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Explorations of the Justice Department into the Labor Exemption

*Abbott B. Lipsky, Jr.**

The basic structure of the labor/antitrust interface, as perceived by the Antitrust Division can be understood in the following way: Free market competition is the fundamental economic policy of the nation, and the antitrust laws are the statutory expression of that policy. There are various exceptions and exemptions from this policy — regions of economic activity that Congress has chosen to exempt from antitrust rules. Generally, where the actors in some segment of the economy have been exempted from the antitrust laws and from the pressures of competition, Congress has replaced those laws with some regulating force to protect the public from such anticompetitive abuses as the freedom from competitive pressures would otherwise allow. Examples of this pattern that come to mind are the recently repealed regulations of the civil aviation industry by the Civil Aeronautics Board and the recently relaxed regulations of the domestic trucking industry by the Interstate Commerce Commission. One finds another common characteristic of these forms of regulation: generally, the fundamental goal of regulation in those industries is to replicate the results of competition under circumstances where it is thought that competition itself is not feasible for that purpose. Labor is a field in which one finds a scheme of federal regulation replacing ordinary competitive rules, to some extent, but that does not share the goal of replicating the results of competition.

There was a day when one could look at section 6 of the Clayton Act,[1] which states that the labor of a human being is not a commodity, and argue on the basis of that language that while laborers may be permitted to collude in labor markets to some extent free

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1. 15 U.S.C. § 17 (1976).

from antitrust restrictions, i.e., to associate and agree to eliminate competition among themselves, the collusion is permissible only so long as those laborers do not exercise market power collectively. The collusion may not associate many workers, among many firms, in a wide geographic area. This would be somewhat akin to the arguments that were often made, and which are now resoundingly rejected, regarding the Capper-Volstead Act,[2] which is the basic antitrust exemption found in the agricultural field and, as are the antitrust exemption statutes affecting labor, a depression era statute. It provides that while the exemption may allow farmers to get together to cooperatively market their produce, the exemption might have been intended to permit associations as long as they do not acquire any substantial market power. In the labor field, what is now called the statutory exemption, might also have been read that way. It does not seem plausible to argue that it can be read that way anymore.

Laborers can get together to eliminate competition with respect to wages, hours, and working conditions. They can also get together with a group of laborers sufficiently large to possess and to exercise some market power over wages, hours, and working conditions.

We have a regulatory scheme under the Wagner Act,[3] administered by the NLRB, that is in some sense fundamentally inconsistent with the notion that the best policy is either to achieve competitive market results by having a competitive market, or to achieve competitive market results by using a regulatory scheme. At one extreme it is granted that laborers can get together and eliminate competition among themselves and still encounter antitrust problems even with a standard as generous as the statute has been interpreted to be. Ordinarily, one does not encounter those problems if only the laborers of one specific firm get together and bargain collectively with the individual employer, at least where that firm has no market power in the market in which it competes. It will be easy enough for the competitors of that firm (if there are such and if they are not subject to that same labor monopoly) to force the firm that must deal with a labor monopoly out of the market simply by competing on the basis of its lower wage rates, or its other inferior forms of compensation. It may not be sufficient to restrain output even if all the laborers in the particular industry

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2. 7 U.S.C. §§ 291-92 (1976 & Supp. V 1981).
3. 29 U.S.C. §§ 151-69 (1976 & Supp. IV 1980).

are in the same collective bargaining relationship with all the employers in that industry. It may instead be the case that in order to make that monopoly effective, the labor used to produce other productive inputs must be organized and brought within the realm of the agreement. There are two reasons for this. First, there are other productive inputs that can substitute for labor, and as long as the employer is free to turn to them the monopoly power of the laborers is inhibited in that respect. The second reason, of course, is that as the scope of this labor monopoly broadens and as it approaches more complete success, the forces impelling laborers to stay out of that combination may become well-nigh irresistible. The higher the monopoly wage, the greater the reward from using unorganized labor.

How do you get around those constraints? Perhaps a better question is, to what extent does the current law allow evasion of the constraints that exist on the ability of laborers to monopolize the market for their labor? One way of solving the problem of unionized firms competing with non-union firms is to allow the laborers to agree to not deal with those non-union firms. That clearly is an avenue toward successful labor monopolization that the courts have not permitted and will not permit. Except in particular industries recognized by Congress as posing specific, historically less tractable labor problems, the route toward labor monopolization must be through the regulated collective bargaining process, and not by the denial of options to laborers who have no opportunity to exercise their rights in that process. On the other hand, to say that the line is drawn, as it is sometimes described, on the basis that laborers cannot combine with non-labor groups or cannot combine with groups outside the collective bargaining process, seems clearly too facile. It seems to me that there are situations in which unions compel employers not to deal with certain types of competitors, as distinct from laborers, where, in effect, the combination is with a non-labor group.

There would be one easy way to allow the labor monopoly to go as far as it is economically capable of going, and that is to pass a law saying that if you are going to be in a specific industry, you can only use union labor. This would clearly afford the union a means of "cartelizing" the entire market. In fact, a union in such an industry might realize all the available monopoly profits in that market. But it seems, as a matter of legislative policy, the latter choice will not be made either. While our statutes seek to give labor something more than it would have in an unregulated competitive

market, they are careful to give something less than the entire monopoly profit extractable from any particular industry or group of industries.

So we must accept the fact that all truly definitive resolutions to the labor/antitrust conflict which involves economic forces underlying the labor/antitrust interface, have been rejected. On the other hand, we do have laws permitting laborers to combine and "cartelize" to some extent. At the other extreme, Congress has not yet been persuaded to pass a law saying participation in an industry requires the use of unionized labor. Given the equipoise of the contending forces, economic analysis would appear to have very little to say about where one is going to draw the line. It is an extremely embarrassing state of affairs for an Antitrust Division that purports to draw its legal distinctions on the basis of economic policy. You may have read about our position on resale price maintenance. For example, we have black-letter law that vertical price arrangements — the type of contract in which a manufacturer and his retailer agree on the price at which the manufacturer's product may be sold — are per se illegal. This rule is said to apply regardless of the manufacturers' lack of any market power. You may have heard that the current leadership of the Antitrust Division believes this rule is inappropriate because where one is supposed to be dealing with a law whose basic purpose is to remove restraints on competition, one should not condemn practices in circumstances in which they simply can not be anticompetitive, and indeed in which they might be procompetitive. In the case of most legal phenomena — perhaps I should say most of the real world phenomena faced by the Antitrust Division — it is possible to draw a legal distinction based on the underlying economic policy. So, for example, in our new merger guidelines, we say that a vertical merger, a merger between firms in a supplier/customer relationship, can be anticompetitive. And we say, with respect to the use of exclusive territories, that the practice can be anticompetitive in certain circumstances and, therefore, in those circumstances we will seek to enjoin it or prevent its use.

But in the labor field, once you cast yourself adrift between the two extremes I have described, i.e., once you accept some labor monopolization, but reject complete labor monopolization, and you approach that spectrum with a line-drawing apparatus, the outcome is dictated once you determine to favor competitive outcomes and to oppose monopoly outcomes. Because that is very much the perspective of the Antitrust Division, we tend to be pushed toward

that side of the spectrum closest to the competitive outcome, or as close as you can respectably get.

Because I have some very limited input into the process by which the Solicitor General submits the views of the United States to the Supreme Court in labor cases, I want to emphasize that the Antitrust Division is not the United States for these purposes. The General Counsel of the National Labor Relations Board and the Board itself have input into that process. The Department of Labor has input into that process. The theory is that the United States speaks with one voice and the spokesman is the Solicitor General. However, I like to think the more directly an antitrust issue is implicated the louder we are likely to shout, but if we are heard to any greater effect I do not know. Having said that there is no economic policy principle that will settle questions of labor exemption, and other questions arising at the labor/antitrust interface, I should also mention that economic policy is not the only thing that the Antitrust Division has in its bag of tricks. Referring to the various regulatory schemes I mentioned at the outset, there is a large body of law built up over the years as to what courts should do when they find themselves confronted with a regulated entity (an airline, trucking company, or a bank) accused of an antitrust violation for engaging in behavior that is arguably not in the competition/antitrust world, but is in the regulated industry world. Where Congress has seen fit to enact a law allowing the regulated party to engage in certain behavior without fear of antitrust liability, and where there is a so-called express immunity, there is no problem. Congress can exempt industries from the antitrust laws if it desires, and it has in fact done so on occasion. The courts generally respect such exemptions, although they are construed narrowly. The more difficult issue, of course, is where the behavior does not fall within the region expressly carved out from the antitrust rules by Congress, but where the activity seems to be so intimately related to the statutory function of the regulators and to the success of the regulatory program that Congress entrusted to the regulator, that to impose antitrust liability would appear inconsistent with what Congress intended when it established the regulatory scheme. The institutional interest of the Antitrust Division and, more fundamentally, the interest in efficient market allocation underlying the antitrust laws, would seek to confine that so-called implied immunity area to the minimum extent that the courts will reasonably allow. The test has been articulated as follows: antitrust laws will be regarded as displaced only where they

require behavior that is "plainly repugnant" to the regulatory scheme established by Congress, and even then only "to the minimum extent necessary" to allow the regulatory scheme to function in the basic way that Congress thought it would function.

Ordinarily, the test means that absent an express immunity, i.e., absent a statute specifying behavior that can be engaged in without fear of antitrust liability, conduct by a regulated entity that is anticompetitive must have been compelled by the regulatory authority before the immunity will be held to attach.

Connell Construction Co. v. Plumbers & Steamfitters Local 100[4] cast the Supreme Court into the role which I think under different circumstances might have been the role of the NLRB. The Court was asked to consider a labor practice that, if permitted, certainly would have allowed the labor interest some incremental monopoly power. The Supreme Court was essentially cast adrift in the vast middle ground to which I have been referring. It did not have a statute or an exemption that allowed it to give the complete monopoly to the labor interest. On the other hand, it had a statute that clearly did not permit it to condemn the labor monopoly simply because it possessed some degree of market power.

Searching for some bright line standard to use in judging the legality of the labor practice, the Court was forced to decide the issue of legality under the antitrust laws rather than under the labor laws. This gave rise to a very interesting and, I think, troublesome problem. If the only tool available to the Court for the purpose of condemning a specific form of labor-market behavior as an inappropriate balancing of labor and antitrust is a finding that the practice is an antitrust violation, then the following consequence ensues: you can go to jail for three years and pay $100,000 if you are an individual, or pay $1,000,000 if you are a corporation. If the Court says that the practice does not run afoul of the antitrust laws, the issue of remedy is avoided. However, the net result of *Connell* is that you fall over the abyss at the point where a violation occurs. The line the Court chose to draw in the spectrum is not a manifestly unreasonable one. I am not sure it is the one that should be drawn in all circumstances. Obviously there are people in this room who would have preferred it to have been drawn in one way or the other, but the Court in *Connell* seemed to be asking simply whether the challenged conduct occurred among parties to a legitimate collective bargaining agreement. This was not a mani-

4. 421 U.S. 616 (1975).

festly incredible thing for them to do, since they cannot be in the position of reconciling the subtle procompetitive and anticompetitive policies which are inevitably and inherently conflicting in every case. The lower courts would do nothing but settle labor/antitrust claims if the Court permitted this balancing. Instead, they found a bright line rule.

While this rule is not manifestly unworkable, the Court left us with the question: If you engage in behavior that *Connell* says the antitrust laws prohibit, does that mean you are going to go to jail and pay treble damages to antitrust plaintiffs?

Let me leave entirely the field of labor/antitrust for the moment and talk about another field. You may have heard recently about a Supreme Court decision in a case called *Community Communications Co. v. City of Boulder,*[5] which involved an allegation that a city, a municipality, did something anticompetitive in the process of awarding cable TV franchises. One of the cable TV franchise competitors, feeling somewhat done in, sued the city, alleging an antitrust violation on the part of the city. The case went to the Supreme Court on the issue of whether cities, as cities, had an immunity from the antitrust laws. The answer was "no."

This leaves us with exactly the same problem in the so-called state action area involved in *Boulder* that we have in the labor/antitrust area after *Connell.* While I doubt that criminal or treble damage liability would ever be imposed on a municipality performing proper municipal functions, a municipality must now worry about whether its actions are anticompetitive. It might not worry so much if the only result of doing something anticompetitive was to be enjoined from so doing. What really troubles the municipalities (and I have talked to some people from the National League of Cities and I can assure you they are very troubled) is that if a court decides that the city did something anticompetitive, and, therefore, violative of the Sherman Act, it may be liable for criminal penalties and treble damages.

The dissenting Justices in *Boulder* said exactly this to the majority, who replied: "Who said anything about treble damages or criminal liability?" This was treated by the majority as an entirely different issue, thus suggesting very strongly in that context the Court might be willing to find a way to say, with respect to some anticompetitive municipal action: first, you cannot do it; second, the antitrust laws are the reason you cannot do it; but third, no

5. 102 S. Ct. 835 (1982).

city is going to pay treble damages and no city official is going to go to jail.

How the Court is going to reach that result I do not know. I sense, though, that the same kind of tension exists in the labor/antitrust field. The Supreme Court has said: first, a labor practice is impermissible; second, the antitrust laws are the reason it is impermissible. However, the remedy presents the difficult step. If you are doing something that the antitrust laws say you should not do, you could go to jail or pay million-dollar fines or become liable for treble damages. Certainly much of the tension in the labor/antitrust field arises from precisely this problem. There seems to be something unsettling when there are two statutes, embodying at least potentially inconsistent standards of behavior, whose reconciliation has proven in concrete cases to be a somewhat complex undertaking. Further, the penalty for guessing incorrectly may include some very serious sanctions. One could regard that state of affairs as satisfactory if one took the view that the harm that results from stepping over the antitrust line is especially pernicious. If your real intention is to keep commercial behavior well away from that line, it may be appropriate to use the threat of criminal and treble damage liability to do so. But I sense that some of the discomfort expressed about *Connell* reflects a basic notion that this intention results in some unfairness where the suggestion implied from the labor statutes is that the elimination of competition over wages, hours, and working conditions is permissible. *Connell* presents some of the same problems as the dispute concerning whether rule of reason or per se rules will attach to antitrust decisions in the labor field following denial of a motion to dismiss on the grounds of exemption. This leads to the conclusion that it is permissible to sail out within fairly close range of the antitrust liability line, while on the other hand, the antitrust doctrine indicates that if you fall over that line it is a terribly long first step.