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THE APPLICATION OF ANTITRUST LEGISLATION TO LABOR UNIONS – PAST, PRESENT, AND PROPOSED

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Today labor unions enjoy practically complete immunity from the federal antitrust statutes, which now prevent only businessmen from imposing unreasonable restraints on trade. This immunity of labor is unique in the long history of antitrust law. Certain labor activities were held to violate the common law on restraints of trade before the passage of the first federal antitrust law, the Sherman Act,[1] and then, until 1941, the statutory law was held to curb the unions.[2] This labor immunity has left the nation so exposed to exploitation by union-imposed restraints of trade that the wisdom of modifying the present policy is now receiving serious consideration.

The critics of the unions' immunity cite John L. Lewis' prolonged fight with the mine owners as an example of the ability of a powerful union to control production in essential commodities.[3] Without examining the merits of the unions' or the operators' contention, it is apparent that the tactics adopted by the union — work stoppages separated by periods of production on a three day week — have resulted in a grievious loss to the national economy. It is also apparent that this control of production would be a violation of the Sherman Act if imposed by any party other than the union.[4]

None of our present laws prevent the unions from adopting competition-stifling tactics. While the Taft-Hartley Act provides for an eighty-day injunction in the event of a national emergency,[5] there

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1. 26 STAT. 209, 15 U. S. C. §1-8 (1890); Arthur v. Oakes, 63 Fed. 310; Toledo. Ry. Co. v. Pennsylvania Co., 54 Fed. 730; State v. Stewart, 9 Atl. 559; Cump v. Commonwealth, 6 S. E. 620.

2. The present curbs are discussed on page 9. Suffice to say, they are practically nil.

3. The report of the President's Fact-Finding Board appeared in the newspapers of February 12, 1950, and this report indicates that the coal supply was then at an all-time low.

4. See Appalachian Coals, Inc. v. United States, 288 U. S. 344, 373 (1933).

5. §206-209 of the Taft-Hartley Act. National Labor Relations Act 49 *Stat.* 449 as amended by Labor Management Relations Act, 1947, Public Law 101, outlines the injunction procedure.

are no restrictions in bargaining involving wages and hours that prevent the union from unreasonably restraining trade to any extent the unions' whims dictate. This injury to the public that results from such monopolistic practices is the target of the critics of labor immunity.

The present immunity of labor and pseudo-labor activity is based on legislation subsequent to the Sherman Act and the judicial interpretation of these laws which sought to foster industrial unionism and to protect the legitimate interests of the union members.[6] Therefore, in order to understand to what extent the antitrust laws now apply to union activities, it is necessary to review the history of the Sherman Act, and the amendments to it, as they have been applied to labor unions. Such a study is also essential in order to evaluate any future legislation on this subject, since it will be interpreted against the background of past experience under the Sherman, Clayton,[7] and Norris-LaGuardia Acts.[8]

As a preliminary question in practically all antitrust cases involving labor unions, it has been argued that unions were not within the scope of the antitrust laws. It is the purpose of Part I of this article to discuss the gradual growth of this immunity, from the passage of the Sherman Act to date. However, independent of the special dispensations given to labor by Congress and the courts, it must be realized that all labor activities do not constitute unreasonable retraints of trade any more than all business activities violate the Sherman Act. Part II discusses the evolution of the unreasonable restraint of trade doctrine as applied to labor unions, in order that the

6. The preamble of both Taft-Hartley and Wagner Acts (29 U. S. C. §151) read, in part as follows:

> "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership associations substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

7. 38 STAT. 730, 15 U. S. C. §12-27, 44; 18 U. S. C. §412; 28 U. S. C. §381-383, 386-390(a); 29 U. S. C. §52, 53 (1914).

8. 47 STAT. 70; 29 U. S. C. §101 *et seq.* (1932).

impact of rescinding or limiting the immunity of unions to the anti-trust laws can be measured. Part III briefly discusses various legislative proposals, with particular reference to S.2912, introduced recently by Senator A. Willis Robertson.[9] It is recognized that any suggested legislation must be based on the premise that interstate commerce is subject today to unreasonable and unpreventable restraints by labor unions which can jeopardize the economy of the nation, under the law as it now exists, but this is a purely political question which need not be discussed here.

I. THE IMMUNITY OF LABOR UNIONS FROM THE ANTITRUST LAWS

Although labor unions acting alone are legally permitted today to impose restraints on production even if the result is detrimental to the national welfare, the same legal precedents which the Supreme Court has relied upon to show the common law crime of monopoly by business are the very precedents that demonstrate that all combinations of labor for any purpose were originally outlawed in England.[10] However, the English statutes were gradually liberalized to legalize labor unions, just as the restrictions on combinations of capital were also eased. Thus, restraints of trade and monopolies by labor were not entirely foreign to the antitrust problem when the Sherman Act was passed in 1890.[11]

With this background in mind, it is not surprising that the Sherman Act was originally interpreted to apply to labor unions, although it was not passed with that specific purpose in mind. Section 1 of the Sherman Act[12] provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal".

This language is unambiguous and unqualified. Read literally, it includes every combination and conspiracy in restraint of trade, whether engaged in by labor organizations or others. Thus, the frequently advanced contention that the Sherman Act was not originally

9. S.2912, 81st Cong., 2d. Sess. A statement by Senator Robertson in support of the Bill is reported at 96 CONG. REC. 756. (January 23, 1950.)

10. Compare Standard Oil Co. v. United States, 221 U. S. 1 (1911) with Loewe v. Lawlor, 208 U. S. 274 (1908).

11. PIOTROWSKI, CARTELS AND TRUSTS (1933), contains an excellent historical discussion of the history of antitrust legislation. Summaries of early Anglo-American labor law may be found in practically every labor law casebook. *E. g.* HANDLER, CASES ON LABOR LAW, p. 3 (1944).

12. 26 STAT. 209, 15 U. S. C. §1 (1890).

intended to apply to labor[13] is predicated chiefly upon the Sherman Act's legislative history. In the debate in the Senate it was argued that the Bill, if enacted in its original form (for which Senator Hoar was largely responsible), would be employed to oppress labor and agricultural organizations. Senator Sherman offered a proviso exempting the activities of such organizations from the Act. Senator Edmunds attacked this proviso on the floor of the Senate and the Bill was then referred to the Judiciary Committee, of which Senator Edmunds was Chairman. The language of the Bill was materially altered by the Committee and no proviso exempting labor was included. Senator Edmunds, who had vehemently opposed the exemption, professed himself satisfied, and no reference to the labor problem appears in the subsequent debates in either the Senate or the House.

It has been argued that the elimination of Senator Sherman's labor-exemption proviso clearly indicates that Senator Edmunds' view prevailed. If so, why then did not the protagonists of labor voice their objection to it? On the other hand, it has been contended that the revised Bill, by using language normally applicable only to business combinations, made any specific exemption of labor unions unnecessary, but the latter argument begs the question, and leaves Senator Edmunds' acquiescence unaccounted for. A solution which will explain the reconciliation of the conflicting senatorial positions is that while the revised Bill was regarded as not exempting labor entirely, it was accepted as applying only to *unlawful* labor activities. The Bill, to which the proviso had been appended, originally gave justifiable grounds for believing that activities of labor unions which had been previously regarded as lawful would be in violation of its terms. The removal of this threat by the revision of the Bill sufficed to satisfy the advocates of the proviso, without giving to labor a blanket immunity which would have met with the continued opposition of Senator Edmunds. This interpretation is substantially in accord with the last Supreme Court opinion treating the matter.[14]

The Supreme Court first applied the Sherman Act to labor unions in *Loewe v. Lawlor,* 208 U. S. 274 (1908), known as the *Danbury*

13. For statements of this view see *Berman, Labor and the Sherman Act,* (1930) pt. 1. *Boudin, The Sherman Act and Labor Disputes,* 39 COL. L. REV. 1283 (1939), 40 COL. L. REV. 14 (1940), advances a theory that the Sherman Act was intended to apply to a very limited range of labor activities. MASON, ORGANIZED LABOR AND THE LAW (1925) cc. VII, VIII, contends that the Act was intended to apply to labor. For a general discussion, See MILLER, ANTITRUST LABOR PROBLEMS — LAW AND POLICY, 7 LAW & CONTEMP. PROBLEMS, 82 (1940).

14. Apex Hosiery Co. v. Leader, 310 U. S. 469 (1940).

Hatters case. This case was a treble damage action against a union brought by a hat manufacturer employing about 230 people. Through a nation-wide secondary boycott, pressure was brought by the union against wholesalers and retailers to keep them from buying the plaintiff's hats in order to compel the plaintiff to consent to a closed shop. The Supreme Court construed the Sherman Act to prohibit any combination whatever which essentially obstructed the free flow of commerce between the States, or restricted, in that regard, the liberty of a trader to engage in business. At common law, according to the Court, "every person has individually, and the public has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction", and the Sherman Act has a broader, not a narrower, application than the common law rule. Thus any distinction between labor and business combinations was repudiated by the Supreme Court at its first opportunity. This holding was in accord with prior lower federal court decisions.[15]

Three years later, the Supreme Court in *Standard Oil Co. v. United States,* 221 U. S. 1 (1911), held that illegal combinations could be dissolved under the Sherman Act. This caused union leaders to become apprehensive that unions might be dissolved under the Act regardless of the extent of their activities. Concurrently — and of more immediate importance to labor — the labor injunction was assuming a more prominent role in labor disputes as a strike-breaking device. Organized labor trained its guns on both the labor injunction and the application of the Sherman Act to union status and activities, and protection against these threats was promised in the Democratic platform in the Presidential campaign of 1912. These promises to labor were dealt with in the Clayton Act of 1914.

Section 20 of the Clayton Act[16] prevents the granting of injunctions by federal courts against certain specific labor activities which even at that time were generally considered legal, such as peaceful picketing. By implication it left undisturbed the illegality attached to certain other conduct.

Section 6 of the Clayton Act,[17] after declaring that "the labor of a human being is not a commodity or article of commerce," provides that "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or

15. United States v. Workingmen's Amalgamated Council, 54 Fed. 994 (E. D. La. 1893), affirmed, 57 Fed. 85 (5th Cir. 1893); *In re* Debs, 64 Fed. 724, 745, 755 (N. D. Ill. 1894), affirmed, 158 U. S. 564 (1895).

16. 29 U. S. C. §52.

17. 15 U. S. C. §17.

to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." This section was the answer to the other promise made in 1912, following the apprehensions engendered by the *Standard Oil Company* decision. It removed all doubt of the right of labor to organize in unions, and affirmed the legality of their status. However, by the use of such language as "legitimate objects," and by legalizing not the *acts* of labor organizations or their members, but only the organizations and members themselves, it is plainly confined to an attempt to protect labor unions against a charge of an unlawful status.

With the Clayton Act, as with the Sherman Act, the legislative history does not show that Congress intended to exempt all union activities from the Act. In the course of the debates in the House, after a question had been raised as to the meaning of Section 6, and particularly the meaning of the declaration that labor is not a commodity or article of commerce, a clear-cut labor exemption proviso was offered by way of amendment and rejected.[18]

After the passage of the Clayton Act, the Supreme Court took the first opportunity to refute, in very explicit language, the suggestion that the Clayton Act had created any blanket immunity for labor unions. In *Duplex Printing Press Company v. Deering,* 254 U. S. 443 (1921), a majority of the court held that Section 6 of the Clayton Act protected only the *existence* of labor organizations. The Act was said to be merely declaratory of the prior substantive law — merely declaratory of what the best practice always had been for the granting of injunctions. See *American Steel Foundries v. Tri-City Council,* 257 U. S. 184, 203 (1921). Further, §20 was construed to apply only where an employer-employee relationship existed.

Since the Clayton Act allowed individuals as well as the government to seek injunctions, the injunction problem became increasingly acute in the eyes of labor organizations. The question of what a union could or could not do legitimately to further its interests was frequently litigated in the 20's, and the now famous labor dissents of Justices Holmes, Brandeis and Stone were mostly concerned with the question of the justifiable extent of a labor union's interest in industry-wide conditions in how far a union could go to further the welfare of its members.

18. See footnote 13, *supra.*

The cases decided under the Clayton Act recognized that a union cannot be effective in raising the wages of its members without going outside a single employer's shop. As Chief Justice Taft expressed it, "It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge membership and especially among those who labor at lower wages and willingly injure their whole guild." *American Steel Foundries v. Tri-City Council,* 257 U. S. at 209.

Some members of the Court went further. Mr. Justice Brandeis, in his dissenting opinion in *Hitchman Coal and Coke Co. v. Mitchell,* 245 U. S. 229, 268 (1917), stated that the desire of the United Mine Workers to unionize every mine on the American continent, and especially those mines in competition with mines already unionized, was not unlawful but was part of a reasonable effort to improve the condition of working men engaged in the industry by strengthening their bargaining power through unions and extending the field of union power.

In spite of these favorable legal demonstrations, unions still found the Sherman and Clayton Acts embarrassingly restrictive, and the use of the injunction as a strike-breaking weapon increasingly onerous, as unions expanded and sought greater power.

The result of labor's hue and cry was the Norris-LaGuardia Act of 1932, which broadly and unequivocably removed the jurisdiction of any federal court to issue any restraining order or injunction in practically any case arising out of a labor dispute. Thus, labor finally secured immunity from the injunctions that had plagued so many of its organizing campaigns.

The main object of the Norris-LaGuardia Act was to remedy what was felt to be an existing evil, namely, a too-liberal use by the federal courts of their equity power to issue injunctions in labor disputes. Labor unions and their partisans had contended that whatever power labor might possess through collective action was effectively canceled by the ability of employers to secure temporary restraining orders against strikes, picketing, and other concerted activities, merely by filing an affidavit, in a federal district court, without notice to the opposing party. To remedy this situation, the Act provided in substance that the federal courts should no longer have jurisdiction to issue restraining orders or temporary or permanent injunctions in any case involving or growing out of a labor dispute.

It will be noted that to some extent the Norris-LaGuardia Act

duplicates Section 20 of the Clayton Act. Two significant distinctions between these statutes exist, however.

The first of these differences is that the term "labor dispute" is defined explicitly in the Norris-LaGuardia Act to cover more ground than was covered by Section 20 of the Clayton Act. A labor dispute may exist, within the meaning of the Norris-LaGuardia Act, "whether or not the disputants stand in the proximate relation of employer and employee". (Section 13(c)).

The second major difference between the Clayton Act and the Norris-LaGuardia Act is that the latter purported to do no more than regulate the issuance of injunctions by the federal courts. Whereas Section 20 of the Clayton Act contained the substantive provision that none of the labor activities therein mentioned should "be considered or held to be violations of any law of the United States", the Norris-LaGuardia Act nowhere contains such a provision.

With the law in this posture, the Department of Justice in 1939 began a nation-wide campaign against racketeers in the building trades, where labor unions were prohibiting the use of new building techniques, imposing wasteful feather-bedding practices on employers, and, in general, restraining trade through callous abuse of their power. No clearer example of restraints of trade can be conceived than the policy of certain unions of excluding from a geographical area the products of companies in competition with local employers of union labor.

Criminal prosecutions under the Sherman and Clayton Acts were begun on a nation-wide basis, and numerous indictments secured. The whole campaign, however, came to naught when the Supreme Court held in *United States v. Hutcheson,* 312 U. S. 219 (1941), that labor activities exempted from injunction by the Norris-LaGuardia Act were by implication exempted completely from the prohibitions of the Sherman Act. This case involved an employer caught in the middle of a jurisdictional dispute between the carpenters' union and the machinists' union. The carpenters' union called a strike, picketed the premises, requested its members throughout the nation not to buy the employer's product, and attempted to foment sympathy strikes. The holding in this case might well have been that the direct employer-employee relationship brought this case within the immunities provided by Section 20 of the Clayton Act. Instead, the majority opinion by Mr. Justice Frankfurter was based on the theory that the Norris-LaGuardia Act had in effect amended both the Clayton Act and the Sherman Act to immunize all concerted labor activities where pursued by labor unions acting in their own interests and where such activities

were involved in or grew out of labor disputes as defined in the Norris-LaGuardia Act. This bombshell was fatal to the Department of Justice's attempts to remove these log-jams in the stream of interstate commerce and explains why the Department cannot adequately deal with problems like the present coal situation.

The licit and illicit under Section 20 of the Clayton Act were no longer, after the *Hutcheson* case, to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness, of the end which the particular union activities sought to achieve. And the case of *Hunt v. Crumboch,* 325 U. S. 821 (1945), underscored the holding in the *Hutcheson* case that motive and wisdom are immaterial. In that case the union's grievance stemmed wholly from a personal dislike for the employer, because of which the union withheld its labor from the employer in order to destroy him. Although the employer offered to sign a closed shop contract, the union refused to let its members work for him, and forced his customers, with whom the union had closed-shop contracts, to cease doing business with him. Such conduct was held to be lawful under the doctrine of the *Hutcheson* case, on the theory that laborers can sell or not sell their labor on such terms as they please. The employer was destroyed but left without legal recourse.

Under the *Hutcheson* case the only apparent limitations upon the immunity accorded a union are that it must act to further its self-interest as a labor organization, and cannot combine with non-labor groups. Thus, almost any conflict can qualify as a labor dispute. Although associations of independent merchants are not within the immunity, *Columbia River Packers Association v. Hinton,* 315 U. S. 143 (1942), nor are doctors, *American Medical Association v. United States,* 317 U. S. 519 (1943) even employer-union combinations[19] may escape condemnation due to the extraordinary statutory standard of proof required to show that the act of a union official can be said to be the act of his union.

Section 6[20] of the Norris-LaGuardia Act provides that

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participa-

19. Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797 (1945), held that the *Hutcheson* doctrine had no application to employer-union combinations.
20. 29 U. S. C. §106.

tion in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

The Taft-Hartley Act[21] provides that "In determining whether any person is acting as 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling," but the Taft-Hartley rule does not specifically apply to antitrust actions. The Senate Report (105, 80th Cong., p. 21) cites *United Brotherhood of Carpenters and Joiners of America v. United States,* 330 U. S. 395 (1947), as necessitating a change in the rule established by the Norris-LaGuardia Act.

This case was a criminal action under the Sherman Act involving an employer-union combination, and the lower court determined that an offense was charged under the Sherman Act. The Supreme Court reversed the conviction on the ground that the trial court had refused to give the necessary instruction as to Section 6. In other words, by applying Section 6 to the criminal action, the Supreme Court was extending still further its holding in the *Hutcheson* case.

The Supreme Court held that "authorization" as used in Section 6 means something different from corporate criminal responsibility for the acts of officers and agents in course or scope of their employment. The requirements of "authorization" were said to restrict

> ". . . the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality, had been expressly authorized, or necessarily followed from a granted authority, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence." 330 U. S. at 406.

However, Mr. Justice Frankfurter, who wrote the *Hutcheson* opinion, dissented strongly in this case, and legislation is certainly neces-

21. 20 U. S. C. §152(13).
' This provision makes clear that the common law rule and not the Norris-LaGuardia test applies. See the Conference Report, H. R. No. 510, 80th Cong., 36.

sary if his fears are justified. Referring to the Court's decision, he stated that

> "The holding is that the view which the trial court should have taken, which all trial courts will have to take hereafter, and which, whatever the language used in the charge, must control a jury's findings from the evidence, is the elucidation which the Court now gives to §6. For practical purposes, this elucidation immunizes unions and corporate offenders for acts which their agents perform because they are agents and, as such endowed with authority. For practical purposes, a union or a corporation could not be convicted on any evidence likely to exist, if the trial court has to charge what the Court now holds to be required by §6." 330 U. S. at 417."

A careful evaluation of the possible effect of the *United Brotherhood of Carpenters* case might well accompany any legislative attempt to overrule the *Hutcheson* case, in order that a legislative intent to apply the Sherman Act to unions in certain instances will not be frustrated before the courts by this secondary obstacle.

2. Labor Activities as Restraints of Trade

The *Hutcheson* and *United Brotherhood of Carpenters* cases mark the practical realization of the immunity of labor from the antitrust laws originally sought in *Loewe v. Lawlor*. Labor's immunity has grown by stages as the Clayton and Norris-LaGuardia Acts have been construed to withdraw specifically enumerated practices of labor unions from the general interdict of the Sherman Act until at the present time this immunity encompasses practically all labor activities. This protecting shield developed over a fifty-year period; and while the immunity was still incomplete, the Courts also were considering the companion problem of what types of union restraints were illegal under the Sherman Act itself.

The application of the antitrust laws to labor unions in the absence of the special exemption has assumed new virility due to proposed federal legislation and actions in state courts based upon state statutes similar to the Sherman and Clayton Acts, since the effect of removing by legislation part of labor's immunity would be to reinvigorate and rejuvenate the concept of unreasonable restraints of trade as developed prior to the *Hutcheson* case.

While the basic language of the Sherman Act is unchanged, the Supreme Court's version of its meaning has been subjected to modifications. The rule as to which restraints are illegal adopted in *Loewe*

v. Lawlor, which held illegal a secondary nation-wide boycott of a small hat manufacturer, was thus stated by the Court:

> "In our opinon, the combination described in the declaration is a combination 'in restraint of trade or commerce among the several States,' in the sense in which those words are used in the Act, and the action can be maintained accordingly.
>
> "And that conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business.
>
> "The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the court of trade except on conditions that the combination imposes; and there is no doubt that (to quote from the well-known work of Chief Justice Erle on Trade Unions) 'at common law every person has individually, and the public also has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction'." 208 U. S. at 292.

This concept was subjected to modification by the *Standard Oil* case, 221 U. S. 1 (1911). That case first established the "rule of reason", which declared that only those contracts which "unreasonably" restrained trade were outlawed by the Sherman Act. The opinion contains an elaborate analysis of the common law dealing with monopolies. Later, the rule of reason was declared applicable to labor restraints, in *National Association of Window Glass Manufacturers v. United States,* 263 U. S. 403 (1923).

Typical of the cases following the *Loewe v. Lawlor* concept of physical interference with interstate commerce is *Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 299 (1917), an extremely controversial opinion by Mr. Justice Pitney, which upheld an injunction against an attempt by the United Mine Workers to organize non-union mines in which workers had agreed to quit work if they joined a union. In dealing with such an employer the unions naturally strove to keep the extent of their success in organizing secret until they were able to close the mine by strike. Also the members of the union kept working while awaiting the strike call. The opinion stressed the idea that the employer's action in imposing the condition of non-union membership was reasonable due to the difficulties in operating with a union shop in the past. The union recognized these unorganized

mines as a serious threat, since the competition produced by the unorganized field rendered it more difficult for the operators of union mines to grant concessions demanded by the union. Thus, in order to relieve the pressure on union members and their employers elsewhere, a concerted organizing drive was undertaken in the unorganized West Virginia district.

On these facts the Court held that the employer was within its legal rights in employing its men only on terms of continuing non-membership in the union. It was held the employer had a property right in the employment relationship with its employees which could not be interfered with by a third person. The union had violated this property right by secretly soliciting among the employees in preparation for a strike, and therefore the union was not pursuing its object by lawful means.

Mr. Justice Brandeis' dissent is predicated on the proposition that the organizing campaign in West Virginia was part of a reasonable effort to improve the conditions of working men engaged in the industry by strengthening their bargaining power through unions, and extending the field of union power. According to his dissent, the employees were not induced to violate their contracts with the employer, but were merely solicited to join the union. This distinction the majority of the Court declined to recognize.

A different approach is reflected in *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922). Chief Justice Taft, speaking for a unanimous Court, reversed and remanded a judgment against a union entered as a result of a strike accompanied with considerable violence in the Arkansas coal fields. Some Arkansas mines which had been operating as union mines decided to operate as an open shop. The strike, fighting, and flooding of the mines followed. An injunction was secured, and non-union miners were brought in from outside the state. Some of the strike breakers were shot in an attack by the union forces.

The Court held that obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it may be affecting it by reducing the amount of coal to be carried in commerce. The U. M. W. pressed the unionization of the mines not only as a direct means of bettering the conditions of the workers there, but also as a means of lessening interstate competition for union operators. But this latter was held to be only an ancillary motive, with the actuating force in a given case necessarily dependent upon the particular circumstances to which it is sought to make it applicable. According to the Court, if unlawful means had been used by the union to union-

ize miners whose product was important, actually or potentially, in affecting prices in interstate commerce, the union would be guilty of an actionable conspiracy under the Sherman Act, but here the evidence was held not to show any primary plan to control competition. *Loewe v. Lawlor* was distinguished on the ground that the direct subject of attack there was interstate commerce. The Supreme Court said that the capacity of the mines affected was not shown to be large enough to affect substantially the market price of coal, and the decision of the lower court was reversed.

A new trial was granted, which resulted in a directed verdict for the defendants, and the case was brought to the Supreme Court for a second time. 268 U. S. 295 (1925). New evidence was introduced at the second trial to show that a major purpose of the strike was to prevent the non-union coal from competing with coal produced by union mines. Evidence about union meetings, and testimony by former union officials, indicated the great concern of the union over that part of the industry not covered by union contracts. New evidence also showed that the productivity of the mines in question was much greater than had been indicated in the first opinion of the Court, and could have an effect upon the general price level of coal. The Supreme Court held that there was substantial evidence at the second trial to show that the purpose of the strike was to stop the production of non-union coal and to prevent its shipment to markets in other states where it would be in competition tending to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines.

United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457 (1924) involved a strike to secure a closed shop. Illegal picketing and violence followed and in consequence the employer was unable to fill orders from out of state. There was no evidence as to any attempt to impose a boycott or to prevent shipment in interstate commerce of already manufactured products. The Court held against the employer on the ground that only where there is a direct intention to restrict interstate commerce and thus to create inflated price structures or prevent price competition is there a violation. "It is only when the intent or the necessary effect upon such commerce in the article is to enable those preventing the manufacturer to monopolize its supply or control its price or discriminate between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce."

Important distinctions between the second *Coronado* and *Herkert* cases are hard to find since in both cases the unions acted with the ob-

ject of either compelling unionization or forcing employers out of business. Although there was proof in the second *Coronado* case, as there was not in the *Herkert* case, of an intention on the part of the union later to gain the elimination of non-union mined coal in the national markets, such proof was not required in the secondary boycott cases of *Loewe v. Lawlor* and *Duplex Printing Press Company v. Deering*. The confusion was enhanced when the Court in 1927 decided *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association,* 274 U. S. 37, (1927) which, following the two cases last named, held unlawful a nation-wide secondary boycott.

This confusion remained relatively static until the Supreme Court decided *Apex Hosiery Co. v. Leader,* 310 U. S. 469 (1940), a civil action for treble damages under the Sherman Act against a union which had shut an employer down by use of sit-down strike tactics. The strike was marked by violence; and although the jury only found an intent by the union to conduct a sit-down strike, there was specific testimony that the strikers refused to permit the withdrawal of finished merchandise from the manufacturer's factory for shipment to fill out-of-state orders.

The union argued once again that union activities should be granted an immunity under the Clayton and Sherman Acts. Once again this was rejected. Stating that mere violent interference with interstate commerce, such as a train robbery, is not necessarily a violation of the Sherman Act, Mr. Justice Stone conceived the question as

> ". . . whether a conspiracy of strikers in a labor dispute to stop the operation of the employer's factory in order to enforce their demands against the employer is the kind of restraint of trade or commerce at which the Act is aimed, even though a natural and probable consequence of their acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer." 310 U. S. at 487.

The Court held that the Sherman Act was not designed to police interstate commerce but was enacted "for the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury," 310 U. S. 493. According to the opinion, the Sherman Act did not apply in any case, whether or not involving labor organizations or activities, unless there was some form of restraint upon commercial competition in the marketing of goods and services, and

could not apply in cases of local strikes conducted by illegal means in a production industry except where it was shown that the restriction on shipments had operated to restrain commercial competition in some substantial way. In other words a restraint on competition in the course of trade in articles moving in interstate commerce is not enough unless the restraint is shown to have, or have been intended to have, an effect upon prices in the market, or otherwise to deprive purchasers or consumers of the advantages which they might derive from free competition. Although, in order to render a labor combination effective, it must eliminate the competition from non-union made goods, and although the elimination of price competition based on differences in labor standards is the objective of many national labor organizations, this effect on competition was stated not to be considered the kind of curtailment of price competition prohibited by the Sherman Act. It was observed that in each of the cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at the control of the market and were so wide-spread as to affect it substantially.

Mr. Justice Stone did not find it necessary to overrule any precedents. *Loewe v. Lawlor,* and the *Duplex Printing Press Company* and the *Bedford Cut Stone Co.* cases were all distinguished on the stated ground that in those cases,

> "the effort of the union was to compel unionization of an employer's factory, not by a strike in his factory but by restraining, by the boycott or refusal to work on the manufactured product, purchases of his product in interstate commerce in competition with the like product of union shops.
> "In the *Bedford Cut Stone Co.* case it was pointed out that, as in the *Duplex Printing Press Co.* case, the strike was directed against the use of the manufactured product by consumers 'with the immediate purpose and effect of restraining future sales and shipments in interstate commerce' and 'with the plain design of suppressing or narrowing the interstate market,' and that in this respect the case differed from those in which a factory strike, directed at the prevention of production with consequent cessation of interstate shipments, had been held not to be a violation of the Sherman law.
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> * * *
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> "That the objectives of the restraint in the boycott cases was the strengthening of the bargaining position of the union and not the elimination of business competition — which was the end

in the non-labor cases — was thought to be immaterial because the Court viewed the restraint itself, in contrast to the interference with shipments caused by a local factory strike, to be of a kind regarded as offensive at common law because of its effect in curtailing a free market and it was held to offend against the Sherman Act because it affected and was aimed at suppression of competition with union made goods in the interstate market." 310 U. S. at 506.

In *The Apex* case the Court found the elements of restraint of trade present in the second *Coronado* case, and alone to distinguish it from the first *Coronado* case and the *Leather Workers* case were here lacking. The restraints imposed were said not to be within the Sherman Act unless they were intended to have, or in effect have, the effects on the market on which the Court had relied to establish the violations in the second *Coronado* case, and restraints not within the Act when achieved by lawful means are not brought within its sweep merely because, without other differences, they are attended by violence.

Thus, after 13 years, an attempt at a definitive statement of the application to labor unions of the antitrust acts was finally given. Unfortunately, it has had little practical value yet, because the next year, in the *Hutcheson case,* labor unions were accorded the immunity from the Sherman Act which they had been denied in the *Apex* case.

The *Apex* case shows that buried beneath the gloss of the Clayton and Norris-LaGuardia Acts, the Sherman Act still condemns restraints of trade in the same forceful and unequivocal language as in 1890. Labor unions are immune only because of Supreme Court's construction of the subsequent statutes, and the Supreme Court has recently held[22] that there is no constitutional ground requiring the exemption of any group from the anti-trust laws.

3. Legislative Proposals

Being mindful of the background of antitrust law just discussed, is it possible to outlaw those restraints on commercial competition that threaten the national economy, without endangering the very existence of unions, or unduly restricting the pursuit by unions of their legitimate objectives? The Senate Committee on Banking and

22. Giboney v. Empire Storage Co., 336 U. S. 490 (1949). See Carpenters and Joiners Union of America v. Ritter's Cafe, 315 U. S. 722 (1942). However, the widespread use of State statutes would encounter other difficulties.
Cf. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U. S. 740 (1942).

Currency held hearings[23] from July 25 to August 26, 1949, on the economic power of labor organizations, and numerous experts placed before the Committee their suggestions as to the manner in which the antitrust laws should be amended to prevent such situations as the current coal crisis.

One proposed method was to outlaw union activity on a nationwide basis.[24] Another method proposed was to define specifically and to spell out the particular kinds of labor-union activities which are legal, and those which are illegal.[25] Such a task seems an almost impossible objective, since once a list is made of the specific activities which are declared to be unlawful, the list must always be qualified by some sort of an exemption of activities of these kinds when they are clearly pursued with the primary purpose of furthering a legitimate union objective. Once such a qualification is introduced, the whole matter of intention and purpose, *i. e.,* whether the primary purpose is in furtherance of legitimate union objectives like bettering working conditions, or whether the primary purpose is to control production or prices, becomes controlling. Thus the final decision of whether the conduct is lawful or unlawful comes back to a finding by a court, based on concepts not specifically spelled out. Thus the specific enumeration would probably introduce new obscurities into the law without removing any of the already more than adequate supply.

One proposal warranting mention would have modified the Sherman Act by outlawing labor monopolies through an amendment to Section 2 of the Sherman Act, dealing with monopoly as a criminal offense.[26] The difficulty in applying any anti-monopoly criminal provision to unions is that the monopoly provisions of the Sherman Act cannot be said to have the same sort of application to labor unions as they have to business combinations. Every labor union is seeking to monopolize the supply of labor, either on a comparatively limited scale or on a national scale. That kind of monopolization is the avowed objective of labor unions, and it has been approved as a matter of public policy by Congress, not only in the Wagner Act, but also in the Taft-Hartley Act.[27] Such an enactment would repre-

23. The hearings are officially entitled "Hearings Before the Committee on Banking and Currency, United States Senate 81st Congress, First Session, on Effect of Economic Power of Unions Upon Banking and Credit Policies, Small Business Enterprises, Consumers' Prices, and National Economic Stabilization". Mr. Edward Miller testified at the request of the Committee. P. 752.

24. Hearings, pp. 188, 239.

25. Hearings, p. 80. The Hartley Bill, as approved by the House, contained a provision of this type. 93 CONG. REC. 3656, 3671, (April 17, 1947).

26. Hearings, pp. 136, 256.

27. *Supra,* footnote 6.

sent a reversal of Congressional policy toward labor unions extending back at least to the Clayton Act.[28]

Senator A. Willis Robertson of Virginia, who conducted the hearings, concluded that corrective legislation that suffered from none of these defects was possible, and introduced the following Bill:[29]

> (a) Section I of the Act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', as amended (U.S.C., title 15, sec. 1), is amended by inserting before the period at the end thereof the following: *Providing, further,* That when a labor organization or the members thereof have unreasonably restrained trade or commerce among the several States, or with foreign nations, in articles, commodities, or services essential to the maintenance of the national economy, health, or safety, or any substantial segment thereof, such conduct shall not be made unlawful, and the jurisdiction of any court of the United States to issue an injunction against any such conduct shall not be restricted or removed, by the Act of October 15, 1914, entitled 'An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes' as amended, or the Act of March 23, 1932, entitled 'An Act to amend the judicial code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes'."
>
> (b) [Amends §3 in like language to apply to territories and the District of Columbia.]

This Bill emphasizes the public character of the injury suffered from unreasonable restraints of trade, by its limitation to essential articles, commodities, and services. It does not threaten legitimate union activity, since it would only apply in instances where the unions have imposed an "unreasonable" restraint. Thus the doctrine that the possession of monopoly power is illegal whether or not exercised is inapplicable.[30]

The Robertson Amendment reinvigorates the *Apex* case doctrine so that the state laws and the Taft-Hartley Act would still provide the only curbs on violence in local strikes. The determination of what is an "unreasonable restraint" would be left to the court, just as it is with business combinations, and the *Apex* doctrine, plus Con-

28. See American Steel Foundries v. Tri-City Council, 257 U. S. 184, 209 (1921).

29. *Supra,* footnote 9.

30. See American Tobacco Co. v. United States, 328 U. S. 781, 811 (1946).

gressional expressions of policy in legislation concerning the role of unions in the economy, would be the guide. So construed, the Bill would be primarily useful in that it would prevent unions, with or without the tacit consent of the employers, from imposing restrictions on commercial competition that result in conditions as uneconomic as if the same restrictions had been imposed by the employers. The scope of the Bill would be quite limited, but it would provide a curb on the unions that would prevent a recurrence of such crises as the present coal shortage.

Whatever action is taken on S.2912, the potentialities of such legislation will assure its periodic resurgence into prominence on both the federal and state levels.