



## Yale Review of Law and Social Action

Volume 3

Issue 1 *Yale Review of Law and Social Action*

Article 4

1973

# Unions, the Environment, and Corporate Social Responsibility

Jerry Hultin

Follow this and additional works at: <https://digitalcommons.law.yale.edu/yrlsa>

 Part of the [Law Commons](#)

### Recommended Citation

Jerry Hultin, *Unions, the Environment, and Corporate Social Responsibility*, 3 *YALE REV. L. & SOC. ACTION* (1973).

Available at: <https://digitalcommons.law.yale.edu/yrlsa/vol3/iss1/4>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Review of Law and Social Action by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact [julian.aiken@yale.edu](mailto:julian.aiken@yale.edu).

Jerry Hultin

# Unions, the Environment, and Corporate Social Responsibility

*Jerry Hultin, a 1972 graduate of Yale Law School and former editor of the Yale Review of Law and Social Action, practices labor law in Columbus, Ohio.*



*Trade unions . . . were born of the necessity of workers to protect and defend themselves from encroachment, injustice, and wrong. . . .*

*To protect the workers in their inalienable right to a higher and better life; to protect them, not only as equals before the law, but also in their rights to the product of their labor; to protect their lives, their limbs, their health, their homes, their firesides, their liberties as men, as workers, as citizens; to overcome and conquer prejudice and antagonism; to secure them the right to life, and the opportunity to maintain that life; the right to be full sharers in the abundance which is the result of their brain and brawn, and the civilization of which they are the founders and the mainstay.*

Address of  
Samuel Gompers, 1898

*. . . there is a nice ring to the idea of workers participating in the decisions needed to correct the wrongs they have unwittingly been committing upon themselves, their neighbors, and, incidentally, the rest of us.*

Jesse Etelson,  
Legal Assistant to a member of  
the National Labor Relations Board, 1970

50

## I Prologue

### The UAW and Environmental Bargaining

Heady with his re-election that day as President of the International Union, United Automobile, Aircraft, and Agricultural Implement Workers (UAW), Walter P. Reuther addressed the delegates to the union's 1968 convention:

What we are talking about is making the labor movement into a vital force, a creative force that can begin to take the lead in the mobilization of the broad force in America who need to be mobilized if we are going to be equal to dealing with the complex problems we face in the difficult years ahead.<sup>1</sup>

Specifically, Reuther was talking about developing young leaders from the shops "with stars in their eyes", fighting racism, ending "18th century" attitudes about technology in relationship to low-cost housing, creating a set of common-bargaining goals among all auto-producing nations of the world, and (most important to this paper) turning labor's power and money loose on a host of problems from building beautiful cities to cleaning the air.<sup>2</sup>

Whether Reuther was getting back to basics or altering course to meet the modern mood of workers was not clear. Traditionally, Reuther had felt strongly that labor and the community had common interests, on the other hand, the rank and file have been characterized as almost solely concerned with "bread and butter" issues. But now the rank and file were changing. Reports indicated that skilled workers were losing interest in further wage increases since every wage increase seemed to get lost in higher prices. Young workers in the UAW—by the 1960's death was opening the ranks of the UAW and over 40% of its members were under 30—and black militants no longer responded to the rigid discipline of auto industry management. Union leaders could not ignore this fact; the director of the UAW's Skilled Trades Division indicated that he was taking the issues to the bargaining table:

. . . we just have to tell these companies that, in the spirit of youth, the king is dead and we are going to bury him in 1970.<sup>3</sup>

The issue here was management discipline.

Reuther, meanwhile, himself demonstrated a continuing interest in obtaining clean air. When John Lindsay and mayors of eight other major American cities presented to the presidents of the Big Three (GM, Ford, Chrysler) their plea for voluntary pollution controls and a joint task force of industry, union, and city officials to recommend solutions in the fight against air pollution, Walter Reuther was there.<sup>4</sup>

Before the UAW's 1970 convention, Reuther was signalling primary interest in wages, pensions, and a cost-of-living clause without a ceiling.<sup>5</sup> These were the bread and butter issues. But three days later, the convention also issued a call for an Environmental Bill of Rights for Americans and the delegates promised that

the UAW would bargain for a reduction in the pollution emission level of the cars they assembled. In a declaration released to the press, the delegates maintained that industry must be forced to accept responsibility for cleaning up pollution and wastes its processes and products have created.<sup>6</sup>

Reuther had long contended that labor's gains must not be at the expense of the community; now his convention pledge to turn "labor's power and money loose" on American problems was nearing reality. By Labor Day of 1970, Reuther intended to have a new set of contracts with Detroit or to be embarking on the union's first strike against General Motors in nineteen years. The UAW had over \$105 million amassed in its strike

---

**“Reuther was talking about... turning labor’s power and money loose on...problems from building beautiful cities to cleaning the air.”**

---

fund—there was money and power to “turn loose” on the auto industry.

On May 10, 1970, Reuther, his wife and two friends, were killed in the crash of their small, chartered jet just miles short of their destination, the \$20 million family education center in northern Michigan the UAW was building to develop young leaders “with stars in their eyes.”<sup>7</sup>

Leonard Woodcock was elected the new president of the UAW; union writers indicated that he would downplay the social issues so important to Reuther.<sup>8</sup> Possibly signifying a change in strategy<sup>9</sup> and an admission by Woodcock of the slim chance the UAW had of successfully negotiating an effective anti-pollution clause in the upcoming collective bargaining talks with General Motors, the UAW and six major conservation groups<sup>10</sup> appeared before Congress on July 11, 1970 and called for the creation of air pollution guidelines so harsh that they would banish the internal combustion engine from the automobile within five years.<sup>11</sup>

As preparation for bargaining moved into higher gear, the UAW delivered thirty-five position papers to each of the major automakers in mid-July<sup>12</sup> but by September 10th, as contract talks neared the strike deadline, the UAW removed twenty-four non-economic demands related to seniority, promotion, transfer and working hours according to press reports.<sup>13</sup> Whether the demand for pollution free autos was included in the original thirty-five papers and was removed in the subsequent paring down of issues is not clear. But from all

appearances, the UAW's hope of collectively bargaining an agreement on auto pollution was dead.<sup>14</sup>

In November of 1970 the UAW and General Motors settled the strike.<sup>16</sup> Coincidentally with the settlement of the strike, the newly created Environmental Protection Agency announced the pollution standards for automobiles which would be produced in 1972 through 1974.<sup>17</sup>

The federal government's requirement that auto pollution emissions be reduced almost completely by 1975 was the force which finally altered General Motors policy.<sup>18</sup> The genesis of the federal government standard was the stipulation by the city of Los Angeles and the state of California that automobiles produced in California or imported into the state meet stringent anti-smog standards. The automakers opposed this regional regulation both because of the effect it would have on California auto sales and because of its wasteful allocation of research resources. The only way GM could rationally internalize the cost of smog prevention was for there to be an industry-wide requirement<sup>19</sup> that all automobiles produced for the American market meet a nation-wide auto pollution standard. GM (and especially the other automakers) needed to fix the market. As with seat belts and shoulder harnesses, federal regulation was the most satisfactory method of accomplishing this guarantee.

With the promulgation of federal standards there was no longer a need for the UAW to make such demands on the automakers. Nevertheless, the UAW had introduced a new idea into the portfolio of tactics for obtaining corporate social responsibility.

## II Labor Union Motivation and Environmental Collective Bargaining

Reuther's ability to have the emission issue placed on the union's bargaining agenda is tentative proof that labor unions will bargain for environmental issues. But it is difficult to draw generalized conclusions about labor union motivation from this single effort of the UAW. First, actual bargaining never took place.<sup>20</sup> Second, Reuther's role in the UAW may have made the UAW unique compared to other national labor unions.<sup>21</sup>

It may have been that the reason the UAW never went to the bargaining table with General Motors on these environmental issues was because impending federal regulations eliminated the need for such bargaining. The Environmental Protection Agency had held hearings on the proposed pollution standards for 1972 through 1974 automobiles during the summer of the UAW bargaining talks with General Motors, and the official standard was promulgated in November of 1970, less than two months after the environmental issues were dropped from the UAW's bargaining package.<sup>22</sup>

On the other hand, Leonard Woodcock may have wanted to strengthen his position in the UAW. He may have felt that the untested, non-bread-and-butter issue of clean air would endanger the negotiations with General Motors and weaken his standing with the rank and file of the UAW. Many members of the UAW expressed doubts that their national leaders should be spending so much time with "frivolous" issues, when wages and other direct benefits were at stake. It was reported that as the strike deadline neared, opposition to the pollution-standard clause mounted.<sup>23</sup> During the strike, when Woodcock announced that the UAW would allow members to comply with General Motors' request that workers on pollution and safety projects be allowed to return to work while the strike continued,<sup>24</sup> 5000 members of Local 160 employed at GM's massive Technical Center in Michigan, ignored Woodcock's offer and remained off the job.<sup>25</sup> This would indicate, as most everyone must suspect, that controlling the exhaust of automobiles does not represent the first priority for many of the rank and file of the UAW.

Reuther's role in the UAW certainly makes it difficult to draw any broad conclusions about the activities of other labor unions in relation to environmental issues. Among labor leaders, Reuther always held distinctive, but minority views about the role of labor in society.<sup>26</sup> In 1947, he astounded General Motors and management throughout the nation when he requested that GM open their books so that the UAW's wage demands could be based on GM's ability to pay.<sup>27</sup> Throughout his career, Reuther wanted a greater voice for labor in industrial planning; he felt industry kept production down to keep prices up and he wanted to use automation to keep purchasing power abreast of productivity.<sup>28</sup> To Reuther, "Labor must go forward with the community, not at the expense of the community."<sup>29</sup>

In large part, it may have been Reuther's influence and prestige within the UAW which accounted for the 1970 convention pledge to demand of General Motors a contract agreement that automobiles be equipped with effective pollution control systems. But the leadership of the UAW goes far deeper than one man. Leonard Woodcock has been on the forefront of many social issues since taking office as the president of the UAW; moreover the General Counsel at Solidarity House has also been actively preparing papers and collective bargaining proposals which explore the full legal ramifications of environmental activities of unions.<sup>30</sup>

Other national unions have also engaged in the struggle for a cleaner environment and safer world. The United Rubber Workers negotiated the nation's first major environmental clause in a collective bargaining agreement this year. They convinced the large tire companies to contribute half a cent per man hour to conduct research on the "harmful factors in the working environment" and to develop a "toxicological surveillance" system.<sup>31</sup>

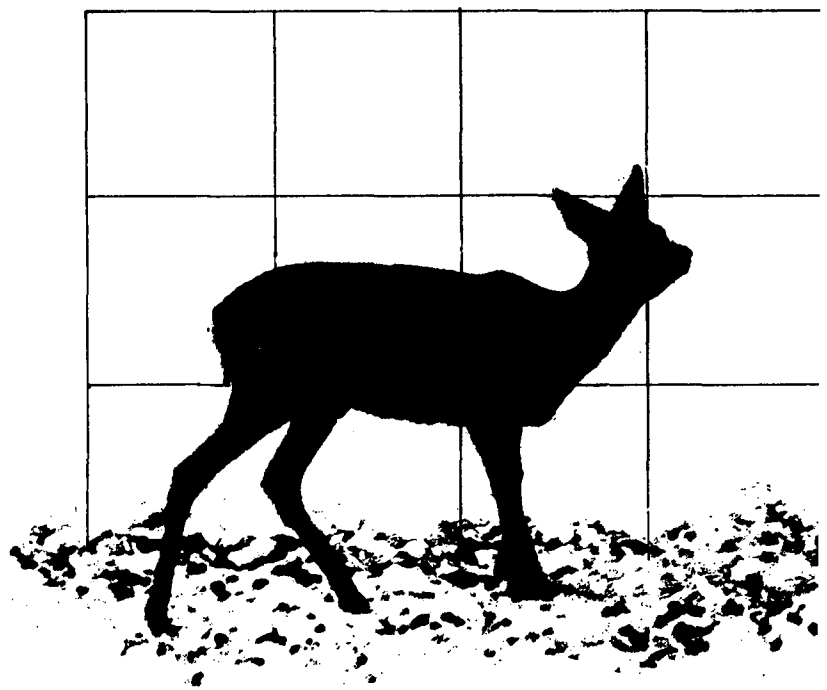
Reportedly the Oil, Chemical, and Atomic Workers tried without success to negotiate environmental clauses and

the Steelworkers, the Pulp, Sulphite, and Paper Mill Workers, and the Communications Workers are exploring the potential of such clauses.<sup>32</sup>

In addition, at least two locals went on strike in 1970 over issues which included pollution controls.<sup>33</sup> And in 1971, Local 2693 of the Steelworkers struck their employer when management refused to use a better grade of coal in its coke ovens to reduce air pollution in the community. The workers did not go back until management started burning the better grade of coal.<sup>34</sup>

But there are many indications that the rank and file is not enamored with environmental issues, especially when the issues impinge on jobs. Just as the UAW Local at the General Motors Technical Institute refused to support the environmental concerns of the UAW president, so other locals are opposing the environmental programs of their national unions.<sup>35</sup>

While the Pulp, Sulphite, and Paper Mill Workers is seriously considering industry-wide pollution-control bargaining at the national level, its Local 119, which represents workers in the paper mills which line the Flambeau River in Wisconsin, has been actively lobbying state officials to extend the deadline for compliance by the paper mills with new waste-treatment standards. Mill workers who have never fished before are now seen hauling in large catches from the river. They are trying to save their jobs by showing that the pollution of the Flambeau River is not serious. When the president of Local 119 appeared before state officials recently, he went armed with pictures of the long strings of fish and signed statements attesting to the excellent fishing conditions on the scenic Flambeau.<sup>36</sup>



Studies have indicated that there is a large gap between the views of national labor leaders and the leaders of local unions and the rank and file.<sup>37</sup> While the environmental backlash of the local unions attests to such a discrepancy in views concerning pollution standards, national labor leaders are affirmatively responding to this backlash by incorporating job protection into their support of environmental issues. The national president of the Oil, Chemical, and Atomic Workers, a national union known for its tough stand on pollution, recently announced,

We will oppose those theoretical environmentalists who would make air and water pure without regard to whether or not people have food on their tables.<sup>38</sup>

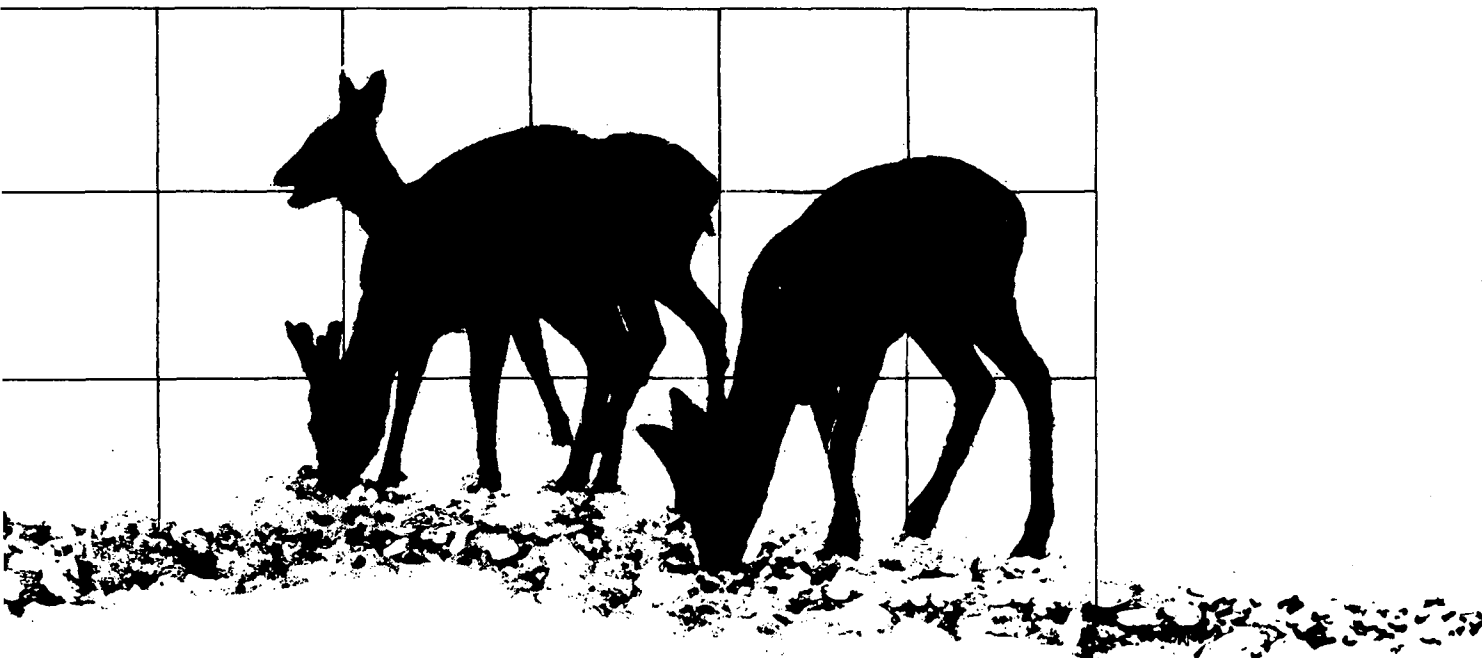
With jobs at stake, the solution may be to insure that jobs are not lost, or that job assistance is provided, when pollution, safety, and consumer standards are implemented by the government, the corporation, or the union. Labor leaders suggested such assistance in Senate testimony last spring and at least one environmental group, Friends of the Earth, hopes to establish a rapprochement with labor groups by including such assistance to workers in their environmental legislation.<sup>39</sup>

There is a suspicion among environmentalists and some labor leaders that corporate threats of loss of jobs are “environmental blackmail” and that unity between labor and ecology can call this bluff of business. Recently, a union and ecological group in Marietta, Ohio, made just such a “call” when Union Carbide threatened to layoff 650 workers if compliance with state pollution standards was forced. But the union and environmentalists stood fast and now Union Carbide is attempting to minimize

layoffs while it complies with the pollution standards.<sup>40</sup> Nevertheless, the problem remains that some layoffs will occur—and those layoffs may be sufficient to sour the local union on further environmental action against their plant.

In these examples of union support and lack of support of environmental causes, there is no clear indication that unions will respond positively to the environmental crisis. The internalization of the costs of externalities adversely affects the economic position of the corporation; this has a detrimental effect on the employees of that corporation. Only in the long-run does either the corporation or the worker stand to gain, for it is only over time (and apparently adjustments in income distribution) that the new and more efficient allocation of resources provides to each member of society the benefits of optimized allocation. There is, to say the least, no obvious, short-term economic incentive for the worker or the union to actively pursue environmental issues.<sup>41</sup>

There are seven factors which I would like to suggest which deserve consideration to determine if it is likely that unions at all levels of their organization—from the rank and file to the leaders of the locals to national officials—will support environmental bargaining. These are (1) environmental harms fall especially heavily on the working class; (2) in increasing numbers, workers have significant amount of “discretionary income;” (3) more and more workers will feel a sense of responsibility for the harms caused by the products they assemble; (4) wage and benefit increases in the future are likely to be limited by government controls; (5) unions and workers will not support a further shortening of the work week;



(6) union bargaining on environmental issues can produce solutions carefully tailored to the needs of both the corporation and the workers and (7) workers and unions will begin to accept long-term welfare as a legitimate factor in bargaining goals.<sup>42</sup> In the following pages, I will briefly discuss some of the considerations related to each of these factors.

Of the *first*, it would seem that workers bear a relatively large share of the burden of environmental, safety, and consumer harms. Unlike the rich, workers cannot afford to insulate themselves from the effects of pollution. Workers tend to live in areas in which there is something wrong with the environment—perhaps there is extensive smoke pollution or a noisy freeway running through the housing tract. For instance, in Los Angeles the major lower-class bedroom communities are located in the worst smog sections of the city; most of the rich, however, live in the hills above the smog or on the ocean beach where the westerly winds always clear the air.

There is no denying that the poor suffer most severely of all in our society from the environmental harms which prevail today. Yet, compared to an empty stomach or a ghetto apartment with rats, an excess of hydrocarbons in the air is not a significant harm. The environmental, safety, and consumer issues are essentially middle-class issues. Not only has the frenetic production of technological society created the dirt which fills the air, but it has also made it possible to sense that dirt in the air is harmful, for only when one is above the poverty line does one dramatically sense the consequence of environmental deprivations. The worker is part of the economic class of Americans who are poor enough to be trapped in the polluted environment, yet rich enough to be motivated by environmental harms.

The *second* factor which is likely to motivate environmental bargaining is the increase in the “discretionary income” of workers. Discretionary income is a term used to describe the income of a family which is above and beyond that needed to provide for the basics of the contemporary standard of living. At the present time, income above \$7500 is considered discretionary.<sup>43</sup> When a worker is making less than \$7500, there is a tendency to focus on “bread and butter” issues. As income rises above \$7500, there might be some willingness to trade-off short-term, self-interest gains for longer-term, and possibly community-interest gains.

Data on incomes indicates that family units which make over \$10,000<sup>44</sup> will increase by 23 million by 1975. This means that the portion of families making over \$10,000 will climb from 17% to 50% of the total number of families in the sixteen years from 1959 to

1975.<sup>45</sup> A large portion of this increase will be made up of families headed by workers.

At least one study indicates that blue-collar workers do not duplicate white-collar spending habits, even when they make as much or more than their white-collar counterparts.<sup>46</sup> This may mean that blue-collar workers will be more willing to make the trade-off between additional income and environmental issues.

There are, however, strong contrary considerations in this area of blue-collar discretionary income. For instance, a government study of family income of blue-collar and white-collar workers concluded:

“White-collar workers earn more money on a weekly basis, enjoy more fringe benefits, have a safer work environment, and are more steadily employed, and opportunities for advancement are more abundant.”<sup>47</sup>

Commenting on these findings, a labor statistician wrote, “The current pressure by blue-collar workers through collective bargaining for substantial wage adjustments may represent not merely a temporary phenomenon, but a deep-seated attempt to match the advantages, economic and otherwise, accruing to those in higher level occupations.”<sup>48</sup>

And finally, the authors of a recent book, *Aspirations and Affluence*, concluded that

... even a substantial increase in income may be viewed as unsatisfactory and may not give rise to optimistic expectations.

People’s perceptions and expectations reflect not only their actual situation but also their underlying attitudes. They reflect both the changes in the financial condition of the individual and his subjective notions about whether he has been making progress. . . .<sup>49</sup>

But the role of “subjective notions” may not preclude a positive forecast concerning the worker’s interests in environmental issues. Because of the wage-price spiral, workers could lose interest in large wage demands; it seems possible that as the environment grows increasingly putrid, workers may consider exchanging cash for guarantees from the corporation that products will not pollute.

The *third* factor is the sense of responsibility workers feel for the products they assemble. Since the days of craftsmen, the worker’s relationship to his work—both the means of production and the ends of production—has become more and more estranged. Workers are given no control over the consequences of their productive activity. Yet when a paper mill pollutes a river, the workers are participants in the illegal act. Some workers are reportedly unhappy with the present state of affairs:

Whether the public gets a good, useful, and meaningful product from the business where the union man or woman works has an impact on [union] members. It is not very

“Workers bear a relatively large share of the burden of environmental, safety or consumer harms.”

pleasant to spend eight hours in a shop and then come out to hear everyone complain about the product. It makes your toil appear meaningless.<sup>50</sup>

This seems to reflect a revival of the craftsman's sense of responsibility for the quality and consequences of one's labor. Its growth should be a positive step in gaining worker support for environmental issues.

In regard to the *fourth* factor, if wage and price restrictions continue for any length of time (as some predict they will<sup>51</sup>), unions may exchange wage demands for environmental demands. This is only a significant factor for the purpose of this discussion if such environmental clauses are not computed into wage and price increases; otherwise, the union would find it more advantageous to take everything in wage and benefit increases.

While one's first response may be to suspect that within a system of wage and price controls the government will promulgate some method of computing the cost of collective-bargained environmental clauses, there are some reasons to think this might not occur. First, the benefit from environmental clauses does not accrue directly to the worker, for a major portion of the benefit flows to the public. Second, the computation of the cost of environmental clauses will be very difficult. Unlike union negotiated pension and welfare funds, where actuarial data can be accurately developed, the specific effect of alterations in the product will be difficult to sort out from other external factors affecting price, such as demand.<sup>52</sup> Third, a change in the product and commensurate increase in price would constitute a non-inflationary increase since presumed value has been added to the product.

The *fifth* factor is that union leaders may not be willing to bargain for short work weeks; if that is so, a likely alternative is fringe benefit bargaining, including environmental issues. Leonard Woodcock said he was opposed to the thirty hour week because it raised the likelihood that workers would take a second job. While many workers are interested in taking second jobs, such "moonlighting" is a threat to the job security of other workers. Obviously, Woodcock's aversion to the thirty hour week does not lead inexorably to bargaining on environmental issues, but environmental bargaining is one way of creating worker interest in the union.

In addition, at some point, workers may feel that the benefit gained from an extra hour of leisure is worth less than the gain he receives from collectively bargained clauses which require the employer to reduce pollution. The Steelworkers who refused to work until a higher grade of coal was burned in the company's coke ovens already seem to be at this point.<sup>53</sup>

*Sixth*, union initiated collective bargaining may be more responsive to the competing interests of long-term benefit to society and short-term economic stability of both the firm and the union. This could lead to an

attempt by unions to preempt government regulation of corporations by negotiating similar, but somewhat less restrictive environmental standards than those proposed by government. Since the union stands to lose jobs in most all upward price shifts in the market, it will tailor its demands to closely fit the economic situation of the firm. On a theoretical level this will reduce the benefit gained by society, but in a practical, real-world sense, this form of decentralized decision making may prevent the gross maladjustments which invariably accompany government intervention.<sup>54</sup>

*Finally*, wage earners and unions may increasingly recognize that community interest is a legitimate goal of collective bargaining. Unions, while closely tied to the economic conditions of the firms they relate to, have often attempted to frame their struggle in broad terms which extend to all of society. Even now American unions are attempting to raise the wage-levels in foreign countries, admittedly to insure the continued economic security of the American worker.<sup>55</sup> But compared to support of high tariffs, such activity reflects a broader perspective which reaches beyond short-term self-interest.

Getting union members to identify with community interests is not easy; recently one UAW official discussed the current situation:

We have a tremendous social problem in convincing these people [especially those not here when the union was organized] that the interest of society as a whole is greater than their own personal interest. They have to develop new values to understand this situation.<sup>56</sup>

But the increasing number of local unions which are willing to support environmental programs indicates that workers can identify their own self-interest with that of the community. And as the world becomes even more complexly interrelated, the effect of short-sighted bargaining agreements will become more and more obvious to the worker. In less than fifty years, shareholders and corporate managers have internalized long-term profit as the standard for corporate decision making. Workers should be capable of a similar transition.

These seven factors may increase the probability that unions will bargain for environmental protection clauses in work contracts. Perhaps with proper cultivation their positive effect can be augmented. But whether they are sufficient to overcome the inherent tension between the immediate consequences of forcing a corporation to internalize the cost of its pollution and the traditional goals of the labor movement is not easily answered.

As is true for corporate management, the shareholder, and indeed all of society, unions must strive to make "long-term" and "community-wide" part of their



concept of self-interest. Sacrificing “bread and butter” does not come “naturally” to unions or to workers.

To the extent that they are able to redefine their interests, unions may be a significant force for corporate social responsibility.

### III Legal Problems

Industry-wide bargaining for environmental and consumer clauses in collective bargaining agreements raises a number of legal questions. First, will management bargain on such issues? Is the subject one which the National Labor Relations Board will rule comes within the bounds of “mandatory bargaining” or, in the alternative, is there sufficient commonality of interests that management will desire to bargain on such issues.<sup>62</sup> Second, does such industry-wide bargaining by the UAW stand up after detailed analysis of its relationship to the antitrust exemption granted in the Clayton Act?

#### The Taft-Hartley Act.

One important question in the context of American labor law is whether the National Labor Relations Board and the courts will rule that the issue is a mandatory subject of bargaining under the Taft-Hartley Act.<sup>63</sup> The Legal Assistant to Gerald A. Brown, one of the NLRB’s five members, has written recently that

...without some expectation of a finding that this is a mandatory subject [of bargaining], it seems unlikely that the manufacturers will bargain seriously. The history of pollution control, in the automotive industry no less than in any other, gives little cause for hope that the manufacturers will welcome the opportunity to bargain in this area.<sup>64</sup>

Such mandatory bargaining under the Taft-Hartley Act would be required if the NLRB and the courts ruled that the pollution emissions of an automobile are related to the “conditions of employment” of the workers in the UAW.<sup>65</sup> Just looking at the term, “condition of employment”, there would seem to be two ways of arguing that pollution emissions are included within the reach of the words.

56 The first tack is one recommended by Jesse Etelson in an article<sup>66</sup> published shortly after Reuther’s death and just before the inauguration of bargaining talks between the UAW and General Motors in 1970. Essentially, Etelson’s argument is that (1) cases hold “travel to and from work” to be a condition of employment, (2) travel to and from work includes driving on the highways, (3) the air pollution through which an auto worker must drive is the result of the product his employer manufactures, (4) the reduction of pollutive emissions of automobiles is a condition of employment for an employee of the automotive industry and is, therefore, a subject of mandatory bargaining.

Conditions of employment as interpreted by the NLRB and the courts has not been limited to the boundaries of the plant; “the statutory phrase . . . has not been regarded as having fixed boundaries in space.”<sup>67</sup> Cases have held both company-provided housing and eating facilities near the plant to be a condition of employment.<sup>68</sup> The gist of these rulings has been that “the advantages of living near to the place of work in an area where housing was in demand materially affect the conditions of employment.” The court must be referring to the higher costs of a longer journey-to-work, such as increased financial cost, increased time, and increased safety risk.

It would be likely, suggests Etelson, that in addition to these travel saving devices (meals and housing), the Board and courts would make such subjects as parking facilities for employees mandatory; or the Board and courts would make split-shifts to relieve traffic congestion a subject of mandatory bargaining. Costs incurred in travel to and from work are a condition of employment to the extent that the employer can affect those costs.<sup>69</sup> To travel to and from work means to come in contact with debilitating pollutants which smog the air. Etelson concludes from this that it seems

... [p]erfectly reasonable, therefore, for employees to demand of their employers to discuss meaningfully with them those measures, if any, which the employer has the capacity to undertake which could protect the employee’s health against these hazards.<sup>70</sup>

Employers, of course, vary in their ability to affect the factors which impinge on a worker as he travels to and from work. Admittedly, the group of manufacturers whose end product significantly affects travel to and from work is a limited category: the two key industries within the category are the automobile manufacturers and the fuel refineries. On the other hand, the list of industries whose *means of production* affects the travel environment easily covers every power-consuming operation and thus the list is coextensive with productive activity in its entirety. Thus steel-workers have requested negotiation on the amount of smoke produced by the smelters in Pittsburgh.<sup>71</sup>

Moreover, the analysis could be applied to industries which pollute only indirectly, that is through the consumption in their productive process of material which itself causes pollution when it is produced. For example the aluminum industry employs a process which creates little, direct pollution, but which uses a large quantity of electricity. The aluminum workers could demand that the aluminum companies purchase clean electrical power or they might demand that the aluminum industry conduct research into the feasibility of using other, cleaner sources of power in the production of aluminum.

The second approach to the problem of making environmental bargaining come within the statutory definition of “condition of employment” is no less far-reaching in its consequences than the first. The argument is that the products “assembled” by the

worker relate to the conditions of his employment in that they constitute his mark on or addition to the social order. In the process of history, the worker expresses himself with his work product; therefore, the worker wants that product to reflect, at least in part, his sensibilities and his personality. This concept of a condition of employment is most clearly seen in relationship to organized teachers; their right to control the subject matter of their teaching is clearly recognized by the union as an essential tenet in any collective bargaining agreement.<sup>72</sup> Management (more neutrally called administration in the academic fields) has long recognized that this is a proper concern of their employees when the industry is based on intellectual

But, in making this statement, the justices were viewing product design from the perspective that the consequences of design never affect the worker in the course of his employment. This dictum seems to mean that if product design did affect conditions of employment to a significant degree, then product design would also be subject to mandatory bargaining.

The traditional sway of management in matters such as product design does not dispose of the issue of mandatory collective bargaining,<sup>75</sup> nor is it necessary to balance the benefit gained by the employee against the loss to the employer, except in those cases where the benefit to employees is so small as to not significantly affect the conditions of employment.<sup>76</sup>



endeavor, but where the industry is not intellectual, there is no tradition of worker control of the end product. Much could be said for the increase in worker satisfaction (and sense of responsibility) which would result from allowing the worker to assist in the decisions about the products of a corporation. At the present time the only option of the worker is to refuse to work for a corporation which produces goods which do not meet his personal standards, for neither corporations nor the courts have recognized that control of the end product is a "condition of employment."<sup>73</sup>

Obviously, both of these arguments—the one relating to the costs of the journey-to-work and the second to the productive process itself—constitute a broad reading of "condition of employment." Such a reading conflicts to some extent with traditional though vague labor law notions of managerial prerogative. Thus the UAW, in bargaining over emission levels of automobiles, is necessarily attempting to effect product-design. In the past, product design has been considered a fast and firm segment of management prerogatives, that "never-never bargaining land" where management has reigned supreme.

Three justices of the Supreme Court in their concurring opinion in *Fibreboard v. NLRB* said that "product design" is one of those subjects of which

... it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employee's bargaining representative.<sup>74</sup>

There is, on the other hand, a need to consider the feasibility of reaching settlement when a subject such as product design is being considered for inclusion within the scope of mandatory bargaining. Etelson suggests that a case-by-case method where each side presents their argument as to the character of the bargaining process in their industry may be the best method of preparing the NLRB to decide whether mandatory bargaining over the pollution control systems of automobiles "will contribute more to industrial peace or to industrial chaos."<sup>77</sup> There is a presumption in favor of a broad view of mandatory collective bargaining expressed in the "Findings and Policies" section of the Taft-Hartley Act<sup>78</sup> and recent Supreme Court rulings indicate an acceptance of this presumption.<sup>79</sup> The NLRB may not want to broaden the play of the "travel to and from work" argument developed by Etelson to areas where it interferes directly with management control of product design. It may also have some undefined fear that acceptance of either argument put forth above would "open up" the bargaining process too much. More reasoned analysis, however, seems to indicate that a broadened definition of "conditions of employment" would not result in any redistribution of bargaining power. Professor Wellington has summarized the dynamic:

Under the Labor-Management Relations Act [Taft-Hartley Act], the private employer has to bargain in good faith over "wages, hours" and other terms and conditions of employment. It is through this statutory provision that the law exerts leverage on the subjects of bargaining; and the general

trend has been to expand the legal definition. However, an expanded legal definition of terms and conditions of employment means, with respect to matters having a financial impact, that, if a union negotiates an agreement over more subjects, it generally trades off more of less for less of more.<sup>80</sup>

A decision by the NLRB which rejected the arguments suggested would not, however, be fatal to the effort by labor to bargain over environmental issues. Mandatory bargaining gives either party the power to “legally insist upon its position as a condition to any agreement and thereby torpedo the negotiations.”<sup>81</sup> Even without the mandatory bargaining designation, unions would still be able to raise the issues, although they could not insist on them. How much of a difference the distinction between mandatory and non-mandatory subjects of bargaining makes in the real world of management-labor relations is subject to some dispute.<sup>82</sup>

Furthermore, creative litigation on these subjects by unions could lead to an extended definition of “conditions of employment” which not only encompassed the harms suffered during travel to and from work, but the harms perpetrated on the worker’s family while he is at work and the harms the worker himself suffers during his leisure hours.<sup>83</sup> While such extension of the statutory phrase “conditions of employment” goes far beyond anything the drafters of the Taft-Hartley Act had in mind, it does not necessarily extend beyond the policy in support of collective bargaining enunciated in the Taft-Hartley Act. Collective bargaining as envisioned in this legislation was designed to give the worker parity of bargaining power over the fundamental aspects of his relationship to his employer. In earlier times, these fundamental matters consisted of wages, hours, and a limited number of conditions related to employment.<sup>84</sup> But as the standard of living increases in the United States, critical issues shift from the gross matters of wages to the margin where safety, lack of pollution, and enjoyment of life are seemingly fundamental. There is strong evidence of this shift in the following statement of an international union official:

Union members have a big stake in consumer protection. That stake increases every time a union is successful at the bargaining table. As unions win greater benefits for their members, as union members get deeper and deeper into the middle class, as contracts get farther and farther away from conditions of basic survival, the union member obviously becomes more and more of a consumer—a buyer. The problems of the marketplace become increasingly important to him. He is ever more conscious of prices, slack fill, truthful labelling, product safety, consumer fraud, warranties, credit reporting, and so on.<sup>85</sup>

For the worker, the question is no longer necessarily wages and hours, for there may be basically adequate wages and reasonably short working hours; instead, the worker may desire to increase the psychological satisfaction he obtains from his work, to insure that his family is safe and healthy, and to increase the value of the wages and leisure he has gained from past collective bargaining by insuring that his total environment is clean and safe. To the extent that a worker wishes to bargain

on these items, they become issues which should be included within collective bargaining.

In summary, the Taft-Hartley Act is designed to expand with the contemporary view of the conditions of employment. As worker values and motivation shift environmental, safety, and consumer issues should move within the scope of conditions of employment.

### Industry-wide Environmental Bargaining and Antitrust

Collective bargaining, when it is based on employee organization along product-market lines, creates strong anti-competitive incentives in both labor and management.<sup>86</sup> Examples of employee organization along product-market lines include most all of the major unions in the United States;<sup>87</sup> for instance, the Steelworkers not only represent the general class of workers who handle basic metals, but bargain along the major product lines within that category (steel, brass) and the UAW negotiates (through the use of pattern-bargaining)<sup>88</sup> with the automakers in one year, with the autoparts industry in another year, and with aerospace industry at another time.

In an over-simplified explanation, these anti-competitive incentives mentioned above exist because (1) the union can maximize its gains by limiting the competitive interplay between the firms making the same product and (2) other factors remaining constant (which in this case they have a tendency to do), the union has the ability to determine the firm’s position in the product market by varying labor cost demands. While one might assume that it is to the union’s best interest to drive the cost of labor as high as each firm can bear, this overlooks the consequence such labor costs may have on the firm’s position in the product market and the subsequent effect on the union’s gains. Almost an identical analysis explains the tendency of corporations to attempt to gain control of product markets through the use of anti-competitive devices.

Labor law, including the exemption of unions from the antitrust laws, is not predicated on national economic policy but relies instead on the “conflict of interest between labor and management to neutralize the market power created by collective bargaining.”<sup>89</sup> There is a real question whether such conflict of interest exists in areas traditionally covered by antitrust laws. Collective bargaining produces limitations on competition which go far beyond those necessary for correcting the imperfections of the labor market. This, combined with management’s interest in limiting competition, means that collective bargaining often leads to the imposition of substantial restraints on the product market.<sup>90</sup> A union’s aim of obtaining a favorable settlement for its members requires not only organizing the labor force, but influencing the position of the firm in the product market and the product market itself.

Winter contends that this behavior on the part of unions is part and parcel of pursuing its own self-interest:

Unions in competitive industries have great incentive to restrain competition between employers as a matter of self-defense.<sup>91</sup>

In fact, Winter argues, there is no limit on union incentive, and often union power, to impose monopoly on product markets.<sup>92</sup>

Furthermore, there are no substantive principles upon which to rest judicial decisions in the area of labor disputes and antitrust. The Sherman Act and the National Labor Relations Act<sup>93</sup> do not provide for the resolution of the competing interests of competition and collective bargaining; instead each act enunciates total support for a policy for competition or for collective bargaining.

Because of the irreconcilable nature of the policy conflict and the statutory indifference to the problem, there is no principle upon which we can distinguish "legitimate" collective bargaining from "illegitimate" monopolization. . . . Whatever distinctions are employed for the purpose of regulation must, therefore, be largely arbitrary, for there are no generalized principles which harmonize the conflicting policies.<sup>94</sup>

The Supreme Court has grappled with this quandry for the past sixty-five years; Congress has at times interceded, but never with clarity. The product of the Court's six decades of balancing the policies of competition and collective bargaining provides only ambiguous guidelines for those union leaders who wish to pursue industry-wide collective bargaining.

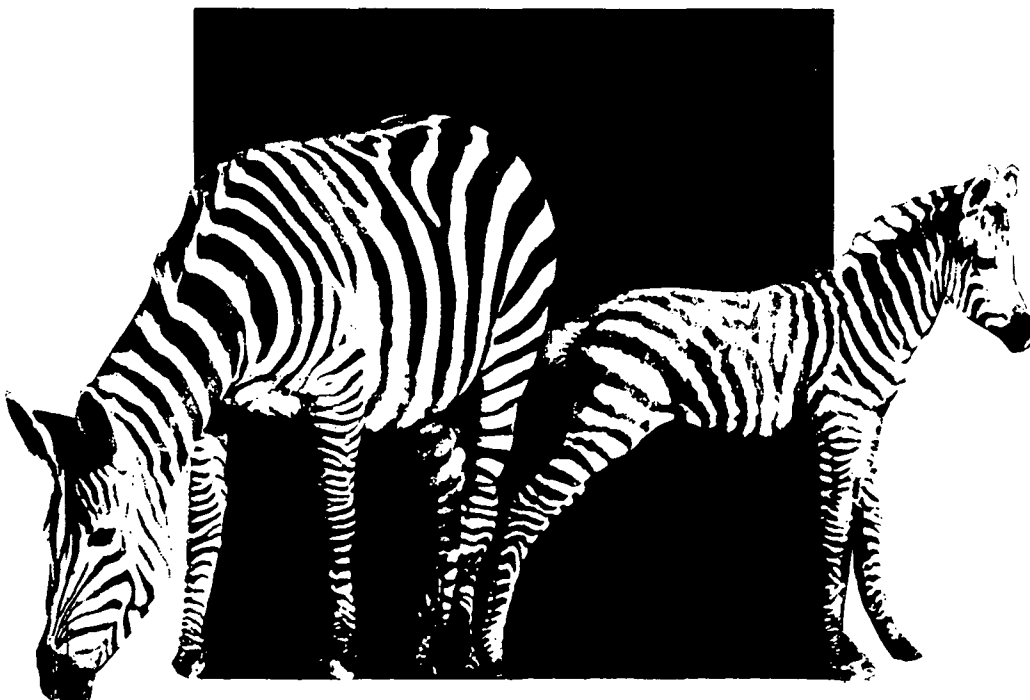
The first forty years of that history culminated in the decision in *U.S. v. Hutchenson*<sup>95</sup> that "union activity in pursuit of economic self-interest is exempt from the Anti-trust Laws."<sup>96</sup>

This plain resolution of the problem was undermined four years later, in *Allen-Bradley v. Local 3 of the IBEW*.<sup>97</sup> Local 3 of the International Brotherhood of Electrical Workers was located in New York City and had collective agreements with most of the electrical equipment manufacturers and contractors in New York City. Through the use of these collective agreements, Local 3 got the manufacturers to agree to sell electrical equipment only to contractors who employed members of Local 3 and got the contractors to agree to buy only from manufacturers who had agreements with Local 3. The result was that prices on electrical equipment went up, wages were higher and hours shorter, and outsiders were denied access to the New York market. Local 3 was acting in its own economic self-interest. But as the court noted, such union activity was effectively allowing business to engage in activity which made the Sherman Act a "futile gesture."<sup>98</sup>

In its opinion, the Supreme Court implied that the facts of *Allen-Bradley* were dispositive of the conflict between antitrust and collective bargaining policy because the businesses in *Allen-Bradley* were the initiators of the combination. Yet even the judicial facts indicate that it was the union and not the businesses which organized and brought about the monopoly.<sup>99</sup>

Resurrecting a phrase from *Hutchenson*, the Court made much of the "combination with non-labor groups" of Local 3. But when does a union not combine with the employer when it obtains a collective bargaining agreement? The Court said,

But when the unions participated with a combination of businessmen who had complete power to eliminate all competition among themselves and to prevent competition from others, a situation was created not included within the exemptions of the Clayton and Norris-La Guardia Acts.<sup>100</sup>



But, as Winter points out, this was an unsatisfactory answer:

*Allen-Bradley* . . . was an attempt to prohibit what the Court thought were flagrant union activities. But its real purpose was obscured by the "business monopoly" test, a standard which not only impairs many aspects of collective bargaining but is also extraordinarily unrealistic.<sup>101</sup>

For the next twenty years, judicial activity in the conflict between antitrust policy and collective bargaining came to a halt. Congress was active, passing the Taft-Hartley Act, the Hobbs Anti-Racketeering Act, and the Landrum-Griffin Act.<sup>102</sup> Many of the irregularities which the Court had attempted to curb through the use of antitrust doctrine were prohibited by these acts. The Court had the opportunity to discontinue its use of the "guideless antitrust laws to regulate union activities as doubly awkward and inappropriate."<sup>103</sup> But in 1965, it handed down two rulings which reactivated its use of the antitrust laws to control union activity. These cases were the *United Mine Workers v. Pennington*<sup>104</sup> and *Jewel Tea*.<sup>105</sup>

In *Pennington*, the United Mine Workers had a series of agreements with the major coal operators to raise wages and drive the smaller union and non-union operators from the market. To a limited number of mine workers, higher wages were beneficial; to many, higher wages mean unemployment. As for the operators, high wages permitted them to automate—that is, if they were large enough to be able to afford to automate.

In *Jewel Tea*, the Meat Cutters Local 189 in Chicago restricted the sale of fresh meat among 9000 retailers to the hours of 9 a.m. to 6 p.m.. There was no allegation of conspiracy here, rather the issue was

whether the marketing-hours restriction, like wages . . . is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain the provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies . . . falls within the protection of national labor policy and is therefore exempt from the Sherman Act. *The crucial determinant is not the form of the agreement—e.g. wages or prices—but its relative impact on the product market and the interests of union members.* (footnote included in text)<sup>106</sup> [emphasis added]

This is the distinction of *Apex*, shaped into a balancing test; as in *Apex*, the distinction is of little value. Yet the Court found the activity of the meat cutters to be legitimate. In *Pennington*, the Court remanded the case, saying that

the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws.<sup>107</sup>

Winter comments

If *Pennington* is right—indeed, if *Allen-Bradley* is right—the federal courts may, in no small number of circumstances, enjoin primary strikes for higher wages at the behest of private parties.<sup>108</sup>

Not only have *Pennington* and *Jewel* been characterized as showing unanimous assent by the nine justices to one basic proposition:

The power of the judiciary to regulate under antitrust laws, matters which also fall within the regulatory scheme of the labor laws,<sup>109</sup>

but furthermore, the three separate opinions seem in agreement on two issues:

(1) if the defendant's agreement were indeed upon a mandatory subject of bargaining and there were no independent evidence of such agreement being in aid of a conspiracy among non-labor groups, liability could not attach under the antitrust laws;

(2) it is for the court, when faced with a claimed violation of the antitrust laws, to determine whether the agreement at bar really did involve an issue which employers and unions are required to bargain.<sup>110</sup>

If that is the meaning of *Pennington* and *Jewel*, there is still little upon which to predict the Court's response to industry-wide bargaining on environmental issues. As Winter indicated above, primary strikes for higher wages could be enjoined as contrary to antitrust law. And as other labor law commentators have noted,

Obviously a hostile finder of fact could have concluded in *Jewel Tea* that there was no necessary relationship between hours of work and hours of sales of meat. In that situation, the Court apparently would have sustained a treble-damages award against the union.<sup>111</sup>

The Court will be hard put to make meaningful the distinction between permitted and illegal union activity. And the *ad hoc* decisions of previous days will continue to be the rule.

What can we draw from this long and ambiguous series of cases? The first conclusion is that it may not be the NLRB, but the courts which first determines if environmental clauses are mandatory subjects of collective bargaining. This significantly alters both the procedure which will be used in making the decision and the substantive factors which will be considered in the decision.

The NLRB, an administrative body, would have approached the question as an unfair labor practice. The Board would have been able to use its ability to

60



construct an extensive record, to make findings and to develop “expertise.” Its decisions have traditionally had a flexibility which matches the shifting relationship of labor and management. Labor and management enter the fray as nominal adversaries<sup>112</sup> and the consequences for labor of an adverse decision—NLRB: a remedial order; courts: treble damages<sup>113</sup>—are radically different.

The NLRB is a political body, solving what most commentators see as essentially political, partisan problems.<sup>114</sup> It makes its decisions on mandatory bargaining within the framework established by the National Labor Relations Act which emphasizes labor-management peace and order and the positive support of collective bargaining.

The procedural limitations of the courts are well known. As to substantive factors, the essential difference in the courts’ handling of labor disputes using the antitrust laws is that the courts have to balance policies of collective bargaining and antitrust simultaneously. The lack of success of this enterprise has been well documented by the courts themselves: there are competing forces at work here which stymie the development of principle, yet the Supreme Court has persisted in attempting to settle such issues.

In terms of the balance between collective bargaining and antitrust, environmental bargaining would seem to stand little chance of being granted mandatory status by the courts. The UAW’s proposal for cleaner cars is designed to benefit society—certainly in that sense it is a more acceptable goal than that of the electrical workers in *Allen-Bradley*. But is it clearly distinguishable from the purpose of the United Mine Worker’s plan for the coal mines of West Virginia which surfaced in *Pennington*?

Reuther most likely understood that market forces and antitrust law prevented the major automakers from adopting stringent pollution standards, so he stepped into the breach. When John L. Lewis began acting like a “labor statesman” and worked out his plan for the coal mines the subject was automation, not pollution. The coal mine operators were in no position to automate because they could not control their market sufficiently to bear the enormous initial cost of automating. Lewis provided the control and gave the world cheap coal—yet the Supreme Court would not approve his plan. Is clean air a purer goal?

Perhaps the conspiracy between the UMW and the coal operators was the determinative issue in *Pennington*. Would the UAW get past this test when the plaintiff introduces the contracts agreed to by Ford, GM, and Chrysler? Justice Goldberg certainly thought the Court in *Pennington* failed to “understand the practical realities of the automobile, steel . . . and numerous other industries which follow the policy of pattern bargaining.”<sup>115</sup>

Perhaps one must take a cue from *Jewel Tea*: is there an intimate relationship between the environmental clause and the wages, hours, and working conditions of this industry? Justice White attempted to gauge the relative impact of the meat cutters agreements on the product market and on the interest of union members.<sup>116</sup> As has been mentioned before, this test, for all of its simplicity, provides no substantive principle upon which to decide a specific issue. The Court will review the evidence and rule; but, as Winter commented, “it will [be] an unprincipled and largely arbitrary judgement.”<sup>117</sup> The lesson of *Jewel* may be to carefully construct the trial record, for, as was true in *Jewel*, the case may be won or lost at that level.

But even in view of the *ad hoc* character of the decisions the Supreme Court has handed down in the past, there seems to be enough of a pattern in the Court’s ruling to suggest one final, tentative conclusion. Those who seriously contemplate industry-wide environmental bargaining will have a difficult time convincing the Supreme Court that the labor exemption from antitrust laws extends to their activities. Not only must one lay the foundation for such activities with care, but one must do it without benefit of plumb line or square.

In summary, the legal milieu for bargaining on environmental issues, while not particularly hospitable, is also not preclusive of bargaining.

#### IV Union Environmental Bargaining and Legitimacy<sup>118</sup>

A major student of labor unions recently provided the following comment on the source of union policies:

From the popular or non-academic viewpoint, trade unions of the West have often been viewed as institutions sensitive and working for social improvement and betterment; . . . that trade unions and their policies are forged in the heat of the interest of the great mass of the people and the nation at large. . . .

That this institutional vehicle, directed and contained by the track of collective bargaining was laid securely in the roadbed of industrial organization has not always been clearly seen. The economic success or failure of unions was and is closely related to the industrial complex in which they exist.<sup>119</sup>

This introduces what I think is an essential problem. If unions are so closely related to the industrial complex in which they exist, can they, any more than the consumer or corporate management, represent the interest of the community at large?

The first part of the answer is that to the extent that the unions represent interests which are co-extensive with those of the community—for instance, with consumers or victims of pollution—the union can be a legitimate source of corporate responsibility. Unions represent interests of some sections of society which are apparently absent from (or at least ineffectively represented in) the mix of factors which are used to make corporate decisions. Workers represented by unions come from a broad cross-section of the lower and middle classes of American society and, with the

**“The solution may be to insure that jobs are not lost, or that job assistance is provided when pollution...standards are implemented.”**

noteworthy exception of blacks and the poor, union members are representative of those in America who suffer most significantly from the ills associated with pollution, product safety, and consumer protection.<sup>120</sup> After all, union members are consumers and victims of pollution. But because the union is somewhat representative does not necessarily mean that it should act as an agent of society in controlling the behavior of corporations.

The second part of the answer is that to the extent that unions are controlled by the economic factors which determine the behavior of the corporation, the union is not a better source of corporate responsibility. The tendency of unions to pursue monopoly control of the product market is one example of an area where unions and corporate management seem to stand in the same relationship to society. The environmental backlash occurring in many local unions is another example of the close identity between corporate and union interests which works to diminish the unions's ability to serve the community in general. However, to the extent that unions are able to redefine their interests as long-term in nature, they can be seen as a legitimate source of social control.

Third, of the four traditional sources of control over the corporation—ownership, government, the market, and organized labor—unions may be in the best position to provide effective control.

—The split between ownership and control has effectively insulated corporate management from accountability to stockholders.<sup>121</sup>

—Government officials perceive themselves as too dependent upon the support of corporate management to undertake effective steps to control the corporation.<sup>122</sup>

—Consumers are too lacking in information and too fragmented to control the corporation effectively.

—Labor unions, however, may not fall victim to these shortcomings.

The classical source of rational control over the quality, quantity, and character of the ends of production has been the corporation responding to the demands and desires of the consumer, that is, the market. To the extent that the consumer within the market controls the

corporation, corporate decision making is considered neutral and the consumer is seen as the participant in the market process who provides value inputs. Materials and labor are also considered neutral factors, especially in comparison to the inputs of the consumer. For instance, the supply of copper does not move in the market with attached provisions that it be used only for peaceful purposes. Instead, copper flows to the highest bidder.

Labor has traditionally followed suit. As a rule, labor has not argued about what it was helping to manufacture, instead it followed the market. As everyone knows, unions were originally developed to overcome a major imperfection in the labor market, the fact that individual, unorganized workers were at the mercy of employers. Now, faced with a second market imperfection—the inability of the consumer to control corporate output through the use of demand—unions may attempt to solve this problem by adjusting the cost of labor so as to control the output of corporations—especially in terms of character and quality. Union bargaining on environmental issues is thus an attempt to control corporate output through the use of the labor market.

A brief look at the present failure of the consumer to control the corporation through the use of demand in the product market indicates that at least three factors have rendered the consumer relatively powerless. First, advertising screens from the consumer's view the harms and disbenefits which come from products. In addition, advertising creates “false” demand among consumers. Consumer decisions are not made with adequate information, let alone perfect information. Secondly, consumer choice is incapable of reflecting all of the costs which should be included in the price of products. Thirdly, the market is beyond the control of the consumer. The supreme concern of corporate management for growth and security means that they must manipulate the consumer.<sup>123</sup>

When a union is bargaining on environmental issues, it is using its economic power in the labor market as a substitute for consumer control in the product market. As the earlier discussion of unions and antitrust law indicated, unions are able to impose extensive control over the product market, and the corporation's position in the product market, through its control over labor costs.<sup>124</sup>

Furthermore, as a substitute for the consumer, the union may not be affected by the deficiencies which make futile the attempt of consumers to control the corporation. First, the union has the ability to accumulate information far beyond the ability of the consumer. It not only has control over large financial and intellectual resources but can concentrate its information into a single series of intensive transactions—the contract negotiations. Secondly, because the union can spell out

its demands in detail, using express language instead of implicit shifts in demand, environmental bargaining can incorporate into the bargain a greater number of externalities than the consumer can. And third, the union has strong economic leverage against the corporation. Unlike the consumer, the union can strike and stop production. It can concentrate its demands into a single confrontation and can multiply the effect of the individual demands of its members into a significant force. For instance, General Motors estimates that every additional penny in a wage agreement represents \$10 million in labor costs.<sup>125</sup>

However, one must be cautious in assigning too much to unions; after all, their primary purpose is to collectively represent members as workers. In regard to this discussion, that means pursuing the basic issues of wages and hours.<sup>126</sup> But since wages are one of the methods by which the corporation creates consumer demand for its products, there may be less antagonism on the wage issue than current mythology allows; and hours (and leisure) may diminish in importance as bargaining issues in the future because of the effect of shorter work week has on job security and unemployment. There are, as I have already mentioned, a number of reasons to think that workers will be interested in making demands on the corporation which reflect their interests as consumer and victim of pollution more than they reflect their short-term interests as worker.

The legitimacy of the labor union using collective bargaining to control corporations would seem to rest on three factors: first, the labor union contains within its membership representatives of at least two major segments of society—consumers and victims of pollution—which are presently incapable of protecting themselves from the power of the corporation; second, the labor union may be capable of defining its interests in social terms; third, the labor union has the economic strength and at least some of the structural characteristics necessary to effectively control the corporation. To this extent, the labor union is a legitimate institution to assist in developing corporate social responsibility.

#### V Conclusion, or the Beginning?

Environmental Bargaining by labor unions is not the final answer to the problem of corporate social responsibility. And certainly environmentalists ought not look to this technique as the place to exert maximum effort.

The real merit of the idea of environmental bargaining may be that it reawakens in us the perception that the union is a unique social organization with a unique opportunity to effect change. We need to remind ourselves that the union is the place in society where class conflict can be least disguised, and therefore where the political energy of labor is most intense.

In the age of Hardhats for Nixon, one might well ask why that political energy is so diffuse, if not mis-

directed. Perhaps the labor movement suffers not so much from a lack of political strength, as from a narrowness of goals. Demands for immediate economic benefits like increased wages and pensions will not preserve the identity of the labor movement in a society of relative worker affluence. The unions, if they are successfully to reassert their autonomy, must move beyond the materialism of the American corporate state and demand that production be subordinated to the human needs of the producers. This is not an outlook wholly foreign to the American labor movement, whose origin lies partly in a concern with industrial democracy. But it is in new manifestations of that outlook, such as environmental bargaining, that the working movement may find new vigor and direction. And it is the burden of this article that within the context of American labor law there exist opportunities for this kind of social action.



1. N.Y. Times, May 12, 1968, at 87, col. 1.
2. *Id.* at 87.
3. N.Y. Times, March 11, 1970, at 15, col. 1.
4. N.Y. Times, April 9, 1970, at 51, col. 1.
5. N.Y. Times, April 18, 1970, at 71, col. 4.
6. N.Y. Times, April 22, 1970, at 45, col. 1.
7. N.Y. Times, May 11, 1971, at 1, col. 1; see page 38, col. 1 for an informative synopsis of Reuther's life.
8. N.Y. Times, June 21, 1970, at 48, col. 1; Woodcock may not be as flamboyant as Reuther was, but since becoming president of the UAW, he has exceeded the expectations of most commentators and has continued a very active pursuit of environmental and civil rights programs. See N.Y. Times, Sep. 27, 1970, Magazine, at 28: "The Unknown Who Leads the 'Walter P. Reuther Memorial Strike.'"
9. I say "possibly" because Woodcock may have had a two-prong strategy in mind.
10. The National Audubon Society, ZPG, Sierra Club, Environmental Action, Friends of the Earth, and the Wilderness Society..
11. N.Y. Times, July 12, 1970, at 28, col. 4.
12. N.Y. Times, July 17, 1970, at 12, col. 5.
13. N.Y. Times, Sep. 10, 1970, at 12, col. 1.
14. N. Pearlstine, "Labor's Pollution Campaign Goes Up In Smoke," Wall St. J., April 19, 1971, at 3.
16. N.Y. Times, Nov. 12, 1970, at 1.
17. 45 C.F.R. 1201 (for 1972, 1973, and 1974 standards); 36 F.R. 12658 (for 1975 standards).
18. 45 C.F.R. 1201; 36 F.R. 12653.
19. Including imports if it is to be effective. To this end, the UAW has recently announced a new program of cooperation with the Japanese Automobile Workers Union. N.Y. Times, May 25, 1971, at 78, col. 2.
20. And now federal regulation has eliminated the need for bargaining for pollution controls on automobiles.
21. The importance of the role Reuther may have played in developing this idea is magnified, since his death and the end of the bargaining plans were almost coincidental.
22. The regulations were officially promulgated on November 10, 1970. 35 F.R. 17288.
23. N. Pearlstine, *Labor's Pollution Campaign Goes Up In Smoke*, Wall St. J., April 19, 1971, at 3. Hereinafter cited as *Up In Smoke*. Pearlstine claims that this is what killed the UAW's plans to bargain on air pollution.
24. N.Y. Times, Sep. 28, 1970, at 34, col. 5.
25. *Up In Smoke*, supra.
26. See, e.d., W. Reuther, *First Things First*, Center for the Study of Democratic Institutions (1964, occasional paper); J. Stieber, *Governing the UAW* (1962).
27. In his autobiography, Alfred Sloan, Jr., chief executive of GM for twenty-three years, concludes his discussion of GM's relationship to the UAW by saying,
 

It is easy to understand why it seemed, to some corporate officials, as though the union might one day be virtually in control of our operations. A. Sloan, *My Years With General Motors* 405 (1965, paperback).
28. Touring a Ford plant to inspect newly installed automated engine-boring machines, Reuther was asked by a Ford official, "How are you going to collect dues from those machines?"
 

Reuther replied, "How are you going to sell Fords to those machines?"
29. N.Y. Times, May 11, 1970 (editorial).
30. My telephone conversation with UAW lawyers and private papers exchanged with the UAW's General Counsel staff. November, 1971.
31. *Up In Smoke*, supra, at 3.
32. *Id.*, at 3.
33. DuPont employees at an acid plant in East Chicago and tunnel workers in New York City; see *Up In Smoke*, supra, at 3.
34. A. Salpukis, "Able Links Steelworkers Demands to Can Settlement," N.Y. Times, March 31, 1971.
35. See Wall St. J., Nov. 19, 1971, at 1, col. 6.
36. *Id.*, at 1. Other examples include the Steelworkers local in El Paso which lobbied to obtain more time for their employer to bring air-clean-up equipment up the par; New Jersey Teamsters who helped stop plans to ban non-returnable bottles; a Holyoke, Mass., local has replaced its fall safety campaign with a drive "to save jobs by halting the ecology steamroller;" the building-trades union officials in Florida are pushing for a resumption of the cross-Florida barge canal.
37. S. Deutsch, *Perceptions of and Attitudes Towards Automation: A Study of Local Union Leaders. 12 Labor L.J. 396 (1967)*. This study was on attitudes concerning jobs lost due to automation; the most noteworthy facet was the way in which the local union leaders thought that neither the government nor the union bore any responsibility to the unemployed. From these leaders' point of view, finding a new job and feeding one's family in the interim is solely the responsibility of the individual.
38. Wall St. J., Nov. 19, 1971, at 1, col. 6. Harry Bridges, leader of the International Longshoremen's and Warehousemen's Union, said the ecology movement is "obviously antiworker" because it is a product of the ruling class." *Id.*
39. *Id.*, at 1.
40. *Id.*, at 35.
41. The one exception to this statement may be when the union can obtain a significant gain in its control of the product market through bargaining on such issues.
42. This is not necessarily an exhaustive list.
43. Fortune, *Markets in the Seventies* 111 (1968). Figures in this section are based on 1967 dollars and are thus compensated for inflation.
44. Again these figures are compensated for inflation.
45. *Markets in the Seventies*, supra, at 117.
46. *Id.*, at 102-111.
47. R. Stein and J. Hedges, "Earnings and Family Income," 94 Monthly Labor Review 13 (June, 1971, #6). Blue collar workers include craftsmen, managers, officials, proprietors, clerical workers, and sales personnel. Data is from the 1970 Census.
48. *Id.*, at 36.
49. G. Katona, B. Strumpel, E. Zahn, *Aspirations and Affluence* (1971) quoted in 94 Monthly Labor Review 4 (June, 1971, #6).
50. "Union Consumer Campaigns," supra, at 418.
51. Interview with Wisconsin bank holding company lawyer at Yale Law School.
52. Of course, in a case such as the United Rubber Workers (where they obtained a half-cent per man hour contribution to an environmental research fund) computation is not difficult; but there still remains the problem that the bulk of benefits pass to the public and not the worker.
53. But not the Teamsters in New Jersey who stymied a legislative plan to ban non-returnable bottles, see note 18, this section.
54. Cf. Wall St. J., Nov. 19, 1971, at 1. col. 6.
55. Cf. UAW program of cooperation with Japanese Autoworkers.
56. E. Mazey, "Future Problems Facing Unions," *New Directions in Industrial Relations*, Notre Dame Union-Management Conference 12 (1964). For a view that collective bargaining will be shifting from "bread and butter" issues to "concern for total society," see the statement by an American Motors vice-president in E. Cushman, "An Evaluation of Industry-wide Collective

Bargaining," *Improving the Relations of the Parties*, Notre Dame Union-Management Conference 9, at 20 (1960).

62. Based on the theory of complementary anti-competitive incentives of unions and corporations, one might expect companies to desire that the union present such industry-wide demands in bargaining talks; but of course public discussion of such desires would risk antitrust action.

63. "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . .

"It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer. . . .

"For the purpose of this section, to bargain collectively is the performance of the mutual obligation . . . to . . . to confer in good faith with respect to wages, hours, and other terms and conditions of employment." Taft-Hartley Act, Sections 8(a) (5), 8(b) (5), 8(d).

64. J. Etelson, "Automobile Exhaust Pollution and Collective Bargaining," 11 Newsletter of the Council on Labor Law and Labor Relations 1 (August, 1970, reprint), hereinafter cites as *Pollution Bargaining*.

65. The following is an indication of the lay view of the meaning of conditions of employment:

We may define the conditions of employment as all those elements not directly related to wages and hours. This category is a catchall which defies enumeration; special wages and bonuses for hazards or discomforts, regulation of lunch and rest periods, provisions for holidays and vacations, considerations of health and safety, benefit plans including insurance against sickness and accidents, pension plans, termination payment, provisions for upgrading and on-the-job training, are but a few of the many conditions of work, some of which are generally categorized as fringe benefits. These are all the subject of collective bargaining. S. Surfin. *Unions in Emerging Societies* 12 (1964).

66. *Pollution Bargaining, supra*, n. 2. Since Etelson serves as a legal assistant to an NLRB member, his article may have been a trial balloon let go to test future NLRB policy, a pseudo-declaratory ruling designed to elicit opinion concerning the mandatory bargaining of environmental issues.

67. *Id.*, at 2.

68. *Id.*, at 6, n. 6: *N.L.R.B. v. Lehigh Portland Cement Co.*, 205 F. 2d 621 (4th Cir. 1953); *American Smelting and Refining Co. v. N.L.R.B.* 406 F. 2d 552 (9th Cir. 1969); cf. *N.L.R.B. v. Bemis Bros. Bag Co.*, 206 F. 2d 33 (5th Cir. 1953). With respect to eating facilities, see *Pollution Bargaining, supra* at 6, n. 7; *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949). The following quotation is from *American Smelting*, at 554.

69. For those whose working day requires their presence on the streets and highways (for instance, GM employees who pick-up or deliver parts and materials), the relationship of air pollution as a condition of employment is even more clearcut. *Pollution Bargaining, supra*, at 3.

70. *Pollution Bargaining, supra*, at 3.

71. See the report of the Steelworkers demand that their employer burn better grade coal in his coke ovens. A. Salpukis, "Abel Links Steelworker Demands to Can Settlement," N.Y. Times, March 31, 1971.

72. See recruiting bulletins of the American Federation of Teachers.

73. Cf. *Fibreboard Paper Products Corp. v. N.L.R.B.* 379 U.S. 203, at 223 (1964) (concurring opinion).

74. *Fibreboard, supra*, at 223.

75. *Pollution Bargaining, supra*, at 4; see, e.g., *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1965).

76. *Pollution Bargaining, supra*, at 5; see, *H.K. Potter Co. v. N.L.R.B.*, 397 U.S. 99, 102-108 (1970).

77. *Pollution Bargaining, supra*, at 5.

78. *Id.*, at 5 and n. 21:

. . . Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources.

79. *Id.*, at 5 and no. 22, see *Fibreboard, supra*, at 214.

80. H. Wellington, "Trends in Labor Law," in *Collective Bargaining Today*, Proceedings of the Collective Bargaining Forum—1970 (1971) 181.

81. *Id.*, at 5 and n. 24.

82. There is, practically speaking, a way around the mandatory bargaining hurdle. The union makes its demands on subjects clearly within the mandatory bargaining category (such as wages and hours) sufficiently high that management is willing to reduce its resistance to bargaining on non-mandatory items in exchange for a reduction by the union in its demands on mandatory subjects. There is some evidence that this interplay between employers and employees is the prevalent process in some collective bargaining situations. Davey, et al, *New Dimensions in Collective Bargaining* 187 (1959). The loss to the union in not being able to elevate pollution clauses to the level of mandatory bargaining is, first, that the union loses the ability to contest the response of the company to the non-mandatory issue and, second, that the union cannot strike on that issue. Since mandatory bargaining never means that the company must submit to the specific union demands, but merely that there be good faith bargaining, the loss to the union may not

be significant. The more powerful the union, the less necessary that a subject be one of mandatory bargaining. As two labor law commentators recently wrote:

. . . when jobs and the wages, hours, and working conditions are considered, managerial freedom is not based on legal rights, but upon the economic strength of the employer and the employees. . . . N. Wortman and F. McCormick, *Management Rights and the Collective Bargaining Agreement*, 16 Labor L.J. 195, at 196.

83. One could argue that the worker worries at work about what is happening to his family and that the worker loses part of the value of his wages and the benefit of the hours the union has bargained for him because of the air pollution which engulfs him at home. One might also be able to make something of the argument that shoddy products soak up his income.

84. Taft-Hartley Act, Section 101, Section 1.

85. *Masey, Union Consumer Campaigns, supra*, this article, n. 13.

86. Winter, *Antitrust and Unions, supra*, at 16; the interested reader would do well to read Winter's article in its entirety. For a more extreme version of this argument see Boarman, *Union Monopolies, supra* p. 10, n. 16 of this article.

87. In cases where a variety of unions represent workers of one employer, the unions will join together in coalition bargaining.

88. Pattern-bargaining is when a union bargains a contract with one employer in an industry (going on strike if necessary) and then gets the other employers to match the first employer's settlement terms.

89. *Antitrust and Unions, supra*, at 16. The argument in this section is based almost totally on this article by Winter.

90. *Antitrust and Unions, supra*, at 17.

91. *Id.*, at 20.

92. *Id.*, at 21. Nevertheless, Winter maintains that the unions highly anti-competitive characteristics are not reason enough for discarding collective bargaining, since unions serve other functions critically related to democratic values such as pluralism, voluntarism, and freedom from coercion. The worker through the union gains status and a sense of participation in the democratic process and the limitations of competition created by collective bargaining "may well be a small price to pay for what collective bargaining contributes to democracy." *Id.*, at 23.

93. The National Labor Relations Act is the body of law which authorizes the National Labor Relations Board and details unfair labor practices. From 1935 to 1947, the N.L.R.A. was also called the Wagner Act. The National Labor Relations Act was amended in 1947 by

the Taft-Hartley; not Wagner. In 1959, the N.L.R.A. was amended by the Landrum-Griffin Act, but its popular name remains the Taft-Hartley Act.

94. *Antitrust and Unions, supra*, at 29, 30.

95. 312 U.S. 219 (1941).

96. *Antitrust and Unions, supra*, at 44.

97. *Allen Bradley Co. v. Local 3 IBEW*, 325 U.S. 797 (1945).

98. 325 U.S. 797, at 810.

99. *Antitrust and Unions, supra*, at 47. Winter points out that many later cases have "turned on the question of whether management jumped at the chance to restrain competition or resisted the union's demands." *Id.*, at 50, n. 179.

100. *Allen-Bradley*, 325 U.S. at 809.

101. *Antitrust and Unions, supra*, at 61.

102. Summers and Wellington, *Labor Law* 207 (1968).

103. *Id.*, at 210.

104. 381 U.S. 657 (1965).

105. 381 U.S. 676 (1965).

106. 381 U.S. 676 at 689-690.

107. 381 U.S. 657 at 669.

108. *Antitrust and Unions, supra*, at 55.

109. J. Rubenstein, *The Emerging Antitrust Implications of Mandatory Bargaining*, 50 Marq. L.R. 50, at 74, (1966), hereinafter cited as *Antitrust and Mandatory Bargaining*.

110. *Id.*, at 75. Rubenstein questions whether the Court has not frustrated Congressional policy by ignoring the detailed manner in which federal labor policy has been spelled out in the Taft-Hartley Act and the Landrum-Griffin Act and, furthermore, whether the Court has ignored the presumed expertise of the National Labor Relations Board for deciding what is and what is not a subject of mandatory bargaining.

It would seem that only the Board should have the power to determine, in the first instance, whether a particular subject really does fall within the scope of mandatory bargaining. . . . the contrary rule . . . will doubtless stifle collective bargaining by tending to fix for all times as "mandatory" issues what a court at one time may believe is or is not such an issue. . . . *Id.*, at 75-76.

111. Feller and Anker, *Analysis of Import of Supreme Court's Antitrust Holdings*, 59 L.R.R.M., 103, at 107, cited in *Antitrust and Mandatory Bargaining, supra*, at 63 and n. 41.

112. This may be contrary to the complementary anti-competitive incentives at work in organized labor and management.

113. Against management also.

114. *Antitrust and Unions, supra*, at 34.

115. 381 U.S. 676, at 722.

116. *Jewel Tea*, 381 U.S. 676 at 694-697.

117. *Antitrust and Unions, supra*, at 58.

118. By legitimacy I have in mind "the quality of 'oughtness' that is perceived by the public to inhere to a political [institution]," and I would also like to limit most of my discussion to the intellectual aspects of "oughtness,"<sup>2</sup> as set out in R. Diamond, *Toward a Democratic Theory of Economics: The Corporation and the Consumer in the United States* 72, at 76 (Corporate Responsibility Materials, Yale Law School, 1971), hereinafter cited as *Democratic Theory*.

119. S. Surfin, *Unions in Emerging Societies* 21 (1964).

120. I have not discussed to this point the matter of union democracy. This question of whether the union represents the views of its members is obviously a critical question in this article.

I recognize that unions do not have opposition movements within themselves, but this does not seem to be an insurmountable problem. There is at least some evidence that union leadership, while attempting to maintain a monolithic appearance, adjusts its proposals and programs to match the mood and opinion of the union rank and file. Operating within this model, Steiber, in his study of democracy in the UAW, concluded that "the UAW must be rated relatively high on this first principle of democracy—the pursuit of broad policy objectives consistent with membership desires." J. Steiber, *Covering the UAW* 162 (1962).

For the purposes of this paper I have accepted such behavior as sufficient for the concept of environmental bargaining by unions. And a full discussion is beyond the scope of this paper.

For studies of democracy in American unions see the series of books commissioned by the Trade Union Study of the Center for the Study of Democratic Institutions; included are volumes on the Retail Clerks, the Carpenter's Union, the American Federation of State, County, and Municipal Employees, the International Machinists, the Teamsters, the Oil, Chemical, and Atomic Workers Union, the Brotherhood of Railroad Trainmen, the Steelworkers, and Steiber's book on the UAW; the publisher is John Wiley and Sons. Also see E. Rhenman, *Industrial Democracy and Industrial Relations* (1968) for a discussion of the possible meanings of union democracy.

121. Berle and Means, *The Modern Corporation and Private Property*.

122. *Democratic Theory, supra*.

123. *Democratic Theory, supra*, at 97-103.

124. See Section III, 6 of this article. Industry-wide Environmental Bargaining and Antitrust.

125. This may not be as significant as it sounds, since it is estimated that GM will spend \$150 million on pollution and safety research in 1971. That would equal 15 cents per man hour worked by UAW employees of GM or approximately 30% of the 1970 contract gains of 51 cents per hour during the first year of the contract. N.Y. Times, June 7, 1971.

126. It also means in most cases handling grievance procedures against management.