ANTITRUST LABOR PROBLEMS: LAW AND POLICY

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Interest in the applicability of the antitrust laws to certain activities of organized labor has been heightened by the current drive of the Department of Justice to eliminate unreasonable restraints of trade in the building industry, in which some of the indictments already returned have been against labor organizations and their leaders. A question, agitated from time to time ever since the Sherman Act was passed, is again being raised, namely, whether the Act applies to the activities of labor organizations at all and, if so, to what extent. The total exemption of labor unions from the application of the antitrust laws has been twice urged upon federal courts within recent months, in the Supreme Court of the United States in the *Chicago Milk* case,[1] and in the Circuit Court of Appeals for the Third Circuit in the *Apex Hosiery Company* case.[2]

In the *Chicago Milk* case, for example, the exemption was asserted by counsel in blanket and unqualified terms; its acceptance in the form urged would permit a labor union and its members acting either alone or in concert with others to engage in combinations and conspiracies in restraint of trade, even though unconnected with labor activities or purposes and, no matter how unreasonable, with complete immunity from prosecution under the antitrust laws.

Such a blanket exemption is negatived by the historical and legislative background of the Sherman and Clayton Acts, by their language, and by unequivocal judicial construction. Not even a dissenting opinion of the Supreme Court of the United States has ever intimated that such an exemption exists. And the case against the blanket exemption need not be based on a failure of proof; these same factors amply and affirmatively demonstrate that labor unions must use their collective power within the limits marked out by labor law, and with due regard for the public interests expressed in other contemporaneous legislation.

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[1] U. S. v. The Borden Co., 60 Sup. Ct. 182, decided Dec. 4, 1939, reversing a judgment sustaining a demurrer to the indictment, 28 F. Supp. 177 (N. D. Ill. 1939). The question of the Act's applicability to the labor union defendants was held not to be before the Court on the appeal.

[2] Leader v. Apex Hosiery Co., 108 F. (2d) 71, decided Nov. 29, 1939.

I

Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.[3]

Apart from Section 2, dealing with monopolies, and apart from enforcement provisions, the quoted language *is* the Sherman Act in its original form. This language is unambiguous and unqualified and read literally it includes *every* combination and conspiracy in restraint of trade, whether engaged in by labor organizations or others.

Those who contend that the Act grants immunity to labor rest their case chiefly upon its legislative history. It is impossible here to examine the question of the weight to be accorded the debates and committee reports in the interpretation of a given statute, but certainly the two-year's history of the Sherman Act does not point convincingly in support of the immunity claim. Scholars examining that history have reached conflicting conclusions.[4] It is my opinion that the contention that labor should be subject to the Act is the more persuasive. In the debate in the Senate it was argued that the bill, if enacted, would be employed to oppress labor and agricultural organizations, and Senator Sherman offered a proviso exempting the activities of such organizations from the Act. Senator Edmunds attacked this proviso on the floor of the Senate. The bill was then referred to the Judiciary Committee of which Senator Edmunds was chairman. The language of the bill was materially altered by the Committee, and no proviso exempting labor was included. Senator Edmunds, who had vehemently opposed the exemption, professed himself satisfied, and no reference to the labor problem appears in the subsequent debates in either Senate or House.

It has been argued that the elimination of the proviso clearly indicates that Senator Edmunds' view prevailed. If so, why did not the protagonists of labor voice objection to it? On the other hand, it is contended that the revised bill, by restricting the Act's applicability exclusively to business combinations, made specific exemption of labor unnecessary. But the latter explanation begs the question in issue and leaves Senator Edmunds' acquiescence unaccounted for. A solution which will explain the reconciliation of the conflicting senatorial positions is that, while the revised bill was

[3] 26 STAT. 209 (1890), 15 U. S. C. §§1-7.

[4] For a statement of the position that the Act was intended to apply to labor, see MASON, ORGANIZED LABOR AND THE LAW (1925) cc. VII, VIII. For the opposing view, see BERMAN, LABOR AND THE SHERMAN ACT (1930) pt. I.

A view that the Sherman Act was intended to apply to a very limited range of labor activities, if any, is developed in a recent article. Boudin, *The Sherman Act and Labor Disputes* (1939) 39 COL. L. REV. 1283, (1940) 40 COL. L. REV. 14. The author ascribes the Sherman Act to Senator Hoar, points to Senator Hoar's statement in debate that the bill was intended to affirm "the old doctrine of the common law," and then seeks to demonstrate that historically the common law did not classify labor combinations as contracts in restraint of trade. The thesis assumes (1) senatorial familiarity with the precise bounds of the common law doctrine of agreements in restraint of trade as developed by the author, and (2) an intent to confine the statute to those bounds despite the inclusion in it of terms such as "conspiracy" and "commerce" which were not appropriate to the statement of the common law doctrine.

applicable to labor, nevertheless it applied only to *unlawful* labor activities. The bill to which the proviso had been appended gave justifiable grounds for believing that activities of labor unions which had previously been regarded as lawful would be in violation of its terms.[5] The removal of this threat by the revision of the bill sufficed to satisfy the advocates of the proviso without giving to labor a blanket immunity which would have met with the continued opposition of Senator Edmunds.

Within four years the Sherman Act was successfully invoked to restrain two major strikes, one the great Pullman strike of 1894, but it was not until 1908 that the Supreme Court, in *Loewe v. Lawlor*,[6] first applied it to labor organizations. The Court after reviewing the historical and legislative background of the statute concluded that labor could not properly claim to be wholly exempt from this law of the land.

Three years later the decision in *Standard Oil Company v. United States*,[7] holding that illegal combinations could be dissolved under the Sherman Act, caused union leaders to become apprehensive that unions might be dissolved under the Act, and agitation was vigorously renewed for protective legislation having as its primary object the removal of the possibility that, under the doctrine of the *Standard Oil Company* case, all associations and combinations of workers might be subject to dissolution regardless of the extent of their activities. Protection against this threat was promised in the Democratic platform in the presidential campaign of 1912 and the promise made good by the enactment of the Clayton Act in 1914.

Two sections of the Clayton Act are relied on by proponents of the blanket exemption, Sections 6[8] and 20.[9] Section 20 prevents the granting of injunctions by federal courts against specified labor activities which even at the time were generally considered legal, such as peaceful picketing. By implication it left undisturbed the illegality attaching to certain other conduct.

Section 6, after declaring that "the labor of a human being is not a commodity or article of commerce," provides that "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . 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." This section was the answer to the promise made in 1912, following the apprehensions engendered by the *Standard Oil Company* decision. It removed all doubt of the right of labor to organize in unions, and affirmed the legality of their status against any fear of dissolution. By the use of such language as "legitimate objects," and by legalizing not the *acts* of labor organizations or their

[5] The language arousing this apprehension appeared in Section 1 and read as follows: ". . . all arrangements, trusts, or combinations between such citizens [*i.e.* two or more citizens of different states] or corporations, made with a view or which tend to advance the cost to the consumer of any such articles [*i.e.*, "articles of growth, production or manufacture"], are hereby declared to be against public policy, unlawful, and void." A union seeking to increase wages or shorten hours might have been assailed as a combination seeking "to advance the cost to the consumer" of the articles made by the union members.

[6] 208 U. S. 274.

[7] 221 U. S. 1 (1911).

[8] 38 STAT. 731 (1914), 15 U. S. C. §17.

[9] 38 STAT. 738 (1914), 29 U. S. C. §52.

members, but only the organizations and members themselves, it plainly is confined to an attempt to protect labor unions against a charge of an unlawful status.

With the Clayton Act, as with the Sherman Act, the legislative history denies the blanket exemption claim.[10] In the course of debates in the House, and after a question had been raised as to the meaning of Section 6 and particularly the meaning of the declaration that labor is not a commodity or article of commerce, a clear-cut exemption proviso was offered by way of amendment and rejected. The Supreme Court took the first opportunity to refute, in very explicit language, the suggestion that the Clayton Act had created any such blanket immunity. In *Duplex Printing Press Company v. Deering,*[11] a majority of the Court held that Section 6 of the Clayton Act protected only the *existence* of labor organizations.

The Court has consistently rejected the blanket immunity. In addition to the cases cited, immunity was denied in 1926 in *United States v. Brims;*[12] in 1927 in *Bedford Cut Stone Company v. Journeymen Stone Cutters' Association;*[13] and in 1934 in *Local 167 v. United States.*[14] In the *Stone Cutters'* case, as in the *Duplex* case, the holding was directed specifically to Section 6 of the Clayton Act. And in the *Brims* and *Local 167* cases, no dissents were announced.

Other antitrust labor decisions have been characterized by vigorous dissents, principally by Justices Holmes, Brandeis, and Stone. These dissents have turned mainly on the question of what interest in and relationship to a labor dispute a participant must have to justify his activities. No dissenting opinion has ever suggested that, regardless of any interest in or relationship to a dispute, the participant can justify his activities merely because he acts as a member of some labor organization. Probably, in the view of both the majority and the minority of the Court, the labor provisions of the Clayton Act were merely declaratory. The majority in *American Steel Foundries v. Tri-City Council*[15] stated that the act was "merely declaratory of what was the best practice always" and Mr. Justice Brandeis, in his dissenting opinion in the *Stone Cutters'* case, said that

> . . . The Act does not establish the standard of reasonableness. What is reasonable must be determined by the application of principles of the common law, as administered in federal courts unaffected by state legislation or decisions.[16]

The labor implications of the antitrust laws have been the subject of persistent and prolonged public discussion, but, despite the plain language of the statutes and their plain construction by the Supreme Court as not according to labor organizations a blanket exemption, no action has at any time been taken by Congress to amend the statutes so as to provide for such an exemption. It cannot be said that throughout this period Congress has been indifferent to the welfare of labor or to the interests of labor organizations. It has enacted legislation designed to prevent the abuse of the

[10] See MASON, *op. cit. supra* note 4, c. X.
[11] 254 U. S. 443 (1921).
[12] 272 U. S. 549 (1926).
[13] 274 U. S. 37 (1927).
[14] 291 U. S. 293 (1934).
[15] 257 U. S. 184, 203 (1921).
[16] 274 U. S. at 58.

injunctive process in labor disputes;[17] legislation designed to protect and preserve the right of labor to bargain collectively and the right of labor organizations to be free from employer interference;[18] legislation designed to protect the wages and hours of labor;[19] and legislation designed to provide protection for workers against the hazards of unemployment and old age.[20]

The passage of the Norris-LaGuardia Act is particularly significant in this connection because it shows just how far Congress was willing to limit the application of the antitrust laws, after a legislative gap of many years, bridged by frequent attempted amendments and almost constant consideration. The act merely prohibits the use of injunctions against labor organizations with respect to labor disputes. It removes no other penalties or remedies. It does not even prohibit the remedy of injunctions against labor unions when they are not engaged in labor disputes.

This act, passed after almost twenty-five years of controversy over the decisions applying the Sherman Act to labor, shows better than anything else that Congress accepted the Supreme Court decisions as they stood and changed what it considered to be established law only to the extent of the right to obtain injunctions.

It is in the public interest to protect and preserve labor organizations, just as it is in the public interest to protect and preserve agricultural cooperatives and the proper use of the corporate franchise. But no groups can properly lay claim to a complete exemption from the statutes designed as the principal bulwark to protect a free economy. Nor can those statutes be effectively enforced against one economic or business group and not against others similarly situated. The use of labor organizations to police or to enforce combinations and conspiracies designed to protect manufacturers, distributors, and others engaged in industry is a persistent and frequent phenomenon. The antitrust laws must largely fail in their purpose if they can be applied only against some members of such combinations and conspiracies and not against all. Quite apart from the wisdom or equity of prosecuting one member of a conspiracy and at the same time permitting his partner in the offense to go free, effective enforcement cannot be conducted on such principles. More, therefore, is here involved than a question of the reasonableness of classifying different economic groups. The problem is a practical one. Under the most favorable conditions the difficulties of enforcing the antitrust laws are great. These difficulties are multiplied if blanket immunities are conferred upon favored groups so that the enforcing officers may prosecute some of the guilty but not all, and may eliminate some aspects of a combination or restraint without destroying it completely.

The Department of Justice thus rejects, as have the Congress and the Supreme Court of the United States, the notion that labor unions are entitled to a blanket exemption from the antitrust laws.

[17] Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U. S. C. §101 *et seq.*
[18] National Labor Relations Act, 49 STAT. 449 (1935), 29 U. S. C. §151 *et seq.*
[19] Fair Labor Standards Act, 52 STAT. 1060 (1938), 29 U. S. C. §201 *et seq.*
[20] Social Security Act, 49 STAT. 620 (1935), 42 U. S. C. §301 *et seq.*

II

Assuming, then, that labor unions must govern their activities in the light of the antitrust laws, to what extent do those laws affect them? Although the Supreme Court has only once, in the *Window Glass* case,[21] indicated that the rule of reason applies to labor antitrust cases, it would seem that here, as in the case of activities by industry, no better criterion could be found. With labor, as with industry, it is difficult to determine reasonableness of conduct in the abstract. The problem of antitrust enforcement can never be settled by definitions. The case-by-case approach technique is the only sound one. But with the necessity of a preliminary governmental decision on the advisability or duty of instituting proceedings on each set of facts presented, some statement of policy from the Department that is obliged to make the decisions can be of some value, however general it must be. The position outlined below is largely derived from statements of the Department's policy which have heretofore been made public.

The antitrust laws should not be used as an instrument to police strikes or adjudicate labor controversies. In each of the Supreme Court cases referred to above the question was presented whether the particular restraint involved was unreasonable and was not calculated to achieve a legitimate labor purpose. The right of collective bargaining by labor unions was and is recognized by the antitrust laws to be a reasonable exercise of collective power. The Department does not question, or have any desire other than to protect, the right of labor unions to use their bargaining power legitimately to consolidate it, to forestall speed-up systems, and to improve the condition of their members by promoting improvements with respect to wages, hours, health, and safety. To restraints of trade resulting incidentally from such activities, the rule of reason prefixes the legalizing "reasonable."

In the current building investigation a large number of legitimate activities of labor unions have been brought to the attention of the Antitrust Division. It has been asked to proceed against labor unions because they maintain high rates of wages, because they strike to increase wages, and because they attempt to establish the closed shop. All such requests have been consistently disregarded.

Refusals by unions to work on goods made in non-union shops have also been brought repeatedly to the attention of the Division. In the past courts have held that such secondary boycotts are violations of the antitrust laws. In the *Duplex*[22] and *Stone Cutters'*[23] cases a minority of the Supreme Court presented the argument against this view. In view of such a conflict of opinion among judges of the highest court as to the reasonableness of such activities, the attorneys in the building investigation have been instructed not to institute criminal prosecutions in such cases.

The kinds of activities which will be prosecuted may be illustrated by a practice frequently found in the building industry. Suppose a labor union, acting in combination with other unions to dominate building construction in a city, succeeds by threats

[21] National Ass'n of Window Glass Manufacturers v. U. S., 263 U. S. 403 (1923).
[22] *Supra* note 11. [23] *Supra* note 13.

of strikes or boycotts in preventing the use of economical and standardized building material in order to compel persons in need of low-cost housing to hire unnecessary labor.[24] Here is a situation having no reasonable connection with wages, hours, health, safety, or the right of collective bargaining. The union may not thus perpetuate unnecessarily costly and uneconomical practices in the housing industry. Progressive unions have frequently denounced this "make work" system as not to the long-run advantage of labor. Such unions have found it possible to protect the interests of labor in the maintenance of wages and employment during periods of technological progress without attempting to stop that progress. They have been able to protect labor from abuses connected with the introduction of improved methods of production without preventing the improved methods.

The *Chicago Milk* case[25] is another illustration. There the indictment charges that the defendant union has combined and conspired with business corporations and with an agricultural cooperative association to fix and maintain artificial and noncompetitive prices for milk moving in interstate commerce and to restrain and control the supply of that milk. If the allegations of the indictment are established, it would seem clear that the union has chosen to act as a private police force to enforce by intimidation and violence an illegal arrangement and that its activities go far beyond the legitimate objects of a labor organization.

Such a situation would not be one in which the union in the course of a dispute with an employer over wages, hours, working conditions, or the right to bargain collectively has engaged in some activity such as a strike or boycott which has had the incidental effect of restraining interstate commerce. Just as in the case of *United Mine Workers v. Coronado Coal Company,*[26] in which the incidental effect of the strike on interstate commerce was held not to be sufficient to justify the injection of the Sherman Act into the dispute as an employer's weapon, so in the milk case the incidental benefits to the union and its members are not enough to justify a claim by them of an immunity from prosecution based on their right to act in concert.

There can be no choice in these matters. Faced with a barrage of complaints, the Department of Justice has no alternative but to take action in those situations which it believes violate the law. The building drive is not against labor unions. It is against all of those persons or groups who are found to have entered into unreasonable agreements in restraint of interstate trade and commerce. This means that the Department will proceed against manufacturers, distributors, contractors, labor organizations, or individuals connected with any of the above groups, when evidence convincingly indicates that they have violated the law. The Department of Justice

[24] Virtually this situation was presented in U. S. v. Painters' Dist. Council No. 14, 44 F. (2d) 58 (N. D. Ill. 1930), *aff'd,* 284 U. S. 582 (1931) *(per curiam),* holding in violation of the Sherman Act union activity to prevent the shipment into Chicago from other states of cabinets and other woodwork in other than an unfinished condition.

[25] *Supra* note 1.

[26] 259 U. S. 344 (1922). This is the first of two decisions by the Supreme Court in this litigation. In the second case, 268 U. S. 295 (1925), the Court found that the union had sought to influence the market for coal produced in other states and thus had subjected interstate commerce to a direct rather than an incidental restraint.

must enforce the law impartially in any situation which it is compelled to enter. Any attempt to eliminate unlawful restraints in the building industry which deliberately and systematically excludes labor unions, irrespective of the nature of their activities, would be a travesty. Rather than try to proceed along such lines the Department of Justice might as well drop all efforts to clear away unlawful restraints in the building industry.

The types of unreasonable restraint against which the Antitrust Division has recently proceeded or is now proceeding illustrate concretely practices which are unquestionable violations of the Sherman Act, supported by no responsible judicial authority whatever.

1. Unreasonable restraints designed to prevent the use of cheaper material, improved equipment, or more efficient methods. An example is the effort to prevent the installation of factory-glazed windows or factory-painted kitchen cabinets.

2. Unreasonable restraints designed to compel the hiring of useless and unnecessary labor. An example is the requirement that on each truck entering a city there be a member of the local teamsters' union in addition to the driver who is already on the truck. Such unreasonable restraints must be distinguished from reasonable requirements that a minimum amount of labor be hired in the interests of safety and health or of avoidance of undue speeding of the work.

3. Unreasonable restraints designed to enforce systems of graft and extortion. When a racketeer, masquerading as a labor leader, interferes with the commerce of those who will not pay him to leave them alone, the practice is obviously unlawful.

4. Unreasonable restraints designed to enforce illegally fixed prices, as in the *Chicago Milk* case.

5. Unreasonable restraints designed to destroy an established and legitimate system of collective bargaining. Jurisdictional strikes have been condemned by the A. F. of L. itself. Their purpose is to make war on another union by attacking employers who deal with that union. There is no way the victim of such an attack may avoid it except by exposing himself to the same attack by the other union. Restraints of trade for such a purpose are unreasonable whether undertaken by a union, or by an employer, or by a combination of a union and an employer, because they represent an effort to destroy legitimate collective bargaining relationships, assuming the established union is a *bona fide* one.

The principle applicable to unions is the same as that applicable to other groups specially protected by law. Investors may combine into a corporation, farmers into a cooperative, and labor into a union. The Antitrust Division has the duty of preventing such legal rights of association from being used for purposes far different from those contemplated in the statutes, when such uses result in unreasonable restraints of interstate trade or commerce.