the employer-union collusion is challenged by a third party. Although the labor laws do have something to say about the latter situation in some cases, as with hot cargo agreements, they exhaustively regulate the former situation.

Let us now consider the *Associated General Contractors* case.⁵⁸ Two District Councils and affiliated Local Unions brought suit against the Associated General Contractors of California, its member firms, and unidentified co-conspirators. The most important allegation of the complaint was that AGC and its members "coerced . . . owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with [the plaintiff Unions]."⁵⁹ That activity was alleged to have restrained trade in violation of section 1 of the Sherman Act. The Unions claimed treble damages under section 4 of the Clayton Act, but did not seek injunctive relief against the alleged coercive boycott. The district court dismissed this antitrust claim, but the Ninth Circuit, in a two-to-one decision, reversed on the ground that the foregoing allegation adequately charged a group boycott of union-signatory contractors. It is important to note that the complaint did not specify the type of coercion employed. The court of appeals rejected the contention that, on a motion to dismiss, it should consider the defendants' claim that the alleged coercive conduct consisted of nothing more than urging resistance to union demands for

56. 421 U.S. 616 (1975).

57. 381 U.S. 657 (1965).

58. 648 F.2d 527 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 998 (1982).

59. *Id.* at 531.

agreements that work be subcontracted only to union-signatory firms. It did so, however, on the ground that the claim was not a matter of record.

How should this case be resolved? I believe that it should be reversed on grounds that the Unions lack standing to recover treble damages. The parties directly injured by the alleged boycott are union subcontractors, but none of these firms is a party to this litigation. Employees should not have standing to challenge restraints in their employer's product market. Indeed the plaintiffs are not employees, but unions suing in their own right, and their interest is even less direct since it derives from dues paid to them by those employees.

If the Court reaches the merits and construes the complaint as alleging a group boycott of union subcontractors, as did the Ninth Circuit, that boycott is a direct restraint in the product market and probably will not be held exempt under the antitrust laws. Although some product restraints, such as lockouts, may be exempt because they are affirmatively protected under the labor laws, this type of alleged boycott does not fall into that category. One can only speculate as to what the outcome of this case might have been if the defendants had filed a motion for summary judgment rather than a motion to dismiss.

Now I would like to turn to the legality of dissemination of labor cost information. Dissemination of labor cost information can have an effect on two different markets. First, if the participating firms are in the same product market, such dissemination could have an effect on that market. Second, such dissemination could have an effect on the labor market. In the product market, the firms are sellers, and in the labor market, the firms are buyers. Most information-exchange cases have involved competing sellers, rather than buyers, but the underlying vice — pricefixing — is equally culpable whether buyers or sellers are fixing the price. Hence the same analysis will apply to both markets.

First, consider the possible effect of exchange of information about labor costs on the product market, with the firms in the role of sellers. Labor is usually only one of many inputs that go into a given product, and so information about a firm's costs usually gives no useful clue about the details of its product prices or output. When that is the case, such information cannot serve as an effective invitation to pricefixing or as a means of policing an interdependent pricing system. It is true that the cases have condemned exchanges of some kinds of information besides prices, but only

those that can have an equivalent anti-competitive effect if subject to agreement or interdependent behavior. Information about output or pricing formulas is obviously as sensitive as prices themselves in this sense.

It is possible that exchange of certain kinds of cost information could serve as an effective invitation to pricefixing. For instance, reports by individual firms of "average cost per product" would be a natural focal point for pricing, especially since such a figure is susceptible to padding and difficult to police. But a report of how much employees in each job category are being paid, even aggregated for each firm, would rarely have such a relationship to the firm's prices or outputs as to be able to convey much information on those subjects to its competitors. Furthermore, the Supreme Court in its *Maple Flooring Manufacturers Association v. United States* opinion,⁶⁰ specifically stated that "[t]he cost of production . . . [is a] legitimate subject of inquiry and knowledge in any industry."⁶¹ I do not believe there is any substantial danger of antitrust liability from this direction in any scheme of exchanging information about labor costs, no matter how detailed, even on a firm-by-firm basis. The exception would be in those cases where labor cost alone or together with other exchanged costs, bore a close relationship to price or output of the firm's products. In such cases, labor cost can be legitimately disseminated through a third party with the identity of the reporting firm withheld.

A more interesting question is the effect of exchange of labor cost information by firms in their role as buyers of labor — that is, the effect on the labor market. Where employers are unionized, their action in making wage surveys or exchanging wage information is undoubtedly exempt from the application of the antitrust laws because it is a necessary ancillary to effective collective bargaining. On the other hand, wage surveys by nonunion firms or exchanges of wage data by nonunion firms may not be entitled to the same exemption. They may be legal, but they are probably not exempt from the application of the antitrust laws. In any event, such wage surveys or exchanges of information should be done through third parties, with the identity of the responding employers masked or deleted.

What about surveys of executive compensation or exchanges of information on executive compensation? Under the current state

60. 268 U.S. 563 (1925).

61. *Id.* at 585.

of the law, there is probably no antitrust difficulty in such surveys or exchanges of information unless they are part of a broader scheme of fixing, or agreeing upon, executive compensation among competitors or have the effect of a stabilizing such compensation. Nevertheless, it is obviously safer to handle such surveys or exchanges of information through third parties, such as trade associations.

I would like to conclude this talk by discussing the very recent decision of the Fourth Circuit in the *National Electrical Contractors* case.⁶² The plaintiffs in that case were electrical contractors who were members of the National Contractors Association, a relatively small trade association. The defendants were the National Electrical Contractors Association (NECA), the largest trade association in the electrical contracting industry and the International Brotherhood of Electrical Workers (IBEW). The basis for the action was a provision in the national agreement between the IBEW and NECA which, as read by the court, required the IBEW to include an industry advancement fund clause in substantially *all* labor contracts the IBEW entered into in the electrical industry. The clause required all employers to contribute one percent of their gross labor payroll to a trust administered by NECA. Apart from going to defray NECA's costs of negotiating and administering the national agreement, the trust fund was used to cover any expenses the trustees deemed to be for "industry advancement [or] services rendered to the electrical contracting industry."⁶³ These expenses would include product advertising, lobbying, and industry relations with architects, builders, and owners.

However, neither the district court nor the Fourth Circuit inquired into the purpose or use of the fund, because both decided that this was pricefixing and illegal *per se* under the antitrust laws. The courts did not inquire into whether the industry advancement fund would have passed antitrust muster if contributions had been completely voluntary. Rather, they simply reasoned that, because non-NECA contractors who in the past did not have to bear the costs of industry advancement had a cost advantage over NECA members who did, an agreement that required them to pay into such a fund (and thereby removed from that competitive advantage) constituted pricefixing.

Because it characterized the agreement as pricefixing, the Fourth

62. 678 F.2d 492 (4th Cir. 1982).

63. *Id.* at 496.

Circuit decided that the purpose and effect of the agreement were irrelevant. The plaintiffs had demanded both treble damages and an injunction. The case was decided on a motion for summary judgment. The courts did not reach the issue of damages, but an injunction was issued restraining enforcement of that clause of the collective bargaining agreement and restraining any of the defendants from soliciting any contributions to the fund by nonmembers of NECA. The court of appeals modified the injunction slightly on appeal so that it would not restrain the IBEW from soliciting or demanding contributions to the fund if the IBEW did not act in combination with a nonlabor group.

The court was probably correct in the law it applied. The agreement has elements of pricefixing, in that it jointly sets certain costs, and of a horizontal boycott, in coercing competitors to agree. Under the Supreme Court's decision in *National Society of Professional Engineers v. United States*,⁶⁴ only improvement in competition can justify such horizontal restraints. Although the agreement prevents non-NECA contractors from getting a free ride on NECA's collective bargaining efforts, that is not a *competitive* justification, and so, if one takes the *Professional Engineers* case seriously, that justification is insufficient to validate the restraint.

The defendants' petition for rehearing *en banc* was denied by the Fourth Circuit on September 8, 1982.⁶⁵ I understand that they intend to seek review by the Supreme Court. If so, it behooves us to watch for the Supreme Court's disposition of the case.

64. 435 U.S. 679 (1978).

65. 689 F.2d 1199 (4th Cir. 1982).