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LABOR, ANTITRUST AND THE SHERMAN ACT

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Robert B. Brodie

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TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

There is very little question that labor should be subject to antitrust laws in some form. The real controversy is whether unions should be subject to the Sherman Act.

In this paper the Sherman Act will be reviewed from the first bill that Senator Sherman introduced into the Senate in 1888 to the decision rendered by the Supreme Court in the case of Allen Bradley Co. v. Local Union No. 3 in 1945.[1]

The first chapter of the paper will show that Congress never intended the act to be applied to labor. Some writers on this subject believe that an examination of the intent of Congress is of little practical value. "The controversy was resolved by the Supreme Court of the United States. It would be a barren academic exercise to inquire whether or not the Court was correct in holding labor unions subject to the Sherman Act."[2] I can not agree with this opinion. If this paper can demonstrate

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[1]Allen Bradley Co. v. Local Union No. 3 (1945), 325 U S 797.

[2]Fred Whitney, Government and Collective Bargaining (New York: J. B. Lippincott Co., 1951), p. 72.

that the act was never intended to include labor it will explain why the Supreme Court has had such difficulty in establishing a lasting precedent.

The third chapter of the paper considers the opinions of various authors on the question of labor monopoly and why unions should be subject to the Sherman Act. Their recommendations for improvements in the Act as it applies to labor are examined.

In the final chapter, an attempt is made to present proposals for a new departure in the application of antitrust regulation to labor markets.

No attempt is made to analyze antitrust on the state level. The whole emphasis is on the Federal Statutes. The writer agrees with the majority of authorities on labor relations that most labor problems transcend state boundaries and must, therefore, depend for solution on action at the national level.

CHAPTER II

LEGISLATIVE HISTORY OF THE SHERMAN ACT

Nobody at the time the Sherman Act was passed would have found it difficult to tell you why antitrust legislation was needed. About 1880 a merger movement had started in American manufacturing industries[1] which the people feared would threaten the very foundations of the Republic. Since competition was the cornerstone upon which it was felt the economy rested, the people, as represented by Congress, considered the passage of an antitrust measure mandatory.

The accumulation of power in the hands of the labor bosses was not a factor in the passage of the act. Unions were not considered a threat to the competitive economy at all. The sole concern of the people was with the concentration of great wealth in the hands of a few financiers.[2]

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[1]Joe S. Bain, Industrial Organization (New York: John Wiley & Sons, Inc., 1959), p. 192.

[2]For a description of the lives of the leading financiers of the time, see Matthew Josephson, The Robber Barons (New York: Harcourt Brace & Co., 1934).

The Original Sherman Act

Prior to the passage of the Sherman Act of 1890 numerous bills on antitrust had been introduced into both Houses of Congress.[3] One of the first was introduced by Senator Sherman of Ohio on August 14, 1888.[4] It was entitled, "A bill to declare unlawful trusts and combinations in restraint of trade and production." It was not passed during that session of the Senate.

The first bill introduced in the Senate on the assembling of the Fifty-first Congress was again presented by Senator Sherman on December 4, 1889. It was referred to the Committee on Finance where amendments were made to the original bill. As amended it had the following provisions:

> Section 1. That all arrangements, contracts, agreements, trusts, or combinations between two or more citizens or corporations . . . of the United States and foreign states . . . made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or with a view or which tend to prevent full and free competition in articles of growth, production, or manufacture of any State or Territory, . . . or in the transportation or sale of like articles, . . . ; and all arrangements, trusts, or combinations between such citizens or corporations, made with a view or which tend to

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[3]Edward Berman, Labor and the Sherman Act (New York: Harper and Bros., 1930), pp. 11-12.

[4]Senate Documents, Bills and Debates Relating to Trusts. Report No. 147, Vol. 14, 57th Cong., 2nd Sess., pp. 11-13.

> advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void. And the circuit courts of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, and to issue all remedial processes, orders, or writs proper and necessary to enforce its provisions. . . .[5] (Italics mine.)

The rest of Section 1 gave the power of prosecution to United States attorneys. Section 2 provided for suits to recover double damages and costs.

On March 21, 1890, the bill was extensively debated in the Senate. Senator Sherman made a speech devoted to a defense of the measure as a means of preventing the activities of the giant trusts. He made no reference to labor unions nor gave any hint that the measure would extend to them at all.

On March 24, 1890, the Senate again debated the bill. Three days earlier a substitute had been offered by Senator Reagan which he now proposed be added to the Sherman Act. The addition was as follows:

> Section 3. provided that anyone engaging in the activities of a "trust" was to be deemed guilty of a high misdemeanor and punished by a fine, imprisonment or both.
> Section 4 declared that "a trust is a combination of capital, skill, or acts by two or more persons, firms, or associations of persons, or any two or more of them, for either, any, or all of the following purposes": 1. to carry out restrictions of trade; 2. to limit production or to increase or reduce the price of commodities; 3. to prevent competition in manufacture, purchase, sale or transportation of commodities; 4. to fix a standard

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[5]Senate Documents, pp. 69, 71, 89.

> or figure for the purpose of controlling prices; 5. to create monopoly in manufacture, purchase, sale, or transportation; 6. to enter into a contract of any kind for the purpose of restricting competition, setting prices, etc.[6]

The amendment was objected to by Senagor George and Senator Teller because it might interfere with the rights of farmers and laborers. Senator Reagan defended his amendment and suggested that the Farmers' Alliance and the Knights of Labor would not come under it; "but if they did the way to prevent all such organizations is to strike down first the organizations which gave rise and necessity to [sic] the local labor association."[7]

Senator Teller then made some very revealing remarks that were never objected to by anyone.

> I know that nobody here proposes to interfere with the class of men I have mentioned. Nobody here intends that by any of these provisions, either in the original bill or in any amendment; and I have only called attention to it to see if the effort of those who have undertaken to manage this subject can not in some way confine the bill to dealing with trusts which we all admit are offensive to good morals. . . . Therefore, I suggest that the Senators who have this subject in charge give it special attention, and by a little modification it may be possible to relieve the bill of any doubt on this point.[8] (Italics mine.)

No senator that day or in any of the days preceding gave any indication that he favoured labor being drawn into the act. In fact during the whole of the debates on antitrust

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[6]Senate Documents, p. 2560.

[7]Berman, p. 17.

[8]Ibid., p. 17.

only Senator Edmunds, the Republican senator from Vermont, gave any indication at all that he desired that labor be included.

Senator Sherman was sure that his bill would not apply to labor but many of the other senators were not as certain.[9]

A proposal was introduced that the bill be sent to the Judiciary Committee with instructions to report back to the Senate in twenty days. Senator Morgan speaking for the proposal said that because of the price enhancement part of the Sherman bill it was applicable to farmers and labor. "I do not know," he declared, "of anything that has a greater or more direct impression upon our foreign commerce and our interstate commerce than the price of labor." He continued:

> If we pass a law here to punish men for entering into combination and conspiracy to raise the price of labor, what is the reason why we are not within the purview of the powers of Congress in respect to international commerce? Who can answer the proposition as a matter of law?
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> There is great danger in any direction you look in respect of such a measure as this, and I am afraid to take ground on it until that committee of this body which is charged with the consideration of judicial questions have had an opportunity to report a bill or, if it can not agree upon a bill, to report that it can not agree.[10]

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[9]U. S., Congressional Record, 51st Cong., 1st sess., 21:3 (March 24, 1890), pp. 2560-2562.

[10]Ibid., (March 25, 1890), pp. 2600-2611.

The proposition to send the bill to the Judiciary Committee was turned down and immediately after the Reagan amendment (see page 5) was adopted by the Senate acting in Committee of the Whole as an addition to the original Sherman bill as reported out of the Finance Committee.

Senator Sherman then offered a proviso to his bill specifically exempting labor and farmers' organizations from its operation. He declared, "I do not think it necessary, but at the same time to avoid any confusion, I submit it to come at the end of the first section." As approved in the Committee of the Whole, the proviso was as follows:

> Provided. That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers, made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agriculture or horticultural products.[11]

This amendment was adopted without the formality of a roll call.

On March 26, Senator Aldrich offered an additional proviso for the purpose of exempting labor. This proviso, to be added after the first section, was likewise adopted without roll call. It was as follows:

> Provided further. That this act shall not be construed to apply to or declare unlawful combinations or associations made with a view or which tend, by

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[11] Ibid., (March 25, 1890), pp. 2611-2612.

> means other than by a reduction of the wages of labor, to lessen the cost of production, or to reduce the price of any of the necessaries of life, nor to combinations or associations made with a view or which tend to increase the earnings of persons engaged in any useful employment.[12]

On March 27, 1890, the Senate heard the only statements made during the whole debate that labor should be included in the antitrust bill. The Senate was considering one by one the amendments adopted in Committee of the Whole. When the proviso offered by Senator Sherman exempting labor and farmers was reached, Senator Edmunds, Chairman of the Judiciary Committee, spoke at great length to the effect that labor should not be exempted.

> We can not shut our eyes, Mr. President, to the fact that if capital combines, . . . labor is compelled to combine to defend itself; and so the country has been turned . . . into great social camps of enemies when they ought to be one great camp of cooperative friends. . . .
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> But if capital and plants and manufacturing industries organize to regulate and so to repress and diminish, if you please, below what it ought to be, the price of all the labor everywhere that is engaged in that kind of business, labor must organize to defend itself on the other side. . . . However, the whole thing is wrong, as it appears to me; and so I think the amendment is wrong in the same way, which says that while the capital and the plant in any enterprise shall not combine to defend and protect itself, to increase the price of the product of that capital production of that plant may combine to increase the price of the work that is to be done to make the production of that enterprise.[13]

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[12] Ibid., (March 26, 1890), pp. 2654-2655.

[13] Berman, p. 24.

In reply to a question asked him, Senator Edmunds made this revealing remark:

> The fact is that this matter of capital . . . and of labor is an equation, and you can not disturb one side of the equation without disturbing the other. . . . If we are to have equality, as we ought to have, if the combination on the one side is to be prohibited, the combination of the other side must be prohibited or there will be certain destruction in the end.[14]

It can not be denied that Senator Edmunds was not opposed to the antitrust act being used to suppress labor and because of his position as Chairman of the Judiciary Committee his views were to prove very important later.

After Senator Edmunds remarks, Senator Hoar, who was also a member of the Judiciary Committee, and whose views were to also assume great importance, spoke in favor of exempting labor. He said:

> I hold . . . that as legislators we may constitutionally, properly, and wisely allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side. When we are permitting and encouraging what is not only lawful, wise, and profitable, but absolutely essential to the existence of the commonwealth itself.
>
> When, on the other hand, we are dealing with one of the other classes, the combinations aimed at chiefly by this bill, we are dealing with a transaction the only purpose of which is to exort from the community, monopolize, segregate, and apply to individual use for the purposes of

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[14] Ibid., p. 25.

> individual greed, wealth which ought properly and lawfully and for the public interest to be generally diffused over the whole community.[15]

Senator Edmunds responded by reiterating his position as already set forth:

> On the one side you say that it is a crime and on the other side you say that it is a valuable and proper undertaking. That will not do. If one side is to be authorized to combine the other must have the same right. Otherwise there would be universal bankruptcy. Then the laborer, whose welfare we are all so really desirous to promote, will turn around and justly say to the Senate of the United States, 'why did you go to such legislation as that? . . . When you allowed us to combine and to regulate our wages, why did you not allow the products that our hands produced to be raised in price by an arrangement, so that everybody that was making them all around for whom we were working could live also?'[16]

Senator Hoar declared that his remarks were intended neither as an attack upon nor a defense of the bill, but only to point out what he thought Senator Edmunds "failed to appreciate thoroughly, the distinction between the associations of laborers and this class of cases at which the bill aimed."[17] A reply rather more to the point would have been a resounding horse-laugh. Senator Edmunds must have been a great fan of George Baer who said, "God has seen fit, in his infinite wisdom, to put the reins of business in the hands of good Christian gentlemen."

The Senators now felt that the bill might be

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[15] Ibid., p. 25.

[16] Ibid., p. 26.

[17] Ibid., p. 27.

unconstitutional and voted to send it to the Judiciary Committee, with orders to report back in twenty days. The Committee used only a fraction of its time and on April 2, 1890, its chairman, Senator Edmunds, reported back with an entirely new bill entitled, "A bill to protect trade and commerce against restraints and monopolies." The original Sherman bill was entitled, "A bill to declare unlawful trusts and combinations in restraint of trade and production." The Committee bill contained the same provisions which later became law and was known as the Sherman Act. The sections of the Act that were most relevant to labor are outlined below:

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in the 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. . . .
> 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, . . .
> The Federal courts are then given jurisdiction to enforce the act, and the Attorney General is empowered to initiate criminal prosecutions or to secure an injunction against violators. All persons injured by violations of the Act are allowed to maintain civil suits for triple damages against those who violated the terms of the Act.[18]

After the Judiciary bill was brought in there was absolutely no mention by any Senator about its

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[18]26 U. S. Stat. at 209. (1890).

application to labor. Several amendments were discussed but they were defeated and the bill as originally reported from the Committee was passed by a vote of 52 for and one against the bill, 29 members were absent.[19]

The debates on the bill in the House of Representatives made no mention of labor. The House only debated the bill proposed by the Judiciary Committee and did not see the original bill that Senator Sherman had proposed. The House suggested one amendment but later withdrew it and passed the bill as it had come from the Senate, on June 20, 1890. The President signed the bill into law on July 2, 1890.

Who Was the Author of the Sherman Act?

The authorship of the final Sherman Act is quite crucial to determining whether it was meant to apply to labor unions. Since it came out of the Judiciary Committee we can assume that someone on that Committee wrote it. Two people have been suggested -- Senator Edmunds and Senator Hoar. It will be recalled that Senator Edmunds was the only Senator who objected to the exclusion of labor organizations from the operation of the law at the time when the original Sherman Bill was under discussion.[20]

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[19]The only vote cast against the bill was that of Senator Blodgett, who had taken no active part in the anti-trust debates. U.S., Congressional Record, 21:4 (April 8, 1890), p. 3152.

[20]See page 9, supra for Senator Edmund's objections.

It is clear that Senator Edmunds was very much against making an exception for labor, and because he was Chairman of the Judiciary Committee it might be supposed that his general attitude might prevail. In 1892, before the Sherman Act had been applied to labor, Senator Edmunds gave a newspaper interview in which he is reported to have said that the Act was "intended to and I think will cover every form of combination that seeks to in any way interfere or restrain free competition, whether it be capital in the form of trusts, combinations, railroad pools or agreements, or labor through the form of boycotting organizations that say a man shall not earn his bread unless he joins this or that society. Both are wrong. Both are crimes and indictable under the anti-trust law."[21]

The belief that Senator Edmunds was the author of the Sherman Act presumably came from the foreword to an article in the North American Review of December, 1911, which said that Senator Edmunds was "the author of most of the final bill."[22]

Senator Edmunds himself did not claim the authorship of the bill but in fact disclaimed it, stating that

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[21]Louis B. Boudin, "The Sherman Act and Labor Disputes: I." Columbia Law Review, XXXIX (December, 1939), p. 1290.

[22]Berman, p. 39.

every member of the Judiciary Committee contributed something towards the Act in its final form.[23]

Professor Berman considered this article in the North American Review conclusive evidence that the act was written by Senator Edmunds and the rest of the Senators had not realized that he meant to apply it to labor. It must be noted that Senator Edmunds did not specifically accept credit for the Act. However, another Senator did. Senator Hoar (Republican, Massachusetts) claimed sole authorship of the present Sherman Act in his own autobiography. In that book he said:

> Mr. Sherman's bill found little favor with the Senate. It was referred to the Judiciary Committee of which I was then a member. I drew as an amendment the present bill which I presented to the Committee. Nearly every member had a plan of his own. But at last the Committee came to my view and reported the law of 1890. The House disagreed to our bill and the matter went to a Conference Committee, of which Mr. Edmunds, the Chairman of the Committee, and I, as the member of the Committee who was the author of the bill, were members. The House finally came to our view.
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> It was expected that the Court, in administering that law, would confine its operation to cases which are contrary to the policy of the law, treating the words "agreements in restraint of trade" as having a technical meaning, such as they are supposed to have in England. The Supreme Court of the United States went in this particular farther than was expected. In one case it held that "the bill comprehended every scheme that might be devised to restrain trade or commerce among the several States or with foreign nations." From this opinion several of the Court, including Mr. Justice Gray dissented. . . .
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> We thought it was best to use this general phrase which, as we thought, had an accepted and

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[23]Boudin, I, p. 1290.

> well-known meaning in the English law, and then after it had grown up under the law, Congress would be able to make such further amendments as might be found by experience necessary.
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> The statute has worked very well indeed, although the Court by one majority and against the very earnest and emphatic dissent of some of its greatest lawyers, declined to give technical meaning to the phrase "in restraint of trade."[24] (Italics mine.)

Senator Hoar's autobiography appeared in 1904 when many of the members who had served on the Judiciary Committee were still alive. The claim of Senator Edmunds' authorship of the bill was made in 1911 when all the Senators except Edmunds were dead.[25]

When the Judiciary bill was reported out of the Committee it should have been in charge of Senator Edmunds, but the record shows that Senator Edmunds only stated that the bill had been drawn up by the Committee. Senator Hoar was in charge of the bill when it was taken up for consideration in the Senate on April 2, 1890.[26]

In explaining the bill to the Senate he said:

> The complaint which has come from all parts and all classes of the country of these great monopolies, which are becoming not only in some cases an actual injury to the comfort of ordinary life, but are a menace to republican institutions themselves, has induced Congress to take the matter up. I suppose no member of this body who remembers the history of the processes by which this bill

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[24] George F. Hoar, Autobiography of Seventy Years, Vol. II (New York: Charles Scribner's Sons, 1903), p. 364.

[25] Boudin, I, p. 1291.

[26] Ibid.

> reached the shape in which it went to the Judiciary Committee will doubt that the opinion of Senators, themselves, of able and learned and experienced lawyers, were exceedingly crude in this matter. . . .
>
> Now the Judiciary Committee has carefully and as thoroughly as it could agreed upon what we believe will be a very efficient measure, under which one long forward step will be taken in suppressing this evil. We have affirmed the old doctrine of the common law in regard to all interstate and international commercial transactions, and have clothed the United States courts with authority to enforce that doctrine by injunction.[27] (Italics mine.)

Senator Hoar answered most of the questions on the bill and at one point even answered a question that had been asked Senator Edmunds.

It therefore seems reasonable to conclude that Senator Hoar was the author of the Act. This is important for two reasons. First, Senator Hoar was sympathetic toward labor and would never have supported, much less authored, an anti-labor bill.[28] Second, his frequent statements that the act "affirmed the old doctrine of the common law"[29] helps us understand what the Senator intended the Sherman Act to mean.

There are several things of importance to be learned from an examination of the debates in Congress. First, the final Sherman Act was completely different from the bill that Senator Sherman had first proposed. The original bill was against price enhancement while the final

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[27] Congressional Record, 21:4 (April 8, 1890), p. 3146.

[28] Supra, pp.10-11; see his speech in favor of exempting labor.

[29] Supra, p. 16.

bill was an attempt to make contracts that had originally been void at common law, illegal and subject to punishment.[30] Second, all of the provisos exempting labor were discussed in connection with the original bill and all of them were passed by the Senate. Third, there was no debate whatsoever on whether the bill, as finally adopted, applied to labor; neither were there any provisos exempting labor proposed or defeated as was asserted in one of the court cases.[31] Fourth, since it is certain that Senator Hoar wrote the Act, statements he made on the purpose of the Act must be considered as ruling.[32] Fifth, there was no discussion in the House of Representatives on whether the Act would apply to labor.

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[30] Supra, p. 6.

[31] Loewe v. Lawlor (1908), 206, U.S. 274.

[32] Supra, pp. 10, 16, 17.

CHAPTER III

MAJOR CASES INVOLVING LABOR AND THE ANTITRUST ACT

In 1893 two cases were brought in the Federal District courts which were to prove very important to labor. One case achieved its importance because it served as an important precedent in the Danbury Hatters' case and the other because it gave one of the most logical interpretations of the Sherman Act by any court in the United States.

The first case, United States v. Workingmen's Council of New Orleans,[1] resulted from a dispute in November of 1893 between the draymen and warehousemen of New Orleans and their employees. A strike resulted and soon spread to other workers who walked out in sympathy. As a result the transit of goods both in and out of the city was almost completely stopped and the Government applied for an injunction alleging interference with interstate commerce contrary to the provisions of the Sherman Act. The injunction was granted by the court and Judge Billings' decision is given below because of his utterly incorrect

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[1] United States v. Amalgamated Workingmen's Council of New Orleans (1893), 54 Fed. 994.

statements on the intent of Congress and the generally slipshod reasoning evident throughout his whole opinion. Unfortunately, his decision was quoted as authority that Congress intended the Sherman Act to apply to labor in the Danbury Hatters' Case.

> The defendants urge that the right of the complainants depends upon an unsettled question of law. The theory of the defense is that this case does not fall within the purview of the statute; that the statute prohibited monopolies and combinations which, using words in a general sense, were of capitalists, and not of laborers. I think that the congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition which is the yardstick measuring the complainant's right to the injunction, it expressed it in these words: "Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true that this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interests of laborers.[2] (Italics mine.)

The second case involved the cash register trust in which Judge Putman's "opinion, though not as extended as some of the opinions in later trust cases, was a modal of clarity, and bore intrinsic evidence that he had given

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[2] Ibid., p. 996.

the subject the thought it deserved."[3] The Government issued an indictment against the American Cash Register Company charging that it had monopolized the trade in cash registers, and in order to achieve its purpose it had used unfair means of competition including certain acts which amounted to torts or crimes. The indictment also alleged in separate counts that the defendant had conspired to drive certain of its competitors out of business by tortious or criminal means.

Judge Putman sustained some of the counts and dismissed others. The Judge believed that the Sherman Act was entirely concerned with matters of trade and that it did not deal with torts or crimes. Therefore, the application of the Act does not depend on the means used.[4] In other words the statute deals with injuries to the public and not with injuries to individuals, even though individuals who are injured by reason of agreements, combinations or conspiracies against the public are entitled to redress.[5]

As will be remembered from the last chapter, Senator Hoar said that the Act was meant to "affirm the old doctrine of the common law in regard to restraints of

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[3]Louis B. Boudin, The Sherman Act and Labor Disputes: I (Columbia Law Review VII, March, 1956), p. 1294.

[4]Ibid., p. 1295.

[5]Ibid., p. 1296.

trade." Judge Putnam pointed out that at common law "agreements in restraint of trade" had a technical meaning, and the reason for their illegality was the public interest. A conspiracy to injure a particular person in his property, trade or occupation was tortious or criminal under the common law, but it belonged to a different department of the law from "agreements in restraint of trade."[6] In sum (a) the statute was a public statute designed to remedy a public evil and not to redress private wrongs; and, (b) the evil sought to be remedied was economic evil, and it therefore made no difference by what means the evil was brought about or effected.[7]

It is interesting to note why Judge Putnam said he interpreted the statute the way he did. He remarked that if the Act were interpreted any other way, "the inevitable result will be that the federal court will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, by strikes or boycotts, and by every method of interference by way of violence or intimidation."[8]

"It seems clear that if later courts had followed the interpretation of Judge Putnam in United States v. Patterson, the Act would have been confined to the

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[6] Ibid., p. 1296.

[7] Ibid., p. 1297.

[8] United States v. Patterson (1893), 55 Fed. 605, 641.

operations of business combinations. Actually, of course, it was the interpretation of Judge Billings in United States v. Amalgamated Council which was generally accepted."[9] Such are the ironies of history.

The Debs Case

On June 24, 1884, the railroad members of the American Railroad Union, of which Eugene Debs was president, instituted a boycott against the Pullman Palace Car Company because it had refused to submit the settlement of a strike among its employees, who were also members of the American Railroad Union, to arbitration. The railroad workers refused to handle any Pullman cars and when the railroad companies would not detach the Pullman cars the boycott became a strike.

Because the strike interfered with the mails the United States Attorney General went into court and secured an injunction based on the Sherman Act and the law forbidding obstruction of the mails.[10]

Although the case is usually thought of as an antitrust case it was never really tried on the issue. Debs and the other leaders ignored the injunction and were sent to jail for contempt of court. An appeal on a writ of habeas corpus was carried to the Supreme Court but the

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[9]Edward Berman, Labor and the Sherman Act (New York: Harper and Bros., 1930), p. 63.

[10]United States v. Debs (1894), 64 Fed. 724.

court denied the petition saying that the Government had a right to protect the mail. The Court entered into no examination of the Sherman Act upon which the Circuit Court had mainly relied to sustain its jurisdiction.[11]

The Danbury Hatters' Case

Up to 1908 the Supreme Court had not yet determined on the applicability of the Sherman Act to labor. In Loewe v. Lawlor, popularly known as the "Danbury Hatters' Case," the situation was soon remedied. In 1897 the Brotherhood of United Hatters of America began a campaign to secure the closed shop. By 1903 only twelve firms were operating under open shop conditions.[12] The Danbury, Connecticut firm of Loewe and Company was asked in 1902 to operate under closed shop conditions but refused to do so and the union called a strike. In addition a very effective boycott was started and the business of the company suffered badly.

In August of 1903, Loewe and Company filed a suit for damages under the Sherman Act in the Circuit Court. In December, the judge rendered a decision dismissing the company's complaint.[13]

The hat company appealed to the Supreme Court and

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[11]Re Debs, (1895), 158 U.S. 564.

[12]Berman, p. 77.

[13]Ibid., p. 78.

on February 3, 1908, one of the most important decisions rendered in a labor case was handed down. In a unanimous opinion written by Chief Justice Fuller the Court declared that, in its opinion, the union was guilty of a restraint of trade.[14]

The most significant aspect of the decision was the fact that the Supreme Court for the first time definitely took the position that the prohibitions of the Sherman Act extended to trade unions. The court seems to have accepted what counsel for the plaintiff said about the intent of Congress rather than upon a careful examination of the debates themselves.[15] However, the garbled description of the debates in Congress was only partly responsible for the outcome of the case.[16] "The decision was a result of three errors: an utterly wrong statement as to the Congressional debates and the intention of Congress; a wrong statement as to the common law applicable to labor unions; and the application of the broad construction which the majority of the court had decisively repudiated in the Northern Securities Case."[17]

The broad construction was originally adopted

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[14] Loewe v. Lawlor (1908), 208 U. S. 274.

[15] Berman, p. 83.

[16] Boudin, I, p. 1319.

[17] Ibid., p. 1320.

by a bare majority in the Trans-Missouri Freight case[18] which was expressly referred to in the Hatters' case. Within three years, the broad construction so solemnly adopted in Loewe v. Lawlor was all but repudiated again in the Standard Oil Company case,[19] and this rejection was confirmed and made final in the American Tobacco case[20] decided two weeks later. These cases decisively nullified the opinions of the Court in the Trans-Missouri case and Joint Traffic case and adopted the position of the minority in those cases. Mr. Justice White, who wrote the dissenting opinion in the Trans-Missouri case now, as Chief Justice, wrote the opinions in the Standard Oil and American Tobacco cases which officially announced the rule of reason for which he had contended in the Trans-Missouri case -- the same rule which has subsequently been followed with the single exception of the Danbury Hatters' case.[21]

Another point that should be emphasized is that the subject of restraints of trade deals exclusively with questions of capital -- or rather business -- and has never been applied to labor. This point was never brought

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[18] United States v. Trans-Missouri Freight Association (1897), 166 U.S. 290.

[19] Standard Oil Co. v. United States (1911), 221 U. S. 1.

[20] United States v. American Tobacco Co. 221 U.S. 106.

[21] Boudin, I, p. 1329.

out in a brief submitted on behalf of labor until the Apex case in 1940. It was, however, referred to by Mr. H. W. Chaplin in his argument on behalf of the cash register trust in United States v. Patterson:

> Trade statutes have at different times been passed in various jurisdictions. Some of them have been aimed at labor, and some at capital, but the distinction between legislations against labor and legislation against capital has always been patent upon the face of statutes. The ancient legislation against monopolizing and engrossing was legislation against capital.[22] (Italics mine.)

If the Sherman Act were to deal with both labor and capital it would be a "complete departure from previous practice as established both in England and in this country."[23]

The decision in Loewe v. Lawlor is of great importance because the Supreme Court took the position (1) that the Sherman Act applied to labor combinations; (2) that secondary boycotts affecting interstate commerce were illegal under it; and (3) that suits for damages might be brought against the individual union members under its terms.[24]

On the rendering of the decision the company's suit went back to the circuit court. After a trial lasting from October 13, 1909, to February 4, 1910, the jury,

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[22] United States v. Patterson (1893), 55 Fed. 605, 622.

[23] Louis B. Boudin, "The Sherman Act and Labor Disputes: II." Columbia Law Review, XXXIX, (January, 1940), p. 20.

[24] Berman, p. 86.

having been instructed by the court to return a verdict for the company, assessed the damages at $74,000. In accordance with the law this amount was trebled by the court. The addition of costs brought the total to over $232,000. The Circuit Court of Appeals sent the case back for retrial and another verdict was entered against the Hatters' for over $252,000. They appealed this judgment all the way to the Supreme Court again and on January 5, 1915, the Supreme Court affirmed the results reached in the lower court.[25] The Court considered at length whether the individual members of the union should be liable for the acts of their officers and decided in the affirmative because the members, who knew of the boycott, had continued to pay their dues and support their officers while the boycott was being conducted. Not until 1917 was the company able to collect the damages which had been awarded it.[26]

The Danbury Hatters' case was to be the leading precedent for bringing labor under the Sherman Act. Apart from the arguments about the meaning of the common law, the most glaring inadequacy of the Supreme Court was in accepting the reasoning of Judge Billings in the Amalgamated Council case[27] in which he said that, while the

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[25] Lawlor v. Loewe (1915) 235 U.S. 522, 534-536.

[26] Berman, p. 87.

[27] United States v. Amalgamated Workingmen's Council of New Orleans (1893), 54 Fed. 944.

Congressmen had been originally thinking only of business combinations, they had let the subject so broaden in their minds that they drafted the statute to include labor as well.[28]

It should be remembered, however, that counsel for the union must not have submitted any material to refute this statement.

On the whole, it must be conceded that the opinion of the court rests on very thin legal ground and that it was retrettable that this case served as the precedent to bring labor under the Sherman Act for almost thirty years of litigation.

The Gompers Contempt Case

Although this case is customarily referred to in connection with the Sherman Act it actually has very little relevancy. The American Federation of Labor in May, 1907, placed the Buck Stove and Range Company on a "we do not patronize" list in its magazine, the American Federationist, and thereafter sent out circulars for a nationwide boycott.

The company secured an injunction in the Federal Court against the officers of the American Federation of Labor carrying on activities in connection with the boycott. The injunction was ignored and as a result Gompers and several other officers of the Federation were sentenced

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[28] Supra, p. 20.

to jail for contempt of court. This case was merged with the injunction case and both were appealed to the Supreme Court.[29] In the mean time, the Buck Stove Company came under new management. The labor dispute was then settled and the injunction dismissed at the request of the company. The contempt case was dismissed later by the Court on technical grounds.

The firm's petition for an injunction had alleged that its interstate commerce was restrained, but it had not asked for relief under the provisions of the Sherman Act. The defendants took the position that because they had used the printed word to further their ends, no court had the right to enjoin the boycott. The Court completely rejected their position saying, "To hold that the restraint of trade under the Sherman Antitrust Act, or on general principles of law, could not be enjoined would be to render the law impotent."[30]

Hitchman v. Mitchel

This case is important only for the fact that the District Court for the Northern District of West Virginia issued an injunction against the United Mine Workers because they were, in the mind of the court, an illegal organization under the terms of the Sherman Act. The case arose

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[29] Gompers v. Buck Stove and Range Co. (1911), 221 U. S. 418.

[30] Ibid., pp. 438-439.

over the fact that the Hitchman Coal and Coke Company was trying to enforce a yellow-dog contract against its employees.[31]

The court felt that the union's attempt to get Hitchman to deal with it and to organize its workers was carried out in pursuit of the union's unlawful purpose to monopolize mine labor and suppress the West Virginia coal industry. "By reason of its unlawful organization, purposes and practices as hereinbefore set forth," said the court, "this organization, combination, or union, as now constituted, is unlawful, and under the law, therefore, has no right to seek plaintiff's employees to become members thereof or to become party to its unlawful purposes and practices."[32]

The injunction was made perpetual. The Circuit Court of Appeals denied the position of the lower court that the United Mine Workers was an illegal organization. It held that the union had a right to induce the workers to join it, and that they might lawfully join.[33]

The company appealed the case to the Supreme Court and in December of 1917 the Court ruled that yellow-dog contracts could be enforced and that, therefore, the union

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[31] Hitchman Coal and Coke Co. v. Mitchell (1912), 202 Fed. 512.

[32] Ibid., pp. 556-557.

[33] Mitchell v. Hitchman Coal Co. (1914), 214 Fed. 685.

was inducing a breach of contract which was enjoinable.[34]

Although the Supreme Court made no mention of the Sherman Act, this case is worth noting because the District Court had tried to rule a union illegal per se. It was not until the passage of the Clayton Act that the possibility that this could happen again was finally blocked.[35]

The Clayton Act

Although the English common law courts had issued injunctions only to protect tangible property interests from irreparable harm, the American courts went further and found that intangible business interests such as customers and production were also property interests to be protected by the injunction. Although injunctions had been common before the advent of the Sherman Act they were much easier to get when restraint of trade also became an enjoinable crime. After continued agitation against the misuse of the injunction the Clayton Act of 1914 was passed. It was termed the "Magna Carta of the labor movement"

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[34] Hitchman Coal and Coke Co., v. Mitchell (1917), 245 U.S. 229.

[35] Section 6 of the act said that "nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . nor shall such organizations, or members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

because it supposedly prohibited issuing injunctions in labor disputes. The sections of the Act relevant to labor are as follows:

> Section 6. That the labor of a human being is not a commodity of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
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> Section 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property, or property right must described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
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> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do;or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information or from peacefully persuading any person or to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommendign, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value, or from

> peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violative of any law of the United States.[36]

Section 16 allowed private citizens to go into a federal court and ask for injunctive relief against violations of the Sherman Act.

The Duplex Case

In the Duplex case the "Magna Carta of the labor movement" fell flat on its legislative face. The Duplex Printing Press Company of Battle Creek, Michigan, was one of four companies which manufactured newspaper presses in the United States. The three other companies had been induced by 1913 to recognize the International Association of Machinists and to grant an eight-hour day and a minimum wage scale. The Duplex Company refused to recognize the union and continued to operate on an open shop basis with a ten-hour day.

Two of the three other companies notified the union that they would terminate their contracts if the Duplex Company could not be induced to sign a union agreement. The union called a strike at the Duplex plant but only seven of the more than two hundred Machinists walked out. The union then instituted an elaborate boycott on

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[36] 38 U. S. Stat. at 780. (1914).

the presses of the Duplex Company especially around New York where the bulk of the company's business was done. The company found it impossible to deliver their presses or to service or install them if they were delivered and so applied to the courts for injunctive relief under the terms of the Sherman Act. The union naturally contended that the Clayton Act prohibited the courts from issuing an injunction. The lower courts found in favour of the union but in January of 1921 the Supreme Court found that the injunction had not violated the terms of the Clayton Act. The court found that the Act was only declaratory of the law as it previously stood. Concerning Section 6, the Court said:

> There is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the antitrust laws.[37]

Put in other words, the Court found that the Clayton Act protected labor only when it was pursuing its lawful objectives. A boycott could not be considered a lawful objective because the Sherman Act made it illegal. As to Section 20, the Court found that the Act's protection was given only to disputes between an employer and his own

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[37] Duplex Printing Press Company v. Deering (1921), 254 U.S. 443, 469.

employees. Other workers involved in the dispute could not claim protection if they did not fall into this category. Commenting, the Court said:

> Nor can Section 20 be regarded as bringing in all members of a labor organization as parties to a "dispute concerning terms or conditions of employment" which proximately affects only a few of them, with the result of conferring upon any and all members, no matter how many thousands there may be, nor how remote from the actual conflict -- those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of Section 20 which contain no mention of labor organizations.[38]

By such means the Court was, in effect, able to interpret the Clayton Act out of existence, but for two things: labor organizations were no longer in danger of being termed illegal per se as they nearly were in the Hitchman case; and there was now nearly double the chance of labor being hampered by the Sherman Act because of the Clayton Act provision allowing private citizens to seek injunctions where before the government had been the only one allowed to institute such proceedings.[39]

The Coronado Cases

In March of 1914 the Coronado Coal Company decided to cease recognizing the United Mine Workers of America. A bitter strike broke out and violence ensued. The union members seized the mine and burned the tipple

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[38] Ibid., p. 472.

[39] Berman, p. 103.

and the surrounding buildings.

In September 1914, the company brought suit for triple damages under the terms of the Sherman Act alleging that the union sought to restrain and monopolize interstate commerce in coal. In 1922, the Supreme Court declared that while the acts of the union were illegal, "coal mining is not interstate commerce, and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce . . . or has necessarily such a direct, . . . effect . . . that intent reasonably must be inferred."[40]

In 1925 on the basis of new evidence the case again went to the Supreme Court.[41] The company was able to get a union official to testify that the United Mine Workers wanted to keep all non-union coal out of the market and in pursuance of that end the strike had been organized. The Court now determined that since the intent of the union had been to interfere with interstate commerce it was guilty under the Sherman Act. Chief Justice Taft, delivering the unanimous decision of the Court, said:

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[40] United Mine Workers v. Coronado Coal Co. (1922), 259 U.S. 344, 410-11.

[41] Coronado Coal Company v. United Mine Workers (1925), 268 U.S. 295.

> The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-trust Act. . . . We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other states than Arkansas, where it would, in competition, tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines.[42] (Italics mine.)

In this case the court thought it relevant to look at the intent of the union and to see how substantial the interference was. In boycott cases the Court did not think this examination relevant.

The Leather Workers Case

The next time the pure strike situation was examined was in United Leather Workers International Union v. Herkert and Meisel Trunk Company.[43] The company alleged that a strike of its employees had prevented the filling of orders, ninety per cent of which were bound for interstate commerce. Again, objectives and intent were the main basis of the decision.

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[42] Ibid., p. 310.

[43] United Leather Workers v. Herkert and Meisel Trunk Co. (1924), 265 U.S. 457.

The Court usually found that the intent of a union in a strike case was to further its economic objectives while in the boycott cases the union was trying to restrain interstate commerce. A more logical interpretation would be that strikes seemed like legitimate activities to the Justices while secondary boycotts did not agree with their economic views.

The Brims Case

The manufacturers of millwork, building contractors, and the carpenters' union in Chicago operated under an agreement whereby the manufacturers and contractors would employ only union carpenters, and the carpenters agreed that they would not install millwork produced under non-union conditions. In November of 1926 the Supreme Court found that the purpose of the agreement was to keep outside millwork from coming into the city of Chicago, and that this was clearly a violation of the Sherman Act.[44]

The Bedford Stone Case

Prior to 1921 the firms engaged in quarrying and cutting limestone in the Bedford-Bloomington district of Indiana operated under a collective agreement with the Journeyman Stone Cutters' Association of North America.

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[44] United States v. Brims (1926), 272 U.S. 549.

In April of 1921 the union and the companies were unable to reach an agreement and a strike resulted.[45]

The operators set up company unions and reopened the quarries refusing to meet with any of the representatives of the old union. It therefore ordered its members who installed the stone on buildings to refuse to handle any of the Bedford stone. The Bedford Cut Stone Company and twenty other concerns brought suit for an injunction in the District Court. The two lowest courts dismissed the injunction but the Supreme Court on April 11, 1926, found the union guilty of violating the Sherman Act.[46] This decision reaffirmed that of the Duplex case and made it clear that the Supreme Court looked on secondary boycotts as per se violation of the Sherman Act. Justice Brandeis and Justice Holmes entered a strong dissenting opinion based on an application of the rule of reason arguing that the union was effecting a reasonable restraint in light of surrounding circumstances.[47]

The decision in the Bedford case did much to increase labor's agitation for new legislation exempting it from the operation of the Sherman Act.

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[45] Berman, p. 170.

[46] Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association of North America (1926), 274 U.S. 37.

[47] Lila Abramson, "Organized Labor and the Antitrust Laws," Antitrust Bulletin, III, No. 5 (September, October, 1958), p. 540.

The Norris-LaGuardia Act

In 1932 labor's long struggle was rewarded with the passage of the Norris-LaGuardia Act. The Act virtually stripped away the power of the Federal Courts to grant injunctions in a labor dispute. It provided a broad definition of a labor dispute and declared that "the disputants need not stand in the proximate relation of employer and employee." Section 2 of the Act also declared that the public policy of the United States was to foster collective bargaining and the right of the individual worker to choose his bargaining representative.

The New Deal era shook loose the conservative roots of the Supreme Court. The Court declared the new National Labor Act constitutional in 1937 and labor waited with bated breath to see how the Norris-LaGuardia Act would affect the court's application of the Sherman Act.

The Apex Case

In Apex Hosiery Company v. Leader,[48] the Supreme Court found it unnecessary to refer to the Norris-LaGuardia Act. The Hosiery Workers' Union in attempting to organize the Apex Company had staged a sitdown strike and seized and held the plant for over a month. They destroyed equipment and prevented the shipment of a great quantity of hosiery

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[48] Apex Hosiery Co. v. Leader (1940), 310 U.S. 469.

which had already been completed prior to the strike, and most of which was bound for out-of-state customers. The company could have sued in the state courts who, no doubt, would have found in its favor, but preferred recourse to the Federal Courts where they could get triple damages awarded under the terms of the Sherman Act. Since the case was obviously of the strike variety and not a secondary boycott, the Court looked into the intent and objectives of the strikers. In examining this aspect of the case the Court said:

> It is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union's demands and an effect of it, in consequence of the striker's tortious acts, was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market.[49]

The Court felt that the intent of the strikers had not been to influence prices or to interfere with interstate commerce and, therefore, under the intent and objectives doctrine used in the strike cases, the suit against the union was dismissed.

The Court also re-examined whether the Sherman Act was meant to apply to labor. In discussing this particular aspect of the case the Court said:

> A point strongly urged in behalf of the respondents in brief and argument before us is that

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[49] Ibid., p. 501.

> Congress intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act. To this the short answer must be made that for the thirty-two years which have elapsed since the decision of Loewe v. Lawlor, 208 U.S. 274, this Court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the Act, "Every contract, combination . . . or conspiracy in restraint of trade or commerce" do embrace to some extent and in some circumstances labor unions and their activities; and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly from the operationof the Act. On the contrary Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it.[50]

It can be certainly said of Judge Billings' decision in the amalgamated case that "the evil men do lives after them."

The Hutcheson Case

The present application of the Sherman Act to labor was largely determined by the Supreme Court in the case of United States v. Hutcheson.[51] In 1939 the Carpenters' Union became involved in a jurisdictional dispute with the Machinists' union about who should get the work of dismantling certain machinery at the Anheuser-Busch plant in St. Louis. The company gave the work to the Machinists and its employees belonging to the Carpenters' Union went on strike and picketed the plant. The Carpenters also requested, through circulars and advertisements, that all

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[50] Ibid., p. 487.

[51] United States v. Hutcheson (1941), 312 U.S.219.

their members and friends cease buying Anheuser-Busch beer. Hutcheson and other officials of the union were prosecuted criminally for having violated the Sherman Act. If the Danbury Hatters' case was still good law then there was no doubt that the Government would obtain a conviction.

Justice Frankfurter, one of the authors of the Norris-LaGuardia Act, wrote the opinion for a divided court. He found that, "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law, Section 20 of the Clayton Act andthe Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct."[52] In finding Hutcheson and the Carpenters not guilty of a restraint of trade, he said:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activites are the means.[53] (Italics mine.)

By combining the Clayton Act and the Norris-LaGuardia Act, Justice Frankfurter was able to show that all union conduct described in Section 4 of the Norris-LaGuardia Act was not only nonenjoinable in federal courts but also had become

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[52] Ibid., p. 231.

[53] Ibid., p. 232.

absolutely lawful for all purposes under federal law.[54]

He did this by pointing out that had the company sought an injunction it would have been refused and therefore he could not see that what was unallowable on the equity side of the court should be allowable on the criminal side.

Justice Frankfurter's real problem was getting rid of the precedents established in the Danbury Hatters', Duplex, and Bedford Cut Stone cases. However, it seems amazing that instead of overruling them, he went through elaborate reasoning to show that Congress, in effect, had overruled them. If he had simply overruled these cases it would have left the courts free, under the Sherman Act to deal with union practices designed with the specific intention of restraining the market.[55]

The Allen Bradley Case

The Court dictum in the Hutcheson case to the effect that a union was not guilty under the Sherman Act as long as it did not combine with non-labor groups was tested in 1945 in the Allen Bradley Co. v. Local No. 3, International Brotherhood of Electrical Workers.[56]

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[54]Charles O. Gregory, Labor and the Law, 2nd ed. rev., (New York: W. W. Norton & Co., Inc., 1958), p. 283.

[55]Ibid., p. 277.

[56]Allen Bradley v. Local No. 30, International Brotherhood of Electrical Workers (1945), 325 U.S. 797.

Local No. 3 comprised almost all of the production and installation electricians employed in the New York area. The union had been able to get the closed shop from almost every employer that it dealt with. It then forbade its members to work on any electrical equipment not manufactured by Local No. 3 members. The manufacturers agreed to confine their New York sales to contractors who employed members of the Local. The agreement effectively eliminated all competition from outside the New York area, even those who had agreements with other locals of the IBEW. The unionized New York producers had the New York market entirely to themselves, and they charged local consumers higher prices than outside consumers.

Several of the out-of-state manufacturers brought suit against the union under the Sherman Act. The Supreme Court found that there was an agreement with a non-labor group and approved a limited injunction to prevent its effects. "Justice Black, speaking for the Supreme Court, indicated clearly that the Hutcheson doctrine is here to stay and that a labor union is perfectly free under federal law to create and maintain any kind of market control, as long as it achieves this result without the connivance of employers and entirely through the exercise of conduct fairly described in sections 20 of the Clayton Act and 4 of the Norris-LaGuardia Act -- including of course, the secondary boycott."[57]

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[57]Gregory, p. 281.

A union, because of the decisions in the Apex and Hutcheson cases, is able to participate in any kind of economic coercion as long as no employer group is involved. This may include setting prices, dividing markets, and instituting uneconomical work-rules practices. The intent, objectives or results of the union's conduct is not examined. It is not to be wondered that some management groups are concerned.

The Hunt Case

During a strike by a truck drivers' union in 1937 against Hunt, a member of the union was killed. A partner in the trucking firm was indicted for the murder but was acquitted. Later on the Union was able to get a closed shop agreement with most of the trucking companies in the area and secured an agreement from the A & P chain store, who used Hunt's trucks, that they would not do business with any non-union company. Hunt earnestly sought an agreement from the union who refused to deal with him. Hunt lost his contract with A & P and was unable to obtain any other contracts with the result that he was forced out of business. His appeal for relief under the terms of the Sherman Act was denied in the Supreme Court[58] even though it was obvious that the union was pursuing no economic objective except revenge.

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[58] Hunt v. Crumboch, (1945), 325 U. S. 821.

Auxiliary Cases

There is one other set of circumstances, where the Supreme Court will still find a union liable to the provisions of the Sherman Act, besides the conspiring with management.

In the case of Columbia River Packers Association v. Hinton,[59] the Supreme Court held that a controversy between a fisherman's union and a packers' association was not a "labor dispute" as defined in Section 13 of the Norris-LaGuardia Act.

> It would appear that any association of sellers that does not meet the Norris-LaGuardia definition of a labor dispute cannot secure for itself the protection of the Act. In addition, to the extent that these associations fix or attempt to fix the price and other terms and conditions of sale of the products or services of their members, they run headlong into the Sherman Act's per se condemnation of price-fixing.[60]

A union must therefore be a representative of employees and not an association of independent entrepreneurs.

The Attorney General's Committee summarized the present status of labor under the Sherman Act. The Committee said that commercial restraints by unions may be vulnerable to antitrust proceedings:

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[59] Columbia River Packers Association v. Hinton (1943), 315 U. S. 143.

[60] Dale G. Brickner, Labor and the Antitrust Action (Industrial and Labor Relations Review, XII, January, 1960), pp. 247.

(1) Where the union engages in fraud or violence and intends or achieves some direct commercial restraint;

(2) Where the union activity is not in the course of a labor dispute as defined in the Norris-LaGuardia Act. Construing this statute, the Supreme Court has recognized "its responsibility to try to reconcile two declared Congressional policies." The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through an agency of collective bargaining. Accordingly, its task is in each case to determine "how far Congress intended activities under one of these policies to neutralize the results envisioned by the other." Accomplishing this task may require giving content to the Norris-LaGuardia Act's general definition of "labor dispute." We have noted that recent decisions suggest that courts may infer Congressional intent to apply antitrust to those labor activities, not sanctioned by the Taft-Hartley Act, which aim at direct commercial restraint.

(3) Where a union combines with some nonlabor group to effect some direct commercial restraint.[61]

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[61] U.S., Attorney General's National Committee to Study the Antitrust Laws: Report (Washington: U. S. Government Printing Office, 1950), pp. 299-300.

CHAPTER IV

LABOR AND THE MONOPOLY QUESTION

To many people the question of whether labor is a monopoly has great significance particularly in discussing the application of antitrust laws. The word monopoly itself has ugly connotations for the average citizen. It depicts unilateral power and the ability to exploit. The National Association of Manufacturers consider unions to be vicious monopolies who have somehow been able to trick Congress and the courts into giving them freedom from a law that everyone else must heed -- namely, the Sherman Act. Wolman writes for this point of view:

> It is not, nor could it have been, the intention of Congress, the Executive or the Courts to create or protect organizations which would exercise monopoly powers over the supply of labor, and thus be able to impose their will on agencies of government, the public, business and employees both union and nonunion. The laws were intended to protect the creation and operation of voluntary associations, subject to the same responsibilities and curbs to which all organizations must adhere in a free democracy.[1]

There are at least three different ways of looking at the labor monopoly question. One group sees labor as a monopoly because of corrupt practices. The question

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[1]Leo Wolman, Monopoly Power (New York: National Association of Manufacturers, 1957), p. 1.

of labor as a monopoly is rhetorical to them -- "anyone can see that it is." They support this position by posing a rather loose definition of monopoly and by making broad generalizations based on little evidence. Wolman again speaks for this group:

> Monopoly power can be described as the possession of power by an individual or a group to control the supply and fix the price of needed goods and services. On this basis, there can be no doubt that international unions possess monopoly powers in some of the basic industries of the United States. They virtually control the labor supply of these industries and have proved on many occasions their ability to dictate the terms on which the services of labor are available to produce the goods and services the nation needs.[2]

Mr. Wolman goes on to say that, "employers and their employees must accept the terms fixed by the international union; the members of the local union and the local bargaining agents have nothing to say about these terms."[3] This may be true in a minority of cases; however, it does not necessarily mean anything if "monopoly" is properly and rigidly defined. He actually advocates that unions should be abolished as the first step in the process of returning the United States to a perfectly competitive economy.

Killingsworth does not agree with Wolman's remarks:

> Monopoly commonly means exclusive control of commodity or service in a particular market. If

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[2] Ibid., p. 5.

[3] Ibid., p. 1.

> it is argued that a degree of market power is tantamount to monopoly, then firms engaged in monopolistic competition -- and this means most firms -- are also monopolies. But this is not the usage of the layman, who has been taught by generations of politicians to abhor monopoly. In the political arena, monopoly is a lot like sin -- everyone says that he is against it, including its practioners.[4]

In other words among economists there is obviously not one simple definition of monopoly (Mr. Chamberlin not withstanding). Further on, Killingsworth says:

> The knowledge which many distinguished economists have concerning union behavior seems to be confined to garbled heresay; others of them have been greatly impressed by a few activities of a few unions in a few localities. They are even more impressed by what they think unions may get around to doing sometime in the indefinite future. When these economists introduce their caricatures of union behavior into "models of perfectly competitive systems," they conclude that union practices are a leading menace to competition.[5]

Wolman does note some of the corrupt practices which he believes illustrate that unions are monopolies. These include: restraints of trade and price fixing which are per se violations of the Sherman Act for a business firm; dividing territory which again is a per se offense for a business firm; regional monopolies as in the Allen Bradley case;[6] banning new products and processes;

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[4]Charles C. Killingsworth, "Labor Monopoly and All That," Industrial Relations Research Association, Proceedings of the Eighth Annual Meeting (1955), p. 224.

[5]Ibid., p. 227.

[6]Supra, p. 45.

featherbedding; keeping the supply of labor short by maintaining a closed shop with a closed union; the ability to engage in jurisdictional strikes and boycotts; and the use of coercion and compulsion to force people into unions against their will.[7]

It must be acknowledged that some of the above criticisms of labor organizations are true but most of them have very little to do with antitrust policy. These are problems of public policy and will be solved by new labor legislation, not new antitrust laws or harsher application of the old ones. The "bad practices" group is not interested in getting rid of monopoly in the economy, but in getting rid of unions.

There is a second group of people who feel that, while unions are fine, they should not be allowed to exercise a monopoly in what is usually termed the labor market. These people make the mistake of comparing the labor market with the product market and suppose that actions that comprise a monopoly in the latter, automatically comprise a monopoly in the former. Moreover, once they have identified a monopoly they believe that the same remedies which sufficed in the product market are appropriate in the labor market. It may well be that monopoly in the labor market will require legislative action, but such laws must be different from those concerned with the product market.

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[7]Wolman, p. 26.

Fredric Meyers has put the situation very well:

> If unions do monopolize anything, it is labor services. Certainly the relation between a union and that which it "monopolizes" is quite different from the relation between a business monopoly and that which it monopolizes. There is no right of property of the labor union in the services of its members. In fact, legally and in many ways, practically speaking, collective bargaining is not concerned with arriving at a contract of sale and purchase. A union's power is moderated in a fundamental way unlike any threat to the power of a business monopoly: its dependence upon the continued attachment of its members, and their independent need for continued income. The reality of this threat is made clear by the at-least-occasional instances of lost strikes and successful decertification elections. Imagine a business monopoly which would lose its power if its product, say ingots of metal, should vote that they don't any longer want to be sold by the monopolist![8]

As Congress said in Section 6 of the Clayton Act: "the labor of a human being is not a commodity or article of commerce." Research today has certainly not disproved this.[9]

There is a final group which feels that unions have some effect on the product market. This effect may in some instances, amount to a violation of antitrust principles. These individuals believe it is immaterial whether unions have a monopoly of the labor market, but if they are affecting the product market then it would be legitimate for the government to end this influence.

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[8]Fredric Meyers, "Union Antitrust Laws and Inflation," California Management Review, I (Summer, 1959), p. 38.

[9]Arthur M. Ross, Trade Union Wage Policy, (Berkeley: University of California Press, 1950).

It must be admitted that there is very little statistical evidence available to back up the assertions of this group. It has not been proved that labor has a significant effect on the product market. This group, however, has at least realized that the only legitimate connection between antitrust and labor is in the prevention of union interferences in the product market. The group has not involved itself in questions which are not the proper concern of antitrust legislation such as industry-wide bargaining and featherbedding. These areas are, of course, appropriate for labor legislation but are not in the narrow area of antitrust. In addition, labor should not be included under antitrust laws designed for business monopoly. Although it is always tempting to make analogies between labor and business, it is not necessarily a wise course to follow and very often leads to mistakes.

Suggested Remedies for Labor Monopoly

Since the National Association of Manufacturers views unions as monopolies because of their corrupt practices, they propose to remedy the situation by making the practices illegal. Wolman, as the group's spokesman, suggests that amendments be made to federal and local legislation so that the following objectives are realized:

> Real bargaining at the local level and an end to the domination of bargaining by international unions;

> An end to compulsory union membership in any form;
>
> An end to organizational picketing to force people into unions;
>
> A ban on boycotts and on clauses in contracts which provide for boycotts against other employers;
>
> A ban on economic waste in the form of "featherbedding," restrictions of output, unneeded employees, and refusal to allow new machines or processes to be used;
>
> A modification of the doctrine of federal preemption so that state and local authorities can reassume their responsibilities in labor-management matters;
>
> A prohibition against the use of union funds and union staff employees for partisan political purposes.[10]

It is apparent that this group, while invoking the name of antitrust and monopoly, does not make suggestions having very much relevance to either issue. However, it must be admitted that if their proposals were ever taken seriously there would be a great change in the influence of unionism in the United States.

Following Wolman are persons somewhere between the John Birch Society and the conservative wing of the Republican Party. Iserman ranges rather close to the far right in his proposals. He says:

> Congress should forbid the representatives of employees of different employers to combine or conspire together, or to subject themselves to common control in their bargaining activities, or to strike at the same time by agreement with each other. . . .

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[10]Wolman, p. 30.

> Now, Congress at the same time should forbid competing employers to combine or conspire together in fixing terms or conditions of employment to the same extent that it forbids their employees to combine or conspire together or to subject themselves to common control. . . .[11]

Iserman also makes provisions in his proposals against unions whipsawing a weak employer by saying that "the law would forbid conspiracies between the bargaining agents, and collusive selecting of firms to strike."[12]

Donald Richberg, another "conservative" offers these proposals as a panacea to the monopoly problem:

> Proposition 1. The creation and exercise of monopoly powers by labor unions should be made unlawful. [Richberg does not define "monopoly powers."]
>
> Proposition 2. Compulsory unionism, a form of involuntary servitude, should be abolished by law. This is a duty of Congress under the Thirteenth Amendment.
>
> Proposition 3. The right to strike should be qualified and limited by defining the lawful objects, the lawful methods, and the lawful occasions for strikes.
> Strikes should be held unlawful which are:
> Strikes against the public health, safety, and welfare;
> Strikes to compel political action;
> Strikes without a preceding reasonable effort to avoid a strike.
> Strikes conducted with the aid or toleration of criminal violation.[13]

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[11]Theodore Iserman, "Why Our Antitrust Laws Should Apply to Labor as Well as to Management," Vital Speeches, XIX (April 15, 1953),p. 15.

[12]Ibid., p. 17.

[13]Donald R. Richberg, Labor Monopoly: A Clear and Present Danger,(Chicago: Henry Regnery Co., 1957), pp. 144-7.

Edward Chamberlin also offers a general proposal for antitrust policy:

> The public interest requires the imposition of major restrictions on the monopoly power of labor. . . What is needed is a thorough-going survey of the various avenues through which the economic power of unions (and of their leaders) may be most effectively restrained, a survey which will give adequate recognition to the peculiarities of the labor market itself and of its relationship to the product market.[14]

Government committees and unsuccessful bills in Congress are another source of information on antitrust proposals. The Senate Committee on the Economic Power of Labor Organizations made the following recommendations:

> A number of witnesses recommended an amendment to the antitrust laws aimed at the curtailment of the monopoly itself. . . .
>
> No one can doubt that a bill forbidding in general terms the monopolization of labor would straighten out the present situation. Judge Thurman Arnold conceded that point. However, he proceeded to explain that it is not a practical solution. That power is recognized in unions today. "Give them that power," Arnold stated, "but define the objectives for which that power can be used."
>
> "There is no way of defining the objectives precisely," he explained. "In all antitrust cases, you will have to trust the Court to make findings of fact," . . .
>
> Recommendation of amendments to the antitrust laws ranged from the extremely stringent approach of wiping away all distinctions in the exemptions to the antitrust laws between labor and management and the comparatively mild but direct approach of making illegal and criminal such admittedly nefarious means as direct production and price controls, and the use of labor organizations coercive power to restrain trade for purposes which are not reasonably

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[14]Edward H. Chamberlin, The Economic Analysis of Labor Union Power (Washington, D. C.: American Enterprise Association, 1958), p. 45.

> related to wages, hours of labor, health, and safety of its members.[15]

The Department of Commerce, in its submission to the Attorney General's National Committee to Study the Antitrust Laws, suggested that an amendment be added to Section 6 of the Clayton Act[16] to read:

> The term legitimate objects as used herein shall be deemed to include all matters directly related to representation of employees with respect to their wages, hours, and working conditions in the establishment of their employer. The term shall not include any demand by a union the purpose or effect of which is to control or fix the price of the employer's products or services, or to control production, or to limit and restrict the areas in which goods may be bought and sold, or to prevent the introduction and utilization of technological improvements and new processes, or to exclude the use by the employer of certain products or services.[17] (Italics mine.)

The schemes to alter the structure of bargaining relationships have gone far beyond the proposal stage. The Hartley bill, introduced in the 80th Congress, contained provisions limiting the centralized control of bargaining. This measure passed the House by a large margin and failed in the Senate by only two votes. Two similar bills were

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[15] U.S. Senate Committee on Banking and Currency, The Economic Power of Unions, p. 14.

[16] Supra, p. 33.

[17] United States Department of Commerce, Statement Prepared for the Attorney General's National Committee to Study the Antitrust Laws, mimeo., p. 20, as cited in Dale G. Brickner, "Labor and Antitrust Action," Industrial and Labor Relations Review, (January, 1960), p. 249.

introduced in the 82nd Congress. One would have amended the Sherman Act to make it unlawful for a union to represent employees of more than one employer.[18] This bill died in the Committee of the Judiciary. The other bill would have amended Taft-Hartley to preclude the certification of a union which was the representative of employees of a competing firm. In addition, the latter bill would have made it an unfair labor practice for any union to induce a strike among employees of competing firms.[19]

Most of the above proposals are based on the assumption that unions are monopolies on their face or have a monopoly in the labor market. As has been shown, both of these assumptions are open to extreme doubt. Some of the recommendations suffer from another deficiency, that of giving the courts broad latitude in determining the intention of the legislation. It is a dangerous policy to allow the interpretation of such statutes to be left to the judges, to be decided on the basis of their particular economic leanings.

There is another group whose legislative suggestions are based on the theory that the only legitimate function of antitrust laws is to protect the public interest when labor interferes in the product market. Douglas Brown is a member of this latter group. He proposes:

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[18]Dale G. Brickner, "Labor and Antitrust Action," Industrial and Labor Relations Review, (January, 1960), p. 251.

[19]Ibid., p. 252.

> That with respect to activities in the product market, unions should be on the same footing as any other groups vis-a-vis antitrust legislation, regardless of whether or not they combine with non-labor groups.
>
> That antitrust legislation should not be applicable to any union activities in the labor market. It is perhaps unnecessary to add that the exemption of labor-market activities from antitrust prosecution would not preclude legal action of other sorts against specific activities that might be deemed abuses, such as, for example, certain categories of secondary boycotts, or strikes against certified unions.[20]

The Attorney General's Committee on the Antitrust Laws also adopted this point of view in its labor proposals:

> This Committee believes that union actions aimed at directly fixing the kind or amount of products which may engage in their production or distribution are contrary to antitrust policy. To the best of our knowledge no national union flatly claims the right to engage in such activities.[21]

Further on, the committee makes more specific recommendations:

> Unlike the present Labor-Management Relations Act, the Government should have power to proceed, on its own initiative, without formal complaints from others. A coerced employer, for example, might find it advantageous to acquiesce rather than complain. Thus, was the Government dependent upon formal complaints of others to initiate actions, some wrong to the public interest might go uncorrected.
>
> Unlike the Sherman Act, such legislation should not contain provisions for private injunctions. In

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[20]Douglas V. Brown, "Labor and Antitrust Laws," American Bar Association Proceedings, Section of Labor Relations Law (August, 1955), p. 23.

[21]U. S. Attorney General's Committee to Study the Antitrust Laws: Report (Washington, D.C.: Government Printing Office, 1950), p. 294.

> the labor-management area, private injunctive remedies under the Sherman Act have, in the past, been subject to abuse. In any legislation, therefore, primary reliance should be on Government-initiated enforcement.[22]

Nearly all of these proposals have some merit (more or less, depending on one's political alignment) but most of them, as should be evident, are buttressed by insufficient logic. This chapter has attempted to evaluate the various positions which have been taken on antitrust policy and to indicate where they fall short.

The writer feels that labor should not be able to exercise influence in the product market but feels that the labor market monopoly question requires separate treatment. The writer's views on antitrust policy will be set forth in the next chapter.

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[22] Ibid., p. 304.

CHAPTER V

NEW LEGISLATIVE PROPOSALS

Antitrust legislation is a particularly touchy subject among union leaders. Any writer who takes it upon himself to compose antitrust laws that will specifically apply to labor does so at his own peril. Labor, as has been shown, has good reason to fear antitrust laws.

The proposals in this paper attempt to maintain a pragmatic point of view and are not designed to reorganize the economy, nor change any of the basic economic or political institutions of the country. They are concerned only with antitrust laws and not any of the other thousand and one subjects that can be dragged in under this topic if definitions are flexible enough.

First, the Sherman Act should be completely repealed as far as its application to labor is concerned. Both the Clayton Act and the Norris-LaGuardia Act should be left in force. This would clear the slate for the operation of a new law, and get rid of the confusion in interpreting the Sherman Act.

Second, a new administrative agency, similar but separate from the National Labor Relations Board, should be set up to deal with offenses under the new act. Unlike

the NLRB the new agency should have the power to hold investigations and hearings without some member of the public filing a complaint.[1] This provision will give the board power to protect the public interest and remedy a situation where the parties involved are either afraid to make a complaint or find it to their mutual advantage to refrain from doing so.

The board should have on its staff a broad range of talents besides those of the legal profession. Industrial and labor economists would be very helpful in preparing the cases.

When the board finds that the law is being violated it should issue a "cease and desist order," and, if the illegal conduct continues it would apply to the courts for enforcement in the same manner as the NLRB does today. The court should (ideally) be a specially constituted labor or economic court as Kaysen and Turner have suggested for the prosecution of business monopolies.[2] After hearing the case de novo, and determining the board's findings to be true, the court would enforce the board's order by injunction. This would necessitate an amendment to the Norris-LaGuardia Act so an injunction could not be blocked. However, the court might rule that conduct illegal under the new statute does not come under the

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[1]See Attorney General's Committee, supra, p.61.

[2]Carl Kaysen and Donald F. Turner, Antitrust Policy (Cambridge: Harvard University Press, 1959), p.254.

the definition of a labor dispute as defined in the Norris-LaGuardia Act. If the union ignores the court injunction it would be treated as a contempt of court and the penalty would be left up to the trial judge. Civil suits for damages would not be allowed as they have served no useful purpose in the past, except to harass the labor movement.

Third, the main stay of the new proposals is to proscribe labor from exercising an "adverse affect on competition." The provision was suggested by Judge Putnam in the Patterson case when he said:

> It must appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing monopolizing or grasping the market, and it is not sufficient simply to allege a purpose to drive certain competitors out of the vield by violence, annoyance, intimidation, or otherwise. . . .[3]

The purpose of the Sherman Act was, as the judge saw it, to protect competition and not competitors. Unfortunately this interpretation of the Act did not prevail and the courts concerned themselves with examining the intent and objectives of those charged with restraining trade. The new proposals would only halt union action which was a detriment to competition and the public interest, and would have nothing to do with actions which harmed individual competitors.

If the courts are left to their own devices,

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[3]Supra, p. 27.

to interpret what constitutes an "adverse affect on competition," the whole Pandora's box of the common law meaning of the terms would be opened. In order to forestall this, it will be necessary to define precisely what is meant by these terms. A union shall only be deemed guilty of an "adverse effect on competition" if, by itself, or in concert with another group, it significantly affects market shares or the concentration ratio in an industry.[4]

The bulk of the case against a union would be made up of economic data purporting to show that the union had an adverse affect on competition by changing the concentration ratios of an industry or changing market shares in such a way that competition was lessened significantly. (From this it now should be obvious why the new Board should have a large number of economists on its staff.)

The concluding section of the bill would prohibit unions from any influence on price and output. A proviso would have to be attached to the effect that the seeking of wage increases no matter how exorbitant they be or what method is used to achieve them shall not be considered a violation of the law nor shall any measure designed to protect the health or safety of the workers. This section is necessary because the provision against "affecting competition" would not be apt to stop agreements to fix prices

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[4]Kaysen and Turner, pp. 250-9, 101-106, 295-9. Also J. S. Bain, Industrial Organization (New York: John Wiley & Sons, Inc., 1959), pp. 34, 124-133, 85-88, 182-186, 201-208.

unless they were such that they forced large operators out of business and employers should not be allowed to jeopardize the health and safety of their workers.

Probable Effects of the New Proposals

Competition is not based on brotherly love or justice for all, but rather on the survival of the fittest. The proposals in this paper would not affect what are seeming inequities in the economy. The big union may still strangle the small businessman, and a firm may go out of business for no other reason than that a union official does not like the manager.[5] The principle behind the new proposals is the preservation of competition, not competitors, no matter how "just" their cause may be.

The proposals also have some advantages in them for labor. There is always the possibility of the Hutcheson doctrine being overruled and the vague terms of the Sherman Act being turned loose again on labor. Civil suits for triple damages will no longer be possible, in fact, damage suits of all kinds for violations of antitrust will be gone.

The writer feels that the proposals would allow recent decisions in the field of antitrust and labor to be based on greater logic without causing a reversal of any court decisions. The Allen Bradley case would not turn

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[5]See Hunt v. Crumbock, supra, p. 47.

on the union's conspiring with management, but on the fact that the union was able to reduce competition significantly in one market area by refusing to install the equipment of manufacturers from other parts of the country.[6] The Hunt[7] and Hutcheson[8] cases would also be decided the same way. It is unlikely that the elimination of Hunt's trucking business would affect the market or price of transportation nor would the carpenter's boycott of the Anheuser-Busch cause a significant shift in the interstate market for beer.

In both boycott and strike cases the courts, under the new proposals, would not be interested in the intent or objectives of the union. The results of the union's actions would be the criteria of illegality under the new proposals. The union's intent or objectives are quite immaterial to the public.

A union's freedom to strike may be slightly curtailed. If a strike is not in pursuit of a wage gain, then the courts are free to determine if the results the union seeks are legal, provided the conduct does not fall under the exempting proviso of health and safety clause. If the court considers that competition will be adversely

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[6] Supra, p. 45.

[7] Supra, p. 47.

[8] Supra, p. 43.

affected then it could rule the strike illegal. This may make for some seeming inequities because the same conduct by two different unions may be ruled legal in one case and illegal in the other. This result, however, is in keeping with the purpose of antitrust legislation which is to promote the public interest and not look after private interest groups be they management or labor.

CHAPTER VI

A CONCLUDING NOTE

The writer has attempted in this paper to give a broad summary of the relevant material concerning antitrust and labor. The Sherman Act has been reviewed from its inception, and the main Supreme Court cases have been summarized. Hopefully, it has been shown that the Sherman Act has not been adequate to deal with labor, that in fact, the Act was never intended to deal with it at all.

The question of whether labor is a monopoly is not really relevant to the subject of labor and antitrust. Certainly labor does not have a monopoly in the product of any manufacturing industry although it may exert influences that are not really in line with its legitimate purpose.

It is fairly certain that labor unions will be subject to more government regulation in future years. It is not clear just what course this legislation will take but it seems certain that some sort of labor antitrust legislation will be passed. The writer hopes the legislators will not be deceived by some of the currently popular notions of the relation between labor and antitrust,

and will confine themselves to the narrow area it (antitrust) is designed to remedy. In addition, it is hoped that the mistake will not be made again of passing a law on business monopoly and then applying it to labor.

The suggestion given by the writer for antitrust laws for labor, if enacted, would make the administration of antitrust much better. However, it must be admitted that empirical studies are needed to discover to what extent labor unions do affect the concentration ratios and market shares in various industries.

It should be stressed again that the author does not advocate the removal of all governmental regulation of organized labor. The need for regulation is quite readily apparent. It is the author's contention, however, that antitrust legislation (and particularly the Sherman Act) is not the vehicle for attacking the problem of labor power and other labor policy questions.

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