Industry's View

ON

Labor monopoly (1956)

Organized Labor and The Antitrust Laws

New York c 1956

THE RECENT MERGER of the AFL and the CIO into one big union of 15,000,000 members has raised many misgivings in the public's mind.

Even before these two big labor organizations joined together as one — under one man, one roof — there was anxiety about labor union "giantism." A poll conducted by the Opinion Research Corporation of Princeton, N. J., showed the public considerably more concerned about bigness in labor unions than about bigness in business.

How much *more* concern is there *now* about labor bigness? How will this enormous power be used? Are union monopolistic practices now more widespread than ever before? These are among the many questions in people's minds.

Twenty-one years ago the Wagner Act was hailed by union leaders as their "charter of freedom." But it was more than that; coupled with the Norris-LaGuardia and Clayton Acts, the freedom to organize into labor unions and to compel collective bargaining became a license to lawlessness.

In 1947 the Taft-Hartley amendments to the Wagner Act placed a few modest restrictions on certain types of union activities. Despite outrageous misrepresentation to the contrary, these amendments were designed for the most part to protect the rights of individual employees against arbitrary and unlawful union practices. The basic "charter of freedom" for unions was still there and they have continued to grow and prosper.

Today the physical evidences of union prosperity are apparent. It is evident that unions are not the weak and exploited victims of corporate conspiracy they are still seeking to portray themselves to be. In the last two decades unions have come of age; they must be held to the same standards of accountability as every adult citizen, group or organization.

In this connection, it is a matter of timely information that a double standard exists in the application of the antitrust laws — one under which business monopoly is prohibited, and the other under which union monopolistic practices are freed of restraint.

The courts have held that existing antitrust laws do *not* apply to labor unions.

In the following pages a discussion of the double standard in the application of the antitrust laws leads to the inescapable conclusion that the time is long overdue for Congress to make a searching examination to determine how and to what extent monopolistic practices by labor unions should be regulated and controlled in the public interest.

On these pages are presented the views of Industry on a subject of current public interest, factually presented, for whatever use you wish to make of them.

NATIONAL ASSOCIATION OF MANUFACTURERS
2 EAST 48th STREET • NEW YORK 17, N. Y.

ORGANIZED LABOR AND THE ANTITRUST LAWS

The law now permits a combination of labor unions to engage in activities which not only run counter to the basic policies of the antitrust laws but which are completely unrelated to the legitimate objectives of organized labor.

This immunity means that rules of conduct governing other segments of our economic life are inapplicable to organized labor. It means there exists a double standard for application of our antitrust laws – shocking as this may be to our concepts of equal justice under law.

This double standard can be illustrated and pointed up by brief reference to instances where activities of businessmen have been proscribed, whereas analogous conduct by labor unions has been practiced with impunity.

It is clear that group boycotts or concerted refusals by businessmen to deal with other businessmen are deemed undue restraints of trade and, whatever their purpose, will be condemned as violations of the Sherman Act.

For example, an agreement by retailers to boycott wholesalers who sold directly to consumers has been held unlawful. (*Eastern States Retail Lumber Dealers Assn.* v. *United States,* 234 U.S. 600 [1914]).

Similarly, an agreement by dress manufacturers to boycott retailers who practiced "style piracy" by selling copies of original designs was held unlawful despite its worthy objective. (*Fashion Originators Guild* v. *Federal Trade Commission,* 312 U.S. 457 [1941]).

Likewise it was held unlawful for a group of clothing manufacturers to agree on their own initiative to give their work only to members of their group who were in good standing with the International Ladies' Garment Workers Union (*United States* v. *Womens Sportswear Manufacturers Association,* 366 U.S. 460 [1949]).

Unions, however, may freely engage in similar activities. For example, the glazers' union has in its by-laws and in its contracts a judicially approved prohibition in the form of a boycott against the use of pre-glazed window sash, i.e., sash glazed at the premises of another employer prior to installation. (*Joliet Contractors Assn.* v. *National Labor Relations Board,* 202 F. 2d 606 [CA 7th, 1953], cert. denied 346 U.S. 824 [1953]).

STATES RESTRAINED FROM REGULATING UNIONS

The Federal law not only permits such activities by unions, but also prevents the states from effectively regulating them. Thus in a recent case the Supreme Court held that the State of Missouri could not enjoin union picketing designed to force an employer to agree to deal only with unionized contractors, even though this would violate the state antitrust law. The court reasoned that the federal Labor-Management Relations Act has preempted the field and precluded the states from regulating conduct dealt with by the federal Act. (*Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468).

Unions have also increased costs and retarded construction by unreasonably restricting the use of modern techniques. Thus a labor union in Chicago acted lawfully in requiring paving contractors using ready-mixed concrete to employ the same number of men as would be required in mixing concrete by hand. (*U. S.* v. *Carrozzo,* 313 U.S. 539). However, in instances where businessmen have combined for the purpose of suppressing or blocking patented inventions or competing technology, their conduct has been held unreasonable *per se* under the antitrust statutes. (*Hartford Empire Co.* v. *U.S.,* 323 U.S. 386).

Agreements between businessmen, either actual or potential competitors, not to compete in specified territories are held unreasonable by reason of their character and necessary effect on competition. Like price-fixing agreements, such arrangements have been described as having no purpose "other than the elimination of competition" and are thus summarily dealt with. (*Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211; *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593).

WORK STOPPED BY FORCE

Unions, however, divide territory and exclude business competition. Take the example of a construction contracting company of Richmond, Virginia, which operated under an agreement with the AFL Building and Construction Trades Council of that city. The company secured a contract for a coal preparation plant in Kentucky. When it started work, however, the United Construction Workers, affiliated with United Mine Workers, notified the company that it was "working in United Mine Workers territory" and that its men would have to join the United Construction Workers. The men declined to join, whereupon the union stopped the work by force and drove the contractor out of Kentucky. (*United Construction Workers* v. *Laburnum Corp.,* 347 U.S. 656 [1954]).

As regards monopoly power, it is obvious that a single firm, or a group of business enterprises acting in concert, which possesses sufficient economic power to exclude competitors or to fix market prices, may run afoul of section 2 of the Sherman Act. (*United States* v. *Aluminum Co. of America,* 148 F. 2d 416 [CA 2d, 1945]; *American Tobacco Co.* v. *United States,* 328 U.S. 781 [1946]).

It is fundamental that the exercise of economic power by a single businessman for the purpose of destroying a competitor violates the antitrust laws. Moreover, the actual exclusion of competitors by business enterprises is not necessary to establish the offense of monopolization. Thus the Supreme Court has said that "the material consideration in determining whether a monopoly exists is not that prices are raised and that competition is actually excluded, but that power exists to raise prices or to exclude competition when it is desired to do so. (*American Tobacco Co.* v. *U. S.,* 328 U.S. 781).

AN ECONOMIC WEAPON

Unions, however, may and do possess and exercise the same economic power. A prime example is the United Mine Workers' successful imposition of the three-day week throughout the coal industry in order to reduce inventories

and "stabilize" production and prices. Here the purpose of controlling production and the intended effect on supplies and prices stand out in clear relief, unobscured by any alleged legitimate union objectives. Unquestionably, any similar action by coal operators would be illegal.

The economic power held by some labor unions has been used to force business enterprises in certain geographical areas to use only those products manufactured in plants employing members of a particular local union. Thus certain local unions by building a protective wall for themselves around large metropolitan areas have not only created artificially high prices to the consumer, but, in addition, their conduct resulted in the exclusion from that area of all competing products manufactured elsewhere.

This has been done with particular effectiveness in the electrical manufacturing industry. Although such conduct was held unlawful in the *Allen Bradley* case (1945), 325 U.S. 797, on the ground that the employers had instigated and joined in the conspiracy to restrain trade, unions have nevertheless continued unilaterally to accomplish the same objective through coercion of employers in lieu of cooperation with them.

By threats of strikes, slowdowns, and faulty installation, and by refusal to furnish electricians from the tightly controlled pool of workers, the electrical unions still dictate what materials and equipment may be used, and prevent use of those that are unacceptable to them. *(Statement of National Electrical Manufacturers Association before the House Labor Committee, Record of 1953 hearings on IMRA, Part 6, page 2218).*

UNIONS CONTROL LABOR FORCE

These examples do not spell out a precise definition of monopoly. They do, however, indicate the existence of monopoly power as that term has been defined through a series of court decisions dealing with monopolistic practices engaged in by business organizations and which have been found to violate our national policy as established by the antitrust laws.

These examples point to practices which can be effectuated only through monopoly control, and in the case of labor unions, this means monopoly control over the labor force. Such control already exists in our dominant basic industries such as coal, steel, transportation, automotive and others, and we have already seen the practical results of the exercise of that power.

Employers have long been aware of these conditions. They have watched with concern the making of this record through legislative enactments, administrative rulings and court decisions. They have watched labor unions attain and use the economic power which goes with the ability to paralyze a single plant or an entire industry by merely a concerted refusal to work. They have watched the generally accepted principle of collective bargaining and traditional trade union activities become distorted and converted into "collective demanding" by huge unions functioning largely as political organizations. In this process, employers have also watched the diminution of their own individual ability to act as a countervailing force to the economic strength frequently pitted against them.

WHAT THE AFL-CIO MERGER MEANS

We are now confronted with a merger of the two dominant labor organizations — the AFL and the CIO. Can anyone doubt that this multiplies many-fold the opportunities for combined action which individual employers and even the government itself under present conditions may be unable to withstand?

The Constitution of the newly merged federation seems admirably designed to accomplish the objectives the leaders avowedly seek. These objectives include organizing the unorganized — whether employees want it or not is of little moment; elimination of dissident or "corrupt influences" so that common direction and control can be effective; and then to go after the government itself through political activity starting at the precinct level, a recognition of the fact that laws are written at the ballot box.

In the collective bargaining field, this merger will make possible centralized control over collective bargaining demands, techniques and contracts to a far greater degree than in the past. Bargaining strategy can be further developed on a nationwide, across-the-board basis, with demands, strikes, boycotts and other activities timed and coordinated not only between employers but also between entire industries.

It must be admitted that this will doubtless be highly effective to force acceptance of union demands and to destroy real collective bargaining unless effective measures are taken to curb this power. At the same time, the rights of individual employees are also lost sight of, for as labor organizations and their officials increase in size and power, the rights of individuals are correspondingly diminished.

DANGERS IN UNRESTRAINED POWER

Clearly, this merger, in and of itself, does not create a monopoly. It is equally clear, however, that the monopolistic practices outlined, and already widespread in the labor movement, will flourish and spread unless some means is found to bring them under regulation or control.

Today the law provides no effective limitation on the use of the tremendous economic strength now centralized in one body. How it will be used depends only upon the sense of responsibility possessed by leaders of the new federation.

Even acknowledging the good faith and sincere intentions of the leaders of this new federation, all history demonstrates that unrestrained power never goes unused or unabused. Certainly, under the *Hutcheson* decision, the "licit" and the "illicit" will not be determined by any judicial judgment as to the "rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

The concentration of this economic power creates "an opportunity for abuse which is not to be ignored." (*U.S.* v. *Swift & Co.*, 286 U.S. 106). This concentration of power in the hands of a few has also led to a widespread feeling that organized labor is one of the strongest economic forces existing in the United States today.

Washington is very merger conscious these days. Subcommittees of both the House and Senate Judiciary Com-

mittees have been very active investigating what is termed the concentration of economic power. The current investigations are, of course, confined to company mergers. Any industrial merger bringing together anything even approaching the concentration of economic and political power as that involved in the merger of the AFL and CIO would almost certainly come under close scrutiny.

CONGRESSIONAL PROBE LONG OVERDUE

In the past, Congressional study of union activities has been limited to specific abuses which were outstanding at the time. Legislative-wise, they have been dealt with on this basis also and while helpful in some degree, the inquiries have not dealt broadly with the existence of monopoly power or suggested any possible remedy.

The time is long overdue for the Congress to make a searching examination with a view to determining how and to what extent monopolistic practices by labor unions should be regulated and controlled in the public interest.

This power is exercised, it should be stressed, by the international organization – a combination of unions – not by the local unions which individually are primarily concerned with negotiating mutually satisfactory terms and conditions of employment with an employer.

It is this combination of labor organizations acting as a national or international union which poses antitrust analogies and which requires antitrust remedies and limitation. Business concerns, acting alone, may lawfully do many things which if done in combination or concert would bring down the wrath of antitrust. No one would deny, for example, the clear right of an individual steel producer, acting independently, to curtail production or raise or lower prices for economic reasons. By the same token, no one would deny the right of the employees of an individual employer to strike, as a union, for more favorable working conditions. **It is when unions combine or agree or conspire together to take joint action, that the antitrust philosophy against the exercise of concerted economic power should apply.**

Certainly there can be no doubt today that the exercise of such power as has been witnessed in recent years is at least as damaging, if not more so, than the same tactics if undertaken by business organizations through combinations or conspiracy. Yet the one is prohibited while the other is freed of restraint and in fact encouraged.

An antitrust approach to organized labor's economic power should not be limited to an itemization of particular activities and conduct which should be considered violations of antitrust law. Rather the problem should also be attacked at its roots – the power and dominance of the national or international union over its local constituents.

While early Supreme Court decisions did not consider organized labor's restraints on local production or manufacturing as illegal under the Sherman Act, these decisions did serve, however, to localize labor disputes and thus minimize nationwide work stoppages. At the same time, the court was apparently developing a "rule of reason" for application of the antitrust laws to organized labor. Hence if the court had continued to apply the criteria employed in such decisions, it is evident that the Sherman Act would not have been applicable to a local dispute between an individual employer and his employees. However, the act might have been effective in deterring nationwide work stoppages precipitated by a combination of local unions acting through an international labor organization.

Some antitrust lawyers feel it is wrong to seek to apply antitrust laws to labor organizations. They feel, apparently, that if labor abuses are to be dealt with by law, they should be dealt with under the labor code. In this regard, it should constantly be borne in mind that the antitrust laws are the laws of free commerce and trade; and that the labor laws are simply that, i.e., laws which are designed to establish the "ground rules" for the conduct of negotiations between employers and their employees for the single broad purpose of reaching an agreement on terms and conditions of employment. Thus it is entirely proper and appropriate for specific practices by labor organizations to be dealt with in the law of labor-management relations as a means to bring about a better atmosphere in which to conduct the negotiations looking toward mutually satisfactory agreement. Such specification of unwarranted labor conduct would be to the law of labor relations what the Clayton, Robinson-Patman and Federal Trade Commission Acts are to the basic antitrust law. In other words, the specific would complement the general in the public interest.

The broad philosophy of the Sherman Act, however, should and must deal with monopoly power, whether it be manifested in combinations of employers or in combinations of unions. In either instance it is the free economy of the nation, not merely relations between employers and employees, which is threatened or adversely affected.

WOULD NOT HARM UNIONS

It may be contended that to apply the Sherman Act philosophy to activities of organized labor would make it impossible for unions to bargain collectively and engage in self-help. Such an argument is without substance as is shown by the early labor decisions under the Sherman Act which served to localize disputes but which would not have interfered with a national policy of encouraging good faith bargaining as a means to eliminating obstructions to commerce.

It may also be contended that a Sherman Act approach to the problem, along the lines suggested above, would break up international and national unions. The short answer to that argument is that strong national unions existed prior to adoption of the nationwide stoppage and the compulsive "pattern bargaining" techniques.

International unions are not unlike the modern business or trade association in structure. Moreover, many of their present practices, and the "Congressionally permitted" restraints imposed by them are not unlike methods which some trade associations adopted in the early days of their growth. **When trade associations engaged in monopolistic activities, the Sherman Act was not used to compel disbandment but to eliminate monopoly practices. This policy is consistent with our national traditions; it should guide us in dealing with the monopoly power of organized labor.**

Five cents a copy; $3.50 per hundred

March 1956