AN ANALYSIS
OF
THE HISTORY OF THE FEDERAL ANTITRUST LAWS
AND THEIR APPLICATION TO LABOR.

Sherman Nobleman
Graduate School Business Administration
Mr. Ross
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ORIGINS:

Application of anti-trust laws to unions has a long history in the United States which gradually evolved from our Anglo-Saxon legal heritage. English labor legislation dates back to the Statutes of Laborers in 1351 and 1562. These were government attempts to regulate manufacturing and merchandising and to reduce labor's bargaining power. They defined the master-servant relationship, required all able bodied persons to work, fixed the price of labor, regulated labor's freedom to contract, limited labor mobility, and specified product, quality and price standards. Thus, during the mercantile era, statutory and common law determined the permissible labor contract while merchant and craft guilds promoted monopoly by eliminating outside competition.

With the Industrial Revolution,came the advent of trade unions. The substitution of capital equipment for labor increased the difficulty of becoming a master. Journeymen ranks combined in trade unions to nullify the monopolistic bargaining advantages of the masters.

English common law developed the doctrine of criminal conspiracy which made illegal certain concerted action of workers in working demands on manufacturers. Under common law, labor combinations were considered to be criminal conspiracy by federal statutes as well as violations of state criminal law. Early applications of the doctrine by the court aroused public protest and labor gradually gained recognition as a cohesive, economic and political force. In Commonwealth v. Hunt (1842), the Supreme Jucicial Court of Massachusetts set aside a criminal conspiracy conviction insisting that "the purpose of the concerted action was crucial rather than the fact of such action alone." [1.]

In the next few decades, money damages were awarded for tort actions brought against associations for "restraining trade in the free market place" through combination. The early common law doctrine classified every interference with a free and open market as an unlawful restraint. This was the basis for the growth of anti-trust legislation in the United States.

THE SHERMAN ACT (1890)

With the passage of the Sherman Act, foes of organized labor

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1. Mary L. Dooley, "Anti-trust Legislation and Labor Unions", Labor Law Journal, October, 1960. p. 913

acquired a powerful new tool. The public felt that big businesses were becoming too powerful. They were forming combinations and aggregating great masses of capital in an effort to control the marketing of goods and services by eliminating competition, restricting output, sometimes increasing prices and generally impeding freedom of trade. Traditional arguments against monopolies claim they devise unfair or unethical business practices to outsmart competition; they dominate the social, political and economic environment in the community; they represent a dangerous threat to our political democracy in the form of economic concentration.

The general purpose of the Sherman Act was to deal with the problems of preserving business competition and preventing restraints of trade from tampering with that competition. Sections one and two are the most pertinent and read as follows:

> Section 1: 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. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor.
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> Section 2: Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.[2]

The act also provided for triple damages to be paid to those injured by the violators of sections one and two, and provisions were made enabling the federal courts to enjoin activities which were in "restraint of trade".

The language of the act is vague. First, the act does not define exactly what "restraint of trade" or "monopoly"mean. Does a dual standard exist where monopoly in the labor market stands on a separate footing from monopoly in the product market? Secondly, it is not clear whether labor organizations were intended to come within its jurisdiction or not. Labor has consistently maintained that it was not intended to be subject to this law. Similarly, Professor Edward Berman, after studying the congressional debates leading up to the passage of the act states that "no valid evidence can be found in the records of the legislative

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2. Harold S. Roberts, ed., Labor and Antitrust Legislation: Selected Readings, (Honolulu: Industrial Relations Center, University of Hawaii, December 1961, p.1

proceedings that Congress intended the Anti-trust Act to apply to labor organizations."[3] Louis Boudin affirmed this in the Columbia Law Review by stating,"..... the evidence, we believe, conclusively shows that labor organizations were not intended to be included within the purview of the Act."[4]

However, Mary Dooley of the Wisconsin Bar Association claims that more recent investigators take the opposite view. She states that while Senator Hoar, an alleged author of the act, supported an early draft of the bill which expressly exempted labor, Senator Edmunds, another alleged author, publicly stated that the act was intended to apply to labor.[5]

Nevertheless, the court's interpretation of this issue has shifted from one extreme to the other throughout the years. The line of reasoning behind various doctrines imposed by the court in a series of historically famous cases will clarify the scope and application of the act with regard to labor unions.

RESTRAINT OF TRADE

It is interesting to note that while most historians agree that the Sherman Act was not basically intended to apply to labor organizations, this was one of the first effective uses made of it by the courts.

In 1893, several lower court decisions applied the act to labor cases, broadly interpreting the language of the act to mean every restraint of trade was to come under its jurisdiction.[6] In the Northern Securities antitrust case, Justice Holmes examined the meaning of the terms in the Sherman Act in light of the meaning which they had in common law. He concluded that the first section of the Act discussing "restraints" must be read in connection with the second section dealing with monopolies and that only restraints of trade which have a tendency to create monopolies were intended to be prohibited. Thus, the Act is not applicable to labor organizations unless they can be included under

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3. Louis B. Boudin, "The Sherman Act and Labor Disputes", Columbia Law Review, December 1939, p. 1285.
4. Ibid
5. Dooley, op.cit., p. 915
6. U.S. v. Workingmen's Amalgamated Council, 54 F. 40 (1893), cited by Dooley, Ibid, p. 916

the term"monopolies". Furthermore, the ordinary labor dispute would still be outside the scope of the act, since according to Justice Holmes:

> There is no combination in restraint of trade until something is done with the intent to include strangers to the combination from competing with it in some part of the business which it carries on.[7]

THE DANBURY HATTERS' CASE

It wasn't until 1908 that the Sherman Act was applied to a labor dispute when the United States Supreme Court ruled in the famed Danbury Hatters' Case that employee organizations were clearly with the act's scope.[8] Loewe was a hat manufacturer in Danbury, Connecticut. He operated an open shop which the Union hatters sought to organize. Loewe resisted this activity. The union struck, unsuccessfully, and later boycotted Loewe hats. They placed his products on the A.F.L's "Unfair list" and requested wholesale dealers in other states not to buy them. Loewe refused the union's demands for recognition and sued for treble damages claiming:

> 1. that the federal court had jurisdiction because the boycott interfered with his out-of-state orders and shipments
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> 2. that the Sherman Act applied to union activities
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> 3. that the hatters committed "restraint of trade" in violation of the act.

Deciding in favor of the employer, Loewe, the court said that the Sherman Act made illegal every contract, bombination or conspiracy in restraint of interstate commerce, without distinguishing between classes of businessmen and workmen. For the first time, the Supreme Court extended the concept of "restraint of trade" to the activities of labor unions. It did this by interpreting the term "interference" as meaning an interruption in the interstate shipment of a commodity as distinguished

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7. Northern Securities Co. v. U.S., 193 U.S. 409 (1904), Boudin, Op.Cit., p. 1319
8. Loewe v. Lawlor, 208 U. S. 274 (1907) cited by George H. Hildebrand, Collective Bargaining and the Antitrust Laws, (New York State School of Industrial and Labor Relations at Cornell University, Ithaca, New York, 1963).

from the common law principle of manipulation of commodity prices by producers or distributors. By rendering interference a "restraint", the court outlawed the secondary boycott under the Sherman Act. As a result, any form of the use of economic pressure by unions was dubious, even where the purpose was to win a labor dispute and not to manipulate the product market against consumers. It is important to note that the court's holding was based on the boycotting activities and not on the unsuccessful strike. Since both have the same intended effect of putting pressure on the employer to grant the union's demands, this ruling implies that the prevailing body of law accepted the legality of strikes, not including them under the term "restraint of trade", but held the secondary boycott illegal. Thus, "restraint of trade" took on new meaning and the scope of the Sherman Act was defined to include union activity.

LABOR SEEKS EXEMPTION FROM THE SHERMAN ACT

The decision in the Loewe case drove the A.F.L. into a campaign for statutory immunity from the Sherman Act. Labor felt that it had achieved a great victory with the passage of the Clayton Act in 1914. Section six declared that "the labor of a human being is not a commodity or article of commerce",[9] and that nothing in the antitrust laws shall forbid the existence and operation of the legitimate objectives of labor organizations. Thus, labor had been officially distinguished from the product market and labor organizations were held not to be illegal combinations or conspiracies in restraint of trade. Then through section twenty, the use of injunctions in labor disputes was limited in such a manner as to protect the strike, picketing and the boycott provided these activities were lawfully conducted in disputes over terms and conditions of employment. Labor's immunity seemed to be complete, and Samuel Gompers proudly announced, "this declaration is the industrial Magna Carta upon which the working people will rear their construction of industrial freedom."[10] This proved to be an optimistic view, however, for the Supreme Court continued to travel in a different direction from that taken by Congress.

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9. Dooley, op.cit. ,p. 917
10. Ibid

Less than a decade later, in 1921, it was shown that the Clayton Act had not, in fact, protected the rights of labor. Indeed, there was no change in the illegality of boycotting and since section sixteen gave private parties the right of enjoining antitrust violations, labor was subjected to increased application of the Sherman Act.

THE DUPLEX CASE[11] --- LIMITED IMMUNITY

Duplex, a manufacturer of printing presses, refused to recognize union demands for a closed shop, an eight hour day and union wages. Competitors notified the International Association of Machinists that Duplex must be brought up to standard or they would withdraw recognition. The union then instituted a local strike followed by a secondary boycott involving appeals and threats to customers. After being denied an injunction in the lower federal courts, Duplex was successful in the Supreme Court. The court interpreted Section six as granting limited , not general immunity, for legitimate objects lawfully carried out. Section twenty protected only those labor disputes where an employer-employee relationship existed. The court declared the union's conduct illegal in this case because the boycott and strikes extended the dispute to include outsiders who had no legitimate economic interest at stake.

The underlying current in this case involved the effort of national unions to organize and bargain collectively with firms dealing on the interstate level. In the process, disputes inevitably arose that interrupted the free flow of interstate commerce and occasionally affected prices. This posed the question of intent. Was it the primary purpose of the unions to manipulate product prices, or was this incidental to the purpose of monopolizing the labor market? The courts next used the test of direct intent as distinguished from indirect intent.

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11. Duplex Printing Press Co. v. Deering, 254 U.S.,443 (1921), cited by Hildebrand, op. cit. , pp. 155-56

THE CORONADO CASES -- THE QUESTION OF INTENT

Until this time, the Sherman Act had been mainly limited to use in boycott cases, an activity that occured at the point of destination of goods. The issue faced in the Coronado cases was the legal effect of preventing the manufacture of goods at the point of origin thus keeping the goods from entering the flow of interstate commerce.[12] The Coronado Coal Company bargained with the United Mine Workers and met union standards. Non-union mines threatened the company with loss of its markets and the company decided to break with the union. A strike ensued followed by violence and property destruction. The company sued the union for triple damages under the Sherman Act. According to the test of direct intent, the effect upon interstate commerce must be direct, immediate and material for the activity to be declared unlawful. Since most companies dealt in interstate commerce, if the court declared the strike illegal practically all strikes could be found violations of the act. The Supreme Court in its first decision found that the strike had only resulted in indirect restraint of commerce in that it merely reduced the supply of an article to be shipped in interstate commerce. However, Chief Justice Taft stated in his opinion that if the intent of the strike was to restrain commerce by keeping non-union goods off the market then a direct intent could be shown.[13] The case was brought to the Supreme Court for a second time and the court declared there was substantial evidence showing that the union purpose was to impede production of non-union coal and prevent its interstate shipment where it would, through competition, reduce the price of coal and lower wages for union labor in competing mines. The decision was not based upon the occurence of a strike, nor upon the existence of monopoly power in union activity, but solely upon the existence of a direct intent to restrain trade. Thus, when union activity interferes with the product market by controlling the supply or price of a commodity, it violates the Sherman Act. The concept of intent seemed to strike at the very source of union activity. However, the question to trade restraint was seen in a new light in the Bedford Cut Stone Case.

12. United Mine Workers v. Coronado Coal Company, 259 U.S. 344 (1922); Coronado Coal Company v. United Mine Workers, 268 U.S. 295 (1925), ibid, pp.157-59

13. Ibid, p. 158

THE BEDFORD CUT STONE CASE---RULE OF REASON

In the Danbury and the Duplex cases, the Supreme Court held that every combination in restraint of trade was illegal. Later, in the Standard Oil and American Tobacco cases, the court narrowed the application of the Sherman Act to unreasonable restraints. Whether this interpretation applied to labor organizations as well as industrial combinations was dealt with directly in the Bedford Cut Stone Company v. Journeymen Stone Cutters' Association(274 U.S.37 1927).[14] Here, the Stonecutters' union forbid members to handle stone cut by non-union workers. There was no violence, threats or actual boycotts but the court recognized the refusal to work as being an effective boycott. The companies sought an injunction claiming restraint of trade. The injunction was granted. Justice Sutherland stated that "a restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint."[15] He further noted that the action was not confined to local regions and in summation said that where the means are unlawful, the lawfulness of the end sought cannot serve as a justification. This decision made any form of boycott affecting interstate commerce illegal.

Justice Brandeis, in a dissenting opinion, felt that only unreasonable restraints of trade were restraints. He claimed the conduct in this case was reasonable. It did not involve coersion or threats, but was merely an effort at self protection by a small craft against an employer combination. This reasoning renewed labor agitation to free itself from the restrictions of the anti-trust laws.

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14. Dooley, op. cit., p. 919

15. Hildebrand, op. cit., p. 159

THE DOCTRINE OF LICIT MONOPOLY IN LABOR MARKETS (1932-41)

Labor benefited greatly from labor legislation under the New Deal Administration of President Roosevelt. The laws reflected a change in Congressional policy tending toward federal sponsorship of labor unions. Restraint by the judiciary gave way to liberation by statute in the Norris-LaGuardia and Wagner Acts passed in 1932 and 1935. Along with the Supreme Court's decisions in the Apex and Hutcheson cases to be discussed later, these events marked a shift from the anti-trust approach to the labor market in favor of the doctrine of licit monopoly.[16]

The underlying theories of the Norris-LaGuardia and the Wagner Acts differ. The basis of the Norris-LaGuardia Act was the doctrine of laissez-faire. Although the act restricted the use of Federal injunctions, it still left union progress to voluntary initiative and allowed employers to enjoy access to conventional means of resistence. The Wagner Act, on the other hand, sought a means of enforcing collective bargaining which it claimed was the duty of government not merely to protect, but to actively promote. Thus, it imposed restraints and duties upon employers and provided a means to represent employee wishes in bargaining.

The Norris Act gave the individual employee full freedom to organize and bargain collectively, made yellow dog contracts unenforceable and declared the following activities in labor disputes immune from the injunction: striking, joining a union, payment of strike benefits, picketing, persuading and publicizing. Both criminal and damage suits were still enforceable, however. Furthermore, the act defined the term "labor dispute". This was said to include "any controversy over the terms or conditions of employment whether or not the disputants stand in the proximate relation of employer and employee."[17] A dispute was said to embrace anyone having a direct or indirect interest therein. This broad concept immuned from injunction the use of "strangers"

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16. Ibid, p. 162

17. Ibid., p. 163

as long as they could be shown to have a tangible economic interest in the outcome. By implication it further exempted organizational and sympathetic strikes, primary and secondary boycotts and stranger picketing.

The Wagner Act exemplified direct federal intervention into labor-management relations by imposing direct restraints against employers, the duty to bargain collectively when the majority desired, and by providing an administrative body to deal with charges of unfair employer labor practices. It still left the terms and conditions of employment for private negotiations, however. In all other respects the act was anti-competitive in nature because it encourage collective bargaining. It enhanced union monopoly by making union representatives the exclusive representatives of all employees and by forcing the employer to bargain collectively with the union. Finally, the law contained no bar to industry-wide unions or to employer-representation associations. This gave unions the power to enlarge their bargaining scope to cover an entire industry. It is significant that this act fostered industry-wide bargaining which is the target for current proposals to re-apply anti-trust laws to labor. Moreover, it fostered the dual standard of interpreting anti-trust for labor in one way and in a different way for business. Certainly, no business combinations could achieve industry-wide agreements, as they are restricted by anti-trust laws against trust, cartels, and organized collusion. This is the central problem of the anti-trust issue today.

ANTITRUST IMMUNITY ACHIEVED

The Apex Case marks the turning point in the trend toward increased legal immunities from anti-trust laws. In this and the Hutcheson decision, the court virtually removed the Sherman Act from the union scene. In Apex Hosiery Company v. Leader, 310 U.S. 469 (1940)[18], Apex, a non-union firm, refused to sign a closed shop agreement. Union members in other

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18. Leo Wolman, ed., Monopoly Power as Exercised by Labor Unions: A Report to the American People. p. 12

companies declared a sit-down strike and seized the plant, remaining there for six weeks. During this period machinery and other property were destroyed. The occupation of the plant prevented shipment of out-of-state orders and Apex sued under section seven of the Sherman Act. The Supreme court found no violation under the Sherman Act holding that in this case a direct and intentional prevention of the shipment of goods was not a restraint of trade. They reasoned that the purpose of the Act was not to police interstate shipments of goods but to prevent suppression of commercial competition. The union's intent here was merely to organize the firm not to alter hosiery prices. The blockade of shipments and restriction of competitive freedom of the employers was a necessary consequence of the union's activity. This decision was directly opposed to the "lawful means, lawful purpose" analysis in the Bedford Cut Stone Case. Labor was now almost completely exempted from application of the anti-trust laws.

In the Hutcheson Case,[19] the court stated the proposition that a union may not be prosecuted under the Sherman Act for conducting a jurisdictional strike. The dispute was between carpenters and machinists over construction work at the Anheuser-Bush brewery in St. Louis . Although there was a prior agreement to arbitrate, President Hutcheson and three other officials of the carpenters union called a strike against the company and urged union members not to buy Anheuser-Bush beer. The government charged criminal combination and conspiracy in violation of the Sherman Act. Justice Frankfurter held there was no violation. First, he said, the facts in this case came within the union activities specified in Section twenty of the Clayton Act which were not considered violations of federal law. That is, the jurisdictional strike and the picketing and boycott in its behalf were acts in self-defense and lawful. He further stated that the Sherman, Norris-LaGuardia, and Clayton Acts were interlacing statutes. A final point was that the Hutcheson case dealt with union activities outside the employer-employee relationship. Since a major point in the Duplex case was that outsiders shared in the conduct, how could it be overlooked in this case? The court declared that the enactment of the

19. U. S. v. Hutcheson, 312 U.S. 219 (1941), cited by Wolman, Ibid., p. 13

Norris-LaGuardia Act, which clearly applied to union activities outside the immediate employer-employee relationship, rendered the Duplex decision inoperative. Civil action for damages and criminal prosecution were still available remedies, however. This case reinforced labor's freedom from the restrictions of the Sherman Act and built a solid foundation for the dual standard of labor and business with respect to anti-trust policies.

The area of union responsibility was reduced further in Hunt v. Crumboch, 325 U.S. 821 (1945).[20] Here, relief was denied an employer after the union refused to supply workers to him or to accept his workers into union membership, resulting in the destruction of his business.

In the final case to be cited, the Allen-Bradley case, a union was declared exempt "if it acts alone and in its self-interest and pursues legitimate objectives, exercising the peaceful activities normally incident to achieving its usual and proper aims."[21] Local No.3 of the International Brotherhood of Electrical Workers(1 B.E.W.) had negotiated a series of closed-shop agreements in New York City binding contractors to buy equipment only from local producers also having an agreement with Local No. 3. All three groups put pressure on non-participating contractors and manufacturers in the New York area and were able to raise union wages and employment as well as prices and profits. Competition was eliminated and a complete monopoly secured. The Allen-Bradley Company sued the union to have them enjoined.

Were the anti-trust laws violated? Here there was a concerted action between a labor and a non-labor group. The court said the activities of the employers were definitely violations of anti-trust because it constituted a business monopoly, but "that the

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20. Ibid.

21. Allen-Bradley Company v. Local 3, I.B.E.W., 325 U.S. 797 (1945 at p. 810), cited by Dooley, Op.cit., p. 924

same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."[22] Thus, the union had violated the anti-trust laws in this case. However, the statement of the decision meant that the union could carry out the same action by making separate contracts with each employer instead of with business combinations and be free from anti-trust restrictions. The same acts which are criminal for employers may be legally carried out by unions. Here is the double standard in its most flagrant form.

CONCLUSION

Today unions play an essential role in our free enterprise system. Union activities have taken on a business-like aspect. However, as closely as the two are converging, they are separated by a wide gulf of legislative and judicial policies regarding antitrust restrictions. These have taken the form of three federal statutes, the Sherman, Clayton and Norris-LaGuardia Acts, as well as a long history of judicial interpretations. This paper has reviewed the changing attitudes toward labor unions. We have seen how the court originally adopted a checkmate policy to stop coersive union activity in the labor and product markets. The narrow interpretation was widened by the distinction that labor was not a commodity or article of commerce. The legal and legislative pendulum then swung to the opposite extreme granting virtual immunity to labor unions from anti-trust restrictions. With the Allen-Bradley decision, the court seems to have adopted a policy of containment by retaining its liberal view toward union activity yet confining this activity to labor groups acting in the union's self-interest. In a sense, we again find ourselves at a turning point. Today there is growing

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22. Ibid., p.925

support to renew application of antitrust restrictions to the labor market. The topic is being widely debated in law journals, magazines, Congressional committees and in a series of legislative proposals to curb the power of unions. For this reason, it is important to examine the historical precedents in this area as a basis for a better understanding of the problems to be faced by renewed application of anti-trust laws. Only then, can the changing context of these laws be logically determined in light of the current situation.

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