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Eugene Cronin

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## COMMENTS

### EMPLOYERS' MUTUAL AID: NO ANTITRUST LAWS NEED APPLY AND ALMOST ALL'S FAIR IN INDUSTRIAL WAR

#### I. INTRODUCTION

Several major industries will be negotiating new collective bargaining agreements in 1976 and a large number of labor disputes are expected. In four industries—rubber, textiles, trucking and electrical manufacturing—union demands will be greater than usual because their present contracts were negotiated under the restraint of economic controls.<sup>1</sup> At the same time, management resistance will probably be stronger since increases in productivity have been barely perceptible. Any excess of labor cost increases over productivity gains will be reflected in either higher prices or lower profits.<sup>2</sup> Under these circumstances, both sides will be preparing to use whatever means are available to achieve their conflicting goals.

A strike, or the possibility of one, is the primary source of bargaining power for organized labor.<sup>3</sup> A union can substantially increase the economic pressure created by this weapon by applying it selectively against one employer or a group of employers, while allowing competing businesses to continue operations without interruption.<sup>4</sup> Competitors may take the struck employers' business during the strike, and of greater significance, they may divert some customers permanently. In such a predicament, employers will more readily accede to union demands and these presumably favorable terms can then be used as a pattern, or perhaps a base, to obtain similar or greater benefits from the remaining employers. This selective or "whipsaw" strike also renders public opposition less likely since service is still provided by the non-struck businesses. The striking workers need not suffer serious hardship because union members who continue to work can contribute to strike benefit funds.<sup>5</sup>

The whipsaw is available in any market where the employees of competing firms are unionized.<sup>6</sup> In most cases, these competitors will be part of a formal

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1. N.Y. Times, Jan. 11, 1976, at 31, col. 1.

2. See *id.*, Jan. 4, 1976, at 60, col. 1; *id.*, Jan. 13, 1976, at 45, col. 1.

3. *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act* 517 (C. Morris ed. 1971).

4. See, e.g., *NLRB v. Brown*, 380 U.S. 278, 284 (1965); *NLRB v. Teamsters Local 449*, 353 U.S. 87 (1957); *Air Line Pilots Ass'n Int'l v. CAB*, 502 F.2d 453 (D.C. Cir. 1974), cert. denied, 420 U.S. 972 (1975); *Kennedy v. Long Island R.R.*, 319 F.2d 366, 368-69 (2d Cir.), cert. denied, 375 U.S. 830 (1963); *Clune v. Publishers' Ass'n*, 214 F. Supp. 520, 523 (S.D.N.Y.), *aff'd mem.*, 314 F.2d 343 (2d Cir. 1963) (*per curiam*).

5. Also, if the union wishes, marginal employers who might be destroyed by a strike can be spared. See Newborn, *The Validity of the Selective Strike Under the Railway Labor Act*, 60 Geo. L.J. 583 (1972); Note, *Interest-Balancing and the Use of Economic Weapons in Labor Disputes—A New Look at Management's Arsenal*, 20 Rutgers L. Rev. 102, 113-14 (1965).

6. The same pressure would be exerted on an employer where the employees of its competitors were not unionized, but the result would probably be unfavorable to the union. In this

multiemployer bargaining unit,<sup>7</sup> either sanctioned by the National Labor Relations Board (NLRB) or agreed to by the union.<sup>8</sup> However, as in the airline industry,<sup>9</sup> the whipsaw can be equally effective even absent multiemployer bargaining. The tactic is particularly powerful in service industries, which are more vulnerable than manufacturing industries to any type of strike, since stockpiling is unavailable, business lost during a strike is more difficult to recover and repetitive customers are essential.<sup>10</sup>

*NLRB v. Teamsters Local 449*,<sup>11</sup> the so-called Buffalo Linen case, established that there is no violation of the National Labor Relations Act (NLRA)<sup>12</sup> when employers, who have bargained as a unit, defend against the whipsaw by locking out non-striking union members.<sup>13</sup> This response eliminates the threat of losing business temporarily or permanently to competitors. It also exerts increased pressure on the union since a strike benefit fund will be more rapidly depleted with more members drawing on the fund and no working members contributing to it.<sup>14</sup>

situation the employer cannot assume that the same costs will be imposed upon its competitors, so there would be no point in capitulating quickly only to have its prices undercut by non-union employers. This circumstance is a major incentive for unions to organize along product market lines. See notes 30-33 *infra* and accompanying text.

7. Seventy-one percent of all non-manufacturing and thirty-one percent of all manufacturing collective bargaining agreements arise from union negotiations with a multiemployer unit. Cohen, *Coordinated Bargaining and Structures of Collective Bargaining*, 26 Lab. L.J. 375, 376 (1975). Compare *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 713 n.20 (1965) (Goldberg, J., concurring).

8. E.g., *NLRB v. Hart*, 453 F.2d 215, 217-18 (9th Cir. 1971), cert. denied, 409 U.S. 844 (1972); *Andes Fruit Co.*, 124 N.L.R.B. 781, 44 L.R.R.M. 1487 (1959); *Rayonier, Inc.*, 52 N.L.R.B. 1269, 13 L.R.R.M. 91 (1943).

9. The agreement which the International Association of Machinists reached with United Airlines after a recent whipsaw strike "is expected to set a pattern in IAM negotiations at several other large carriers." Wall St. J., Dec. 22, 1975, at 6, col. 3; see Redenius, *Structural Instability in Airline Industrial Relations*, 22 Lab. L.J. 558, 563-65 (1971). During 1976, the prime example of a selective strike in the absence of multiemployer bargaining will probably be in the automobile industry. Ford Motor Company has already been identified as the most likely target. N.Y. Times, Jan. 25, 1976, § 3, at 2, col. 8.

10. See *NLRB v. Brown*, 380 U.S. 278, 284 (1965); Redenius, *Structural Instability in Airline Industrial Relations*, 22 Lab. L.J. 558, 561 (1971).

11. 353 U.S. 87 (1957).

12. 29 U.S.C. §§ 151-69 (1970), as amended, (Supp. IV, 1974).

13. 353 U.S. at 97. See also *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308-18 (1965) (offensive or bargaining lockout is not an unfair labor practice for an employer acting alone); Duvin, *The Bargaining Lockout: An Impatient Warrior*, 40 Notre Dame Law. 137 (1965).

14. Of course, in some states, after a fairly prolonged waiting period, public assistance may be provided to strikers and their families by unemployment or welfare payments. Pati & Hill, *Economic Strikers, Public Aid and Industrial Relations*, 23 Lab. L.J. 32, 35-36 (1972); Comment, *Strikers' Eligibility for Public Assistance: The Standard Based on Need*, 52 J. Urban L. 115 (1974); Note, *Federal Preemption—State Payment of Unemployment Compensation to Strikers as Prohibited by Federal Labor Policy*, 20 Wayne L. Rev. 1191 (1974). Support funds may also be transferred from a parent union or other allied unions. F. Peterson, *American Labor Unions—What They Are and How They Work* 162 (2d rev. ed. 1963); Cohen, *Coordinated Bargaining and*

However, the multiemployer defensive lockout is not always desirable. In some regulated industries,<sup>15</sup> the device is less attractive because such concerted employer action would probably bring government intervention with results unfavorable to the employers.<sup>16</sup> Where employers market perishable products or services, revenue lost during a lockout cannot be recovered by increased business afterwards. Employers may also fear undesirable effects upon public opinion or their own labor relations.<sup>17</sup> Moreover, absent multiemployer bargaining, a lockout in response to a whipsaw has been held an unfair labor practice.<sup>18</sup> As a result, various forms of mutual assistance pacts or strike insurance plans, analogous to union strike benefit funds, have been created.<sup>19</sup> Employers who continue to operate support the struck firm in the hope that it can withstand the whipsaw and obtain a more acceptable pattern for the other employers. The effectiveness of this aid is limited.<sup>20</sup> The striking workers will be similarly supported by the union and the inter-employer aid does nothing to alleviate the pressure of losing customers permanently.

In the future, other forms of mutual aid may be attempted. One option would be to combine a lockout with support for the marginal employer who faces the greatest pressure during a strike and who, therefore, constitutes the greatest threat to employer solidarity.<sup>21</sup> Absent such support, the weak

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Structures of Collective Bargaining, 26 Lab. L.J. 375, 379 (1975). During the 1967 strike in the rubber industry the United Rubber Workers (URW) received a fifty thousand dollar contribution from the AFL-CIO, and the United Auto Workers (UAW) provided "two interest-free loans in the seven-figure bracket." Hirsch, *Strike Insurance and Collective Bargaining*, 22 Ind. & Lab. Rel. Rev. 399, 403 (1969) [hereinafter cited as Hirsch].

15. E.g., *Air Line Pilots Ass'n Int'l v. CAB*, 502 F.2d 453 (D.C. Cir. 1974), cert. denied, 420 U.S. 972 (1975); *Kennedy v. Long Island R.R.*, 319 F.2d 366 (2d Cir.), cert. denied, 375 U.S. 830 (1963).

16. This may also be one of the reasons for a union's decision to whipsaw since a marketwide strike would incite greater public opposition. Newborn, *The Validity of the Selective Strike Under the Railway Labor Act*, 60 Geo. L.J. 583 (1972).

17. McPherson, *Cooperation Among Auto Managements in Collective Bargaining*, 11 Lab. L.J. 607, 613 (1960).

18. *NLRB v. Great Atl. & Pac. Tea Co.*, 340 F.2d 690, 692-93 (2d Cir. 1965). But cf. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), discussed at notes 214-15 *infra* and accompanying text.

19. Among the industries having such agreements are newspaper publishing, rubber, air and rail transportation, and segments of agriculture in California and Hawaii. Similar agreements are suspected in the automobile, steel and trucking industries. Hirsch, *supra* note 14, at 399; Foster, *Employers Strike Insurance*, 12 Lab. Hist. 483 (1971).

20. In a recent strike, even though United Airlines received support payments from its competitors, the International Association of Machinists (IAM) still achieved a twenty-eight percent wage increase over a three year term. By 1978 mechanics will be earning \$10 an hour with a reduced retirement age and improved pension benefits. *Wall St. J.*, Dec. 22, 1975, at 6, col. 3. In the rubber industry, however, a similar pact appears to be more effective. *Id.*, Jan. 26, 1976, at 4, col. 4; see notes 243-45 *infra* and accompanying text.

21. "[I]t is logical that respondents should have been concerned that one or more of their number might bolt the group and come to terms with the Local, thus destroying the common front essential to multiemployer bargaining." *NLRB v. Brown*, 380 U.S. 278, 284 (1965).

business may settle and thus recreate the whipsaw situation. This tactic would be equally applicable to a unit-wide strike.

Concerted employer action is, of course, a business combination which raises questions under both the antitrust laws<sup>22</sup> and the labor laws. The application of these two bodies of law to strike insurance and related employer activity is the subject of this Comment.

## II. APPLICABILITY OF THE ANTITRUST LAWS TO THE LABOR MARKET

The Sherman Act<sup>23</sup> was designed to prevent "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 . . . ."<sup>24</sup> When courts applied it to combinations of employees who sought to eliminate competition in the labor market,<sup>25</sup> the Act threatened the continued existence of many unions.<sup>26</sup> There was no serious danger that a union in itself would be declared unlawful,<sup>27</sup> but the effects of organizing activity on commercial competition between employers were used as grounds for successful antitrust suits.<sup>28</sup> In most cases the union had engaged in secondary activity such as boycotts, and the decisions

22. After *Buffalo Linen*, the legality of the multiemployer bargaining unit is beyond dispute. An earlier commentator had questioned whether the very existence of a multiemployer group might be an antitrust violation. Note, *The NLRB and Multi-Employer Units in a Competitive Economy*, 43 Ill. L. Rev. 877, 881-82 (1949).

23. 15 U.S.C. §§ 1-7 (1970).

24. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940).

25. Unions seek to eliminate labor market competition both between employees and between employers. Moreover, they have every incentive to restrain product market competition since this would create more spoils to divide and less need for employers to resist labor cost increases. Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L.J. 14, 18-19 (1963) [hereinafter cited as Winter].

26. *Loewe v. Lawlor*, 208 U.S. 274, 301 (1908) (*Danbury Hatters*) (broad language of the Sherman Act to be literally construed in light of failure of congressional attempts to exempt unions). *Loewe* was preceded by similar lower court rulings. The first was *United States v. Workingmen's Amal. Council*, 54 F. 994 (E.D. La.), *aff'd*, 57 F. 85 (5th Cir. 1893), involving one of the few general strikes in American history. Only one lower court held the Act inapplicable to labor organizations. *United States v. Patterson*, 55 F. 605, 641 (D. Mass. 1893).

27. Carr, Section 6 of the Clayton Act: A Review, 26 Lab. L.J. 624, 635 (1975). In congressional testimony, Samuel Gompers "stated his fear that while he did not believe that courts would declare the existence of labor unions per se to be violations of the Sherman Act, he believed that [union agreements with multiemployer groups] would be held unlawful . . ." *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 701-02 n.3 (1965) (Goldberg, J., concurring) (italics omitted). But see *Hitchman Coal & Coke Co. v. Mitchell*, 202 F. 512, 556 (N.D.W. Va. 1912), *rev'd*, 214 F. 685 (4th Cir. 1914), *rev'd*, 245 U.S. 229 (1917) (district court held union was a common law conspiracy which violated the Sherman Act). One commentator asserts that *Loewe v. Lawlor*, 208 U.S. 274 (1908), "gave no assurances that unions might not be illegal organizations under the Act." Winter, *supra* note 25, at 32.

28. E.g., *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927) (refusal to work on non-union products); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (same, plus secondary boycott); *Loewe v. Lawlor*, 208 U.S. 274 (1908) (nationwide secondary consumer boycott).

could be described as judicial legislation prohibiting labor union tactics which were unacceptable to conservative courts.<sup>29</sup> However, even if the union had conducted only a primary strike, antitrust liability could still arise if the requisite intent to reduce product market competition were present. Thus, in the two *Coronado* cases,<sup>30</sup> the Supreme Court first held that a United Mine Workers (UMW) organizing strike, which clearly reduced the supply of coal in interstate commerce, was nevertheless a "local" matter concerning conditions of employment which did not come within the Sherman Act.<sup>31</sup> Yet, when a second trial produced sufficient evidence to show that the union's primary purpose was the elimination of competition from non-union coal, the Court held that the exact same conduct could be a violation of the Act.<sup>32</sup> The disastrous implications for the future of unions were obvious since the elimination of commercial competition from less expensive non-union products is always a major aim of organizing activity.<sup>33</sup>

The subsequent declaration of an antitrust exemption for organized labor will be discussed below.<sup>34</sup> The important point here is that the applicability of the antitrust laws, the Sherman Act and its later appendages,<sup>35</sup> is limited to commercial or product markets.<sup>36</sup> They do not apply to conduct which restrains competition only in the labor market. As observed in *Apex Hosiery*

29. Judges and commentators alike have doubted the capacity of the courts to make such broad policy determinations. *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 697 (1965) (Goldberg, J., concurring); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 485 (1921) (Brandeis, J., dissenting); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 283 (1955) [hereinafter cited as Cox]; Sovern, *Some Ruminations on Labor, the Antitrust Laws and Allen Bradley*, 13 Lab. L.J. 957, 963 (1962); Winter, *supra* note 25, at 16-17.

30. *Coronado Coal Co. v. UMW*, 268 U.S. 295 (1925); *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922); see Winter, *supra* note 25, at 36-38.

31. 259 U.S. at 412-13. See also *Industrial Ass'n v. United States*, 268 U.S. 64, 77 (1925) (similar holding in regard to employers' concerted anti-union activity).

32. 268 U.S. at 310. "The doctrine of the *Coronado* Case is that it is the intent to stop production for the purpose of controlling interstate commerce and not the methods used which makes the act unlawful." *Alco-Zander Co. v. Amalgamated Clothing Workers*, 35 F.2d 203, 203 (E.D. Pa. 1929). This may have been a distinction without a difference. One commentator describes the *Coronado* standard as an "accordion-like instrument with which to include or exclude labor union activities from antitrust's strictures, dependent upon the philosophic outlook of the individual judge." Handler, *Labor and Antitrust: A Bit of History*, 40 *Antitrust L.J.* 233, 235 (1971).

33. Only in oligopolies, where employers have already reduced commercial competition, would organizing be done primarily for the benefit of non-unionized workers. If product competition were not reduced unionized employers would either fail or pressure their employees to relinquish whatever gains the union may have achieved. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 448 (1921).

34. See text accompanying note 88 *infra*.

35. 15 U.S.C. §§ 1-77 (1970).

36. "No one seriously suggests that antitrust policy should be concerned with the labor market *per se*." Cox, *supra* note 29, at 254. Nevertheless, the suggestion has been made that under modern industrial conditions labor markets should be included within the antitrust laws. Siegel, Connolly & Walker, *The Antitrust Exemption for Labor—Magna Carta or Carte Blanche?*, 13 *Duquesne L. Rev.* 411, 472 (1975) [hereinafter cited as Siegel].

*Co. v. Leader*,<sup>37</sup> the "Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services . . . ."<sup>38</sup>

However, some courts ignore this fundamental limitation when they encounter concerted employer activity in the labor market. For example, in *Cordova v. Bache & Co.*,<sup>39</sup> brokerage houses had allegedly conspired to fix a uniform maximum share of commissions for the securities dealers they employed. Plaintiffs asserted "that the effect of the conspiracy has been to reduce competition in the hiring of representatives and in the compensation paid to them . . . ."<sup>40</sup> Although section 6 of the Clayton Act expressly declares that human labor is "not a commodity or article of commerce"<sup>41</sup> as those words are used in the antitrust laws, it did not follow, in the district court's view, that the compensation paid for human labor was also beyond the scope of those statutes.<sup>42</sup> The court held that in the absence of collective bargaining the alleged conspiracy stated a claim under the Sherman Act.<sup>43</sup>

Other than a comparison of the wage-fixing scheme with a price-fixing agreement, there was no discussion of any restraint on commercial competi-

37. 310 U.S. 469 (1940).

38. *Id.* at 495. Apex was the first case to recognize a potentially extensive antitrust exemption for labor in section 6 of the Clayton Act, which left unions subject to the Sherman Act "to some extent not defined." *Id.* at 488. Moreover, in dictum which, without bothering to mention it, overruled the second Coronado case, the Court found a major exemption in the nature of the Sherman Act itself: "[A]n elimination of price competition based on differences in labor standards [is not] considered to be the kind of curtailment of price competition prohibited by the Sherman Act." *Id.* at 503-04. Compare *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 622 (1975), which described a nonstatutory antitrust exemption for union-employer agreements as a "tolerance for the lessening of business competition based on differences in wages and working conditions." These exemptions, however, did not apply to the facts of Apex. The sitdown strikers involved escaped treble damage antitrust liability only because their employer's output was too insignificant or the strike too brief to affect the market price of hosiery. 310 U.S. at 500-01. The case lost some significance when the Court declared an even stronger exemption for unions in the very next term. *United States v. Hutcheson*, 312 U.S. 219, 232-34 (1941). In addition, "[c]ommentators have questioned Stone's [the author of the Apex opinion] scholarship, his logic, and his synthesis of the applicable precedents." Handler, *Labor and Antitrust: A Bit of History*, 40 *Antitrust L.J.* 233, 235 (1971). Nonetheless, the holding in Apex, applicable to any defendant and still good law, was that restraints on interstate commerce are within the Sherman Act's prohibitions only if "they are intended to have, or in fact have, the effects on the [product] market . . . ." 310 U.S. at 512; see Cox, *supra* note 29, at 262-64; Winter, *supra* note 25, at 39-44.

39. 321 F. Supp. 600 (S.D.N.Y. 1970).

40. *Id.* at 603.

41. 15 U.S.C. § 17 (1970).

42. 321 F. Supp. at 606. The court noted that Samuel Gompers "would probably turn in his grave if he were credited with urging an exemption that would permit employers jointly and unilaterally to reduce wages of their employees." *Id.*

43. *Id.* at 608. Lest it be misunderstood, the court distinguished the collusion alleged in *Cordova* from the "going rate" paid to law school graduates hired by large law firms which "result[s] from competition between employers." *Id.* at 606 n.2 (italics omitted).

tion. In most industries this omission would not, in itself, lead to the wrong result because labor market restraints will often lessen product market competition.<sup>44</sup> More specifically, an agreement among employers to fix wages not only eliminates wage competition but, if the employers compete in the same product market, also reduces price competition to the extent that prices are dependent on labor costs. In *Cordova*, however, the court admitted that commissions charged to customers—*i.e.*, product market prices—were uniformly fixed by the defendant New York Stock Exchange under the regulation of the Securities Exchange Commission (SEC).<sup>45</sup> A wage-fixing conspiracy cannot reduce price competition where no price competition exists.<sup>46</sup> Thus, taking everything alleged as true, it is submitted that there was no claim stated under the Sherman Act.<sup>47</sup>

*Cordova* is an exceptional case, but it shows the danger of a mechanical application of the antitrust laws to every combination of employers. The Seventh Circuit more rigorously analyzed a similar problem in *Nichols v. Spencer International Press, Inc.*<sup>48</sup> Competing encyclopedia firms entered a "no-switch" agreement whereby competitors would refuse to hire sales per-

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44. See notes 48-51 *infra* and accompanying text.

45. 321 F. Supp. at 605 n.1. This price-fixing was impliedly exempt from antitrust challenge under the then prevailing case law, *Silver v. New York Stock Exch.*, 373 U.S. 341, 357-61 (1963), because such a suit would interfere with SEC regulation and subject defendants to the possibility of divergent views on the legality of their price setting practices. The Court recently held to this effect in *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659 (1975). The opinion outlines the history of stock exchange price fixing and increasingly strict SEC regulation, culminating in 1975 with the elimination of price fixing. *Id.* at 668-82; see Note, SEC Regulation As a Pervasive Regulatory Scheme—Implied Repeal of the Antitrust Laws with Respect to National Security Exchanges and the NASD, 44 *Fordham L. Rev.* 355 (1975).

46. Nor would the conspiracy hinder entry into the industry as would a restraint upon the mobility of workers. See notes 48-51 *infra* and accompanying text. Nevertheless, in a later decision in the same case, *Jacobi v. Bache & Co.*, 377 F. Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 784 (1976), both courts failed to make any distinction between the product and labor markets. A price increase, needed to keep some members of the New York Stock Exchange solvent, was approved by the SEC and exempt from the antitrust laws. However, the Exchange required member firms "to exclude the service charge from the basis upon which they calculated compensation" of their employees. 377 F. Supp. at 88. Although agreeing with *Cordova* that a labor market restraint would be enough to violate the antitrust laws, both courts found that the Exchange rule did not restrain the competition among firms for securities representatives.

47. The employers' collusive restriction of workers' income may have been distasteful and, unlike the early labor antitrust cases, the defendant businessmen were precisely the type of persons at whom the antitrust laws were aimed. *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 700-01 (Goldberg, J., concurring); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 801-02 & n.3 (1945); R. Berman, *Labor and the Sherman Act* (1930); F. Frankfurter & N. Greene, *The Labor Injunction* 139 n.17 (1930). Yet, the applicability of a statute should not be expanded merely because of the identity of the defendant, nor should the antitrust laws be used to implement a court's preferences in labor-management relations. The employees' remedies were organization, collective bargaining and, if necessary, a strike.

48. 371 F.2d 332 (7th Cir. 1967).



sonnel formerly employed by a party to the agreement for a six-month period after termination of such employment. Plaintiffs claimed the resulting reduction in labor market competition violated the Sherman Act. The court explained that "the antitrust laws were not enacted for the purpose of preserving freedom in the labor market . . ." <sup>49</sup> However, defendants were not entitled to summary judgment because their conduct "may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public." <sup>50</sup> Experienced salesmen might avoid joining a risky new firm since, if their new employer were to fail, they would suffer a substantial period of enforced unemployment. The "no-switch" agreement, therefore, could impair entry into the industry and whether it did operate to exclude potential competitors presented a question of fact for the jury. <sup>51</sup>

When viewed properly, as in *Nichols*, antitrust suits brought by employees, including the recent series of professional sports cases, <sup>52</sup> are grounded in a public harm caused by employers' anti-competitive behavior in the marketing of goods and services. The basic issues are usually whether the commercial restraints are reasonable and whether the employees have standing to sue. <sup>53</sup>

Given that the applicability of the antitrust laws is limited to commercial markets, it appears that employers' strike insurance, used to aid the whipsaw victim or support the marginal firm during a market-wide strike, is not subject to antitrust challenge. Mutual aid in these two situations is an example of

49. *Id.* at 335.

50. *Id.* at 336; accord, *Anderson v. Shipowners Ass'n*, 272 U.S. 359, 363 (1926) (agreement to hire only those seamen who were registered with an employers' association); *Union Circulation Co. v. FTC*, 241 F.2d 652, 658 (2d Cir. 1957) ("no-switch" agreement); *Taterka v. Wisconsin Tel. Co.*, 394 F. Supp. 862, 865 (E.D. Wis. 1975) (same).

51. 371 F.2d at 337.

52. *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975) (settled, *N.Y. Times*, Feb. 4, 1976, at 27, col. 2); *Boston Prof. Hockey Ass'n v. Cheevers*, 348 F. Supp. 261 (D. Mass.), remanded, 472 F.2d 127 (1st Cir. 1972); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971); cf. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972). Courts are especially prone to disregard the labor-product market distinction in professional sports cases. See, e.g., 389 F. Supp. at 892; 325 F. Supp. at 1066. Perhaps judges have difficulty viewing these high salaried plaintiffs as part of labor. Certainly, in the past, courts did not consider professional sports to be a business and, even today, baseball is still treated as a game. *Flood v. Kuhn*, *supra*; *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club v. National League*, 259 U.S. 200 (1922). Of course, the failure to make the labor-product market distinction in these cases is harmless since the commercial purpose and effect of the labor market restraints are particularly obvious. A separate problem raised by these suits is the unknown effect upon collective bargaining of permitting antitrust actions by players who are represented by a union. *Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 *Yale L.J.* 1, 7 (1971).

53. E.g., *Radovich v. NFL*, 352 U.S. 445, 453-54 (1957); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 730 (10th Cir.), cert. denied, 411 U.S. 938 (1973); *Freeman v. Eastman-Whipstock, Inc.*, 390 F. Supp. 685, 689 (S.D. Tex. 1975); *Mans v. Sunray Dx Oil Co.*, 352 F. Supp. 1095, 1098 (N.D. Okla. 1971).

concerted employer activity which has neither the purpose nor the effect of reducing commercial competition. The purpose in both instances is to obtain a settlement with the union which reflects the real economic balance in the industry, rather than to accept a distorted agreement resulting from intensified pressure on the isolated struck employer or the weak business. In these circumstances where the union has struck the first blow, there is no immediate commercial market effect. The strikers have already reduced product competition or eliminated it entirely. In the long run, presumably by keeping labor costs at a lower level than they would have been absent mutual aid, commercial competition will be maintained or enhanced. Marginal firms will have a better chance of survival and, where feasible, outsiders may be attracted to enter the industry.

Of course, a mutual aid pact could include an illegal anti-competitive clause. For example, the original agreement in the airline industry required the beneficiary of aid to channel stranded passengers to alternate flights only on those carriers which were contributing to the support fund.<sup>54</sup> While upholding the agreement as a whole, the Civil Aeronautics Board (CAB) deleted this section as an unjustified restraint upon commercial competition.<sup>55</sup> In addition, it has been suggested that strike insurance could create a claim under the Sherman Act for any competitor who was not a party to the agreement.<sup>56</sup> Those employers who benefited from the plan would presumably obtain a more favorable union contract and use their lower labor costs, gained only through their concerted action, to establish a competitive advantage in the product market. However, the very purpose of these support agreements is to spread losses and, in practice, employers have tried to include as many risk bearers as possible.<sup>57</sup> If participating employers were nevertheless to refuse admission to a competitor, it would appear to be a group boycott and a possible Sherman Act violation.<sup>58</sup>

The only case directly on point, *Kennedy v. Long Island R.R.*,<sup>59</sup> supports this analysis. Members of a union which had whipsawed the defendant attacked the strike insurance plan of the Association of American Railroads. The plan had provided \$1,300,000 to the L.I.R.R. during a twenty-six day

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54. Six-Carrier Mut. Aid Pact, 29 C.A.B. 168, 174-75 & n.31 (1959).

55. *Id.*

56. Note, Strike Insurance: An Analysis of the Legality of Interemployer Economic Aid Under the Present Federal Legislation, 38 N.Y.U.L. Rev. 126, 134 n.53 (1963) [hereinafter cited as Strike Insurance Note].

57. *Air Line Pilots Ass'n Int'l v. CAB*, 502 F.2d 453, 460 (D.C. Cir. 1974), cert. denied, 420 U.S. 972 (1975); Strike Insurance Note, *supra* note 56, at 130 & n.21.

58. Comment, Six Carrier Mutual Aid Pact: A New Concept of Management Strike Strategy in the Airline Industry, 60 Colum. L. Rev. 205, 225-26 (1960). Even in this situation the participating employers might be able to justify their action if, for example, the excluded employer had a history of poor labor relations with a consequent increase in strikes. See Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 Rutgers L. Rev. 773, 774-75 (1974). The possibility of an employer's exemption from the antitrust laws for the use of mutual aid and related activities is discussed at notes 137-92 *infra* and accompanying text.

59. 319 F.2d 366 (2d Cir.), cert. denied, 375 U.S. 830 (1963).

strike.<sup>60</sup> Plaintiffs alleged that the payment of money to aid one's competitor was a per se violation of the Sherman Act. The Second Circuit flatly rejected the claim "for the fundamental reason that the [antitrust laws] were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor-management relations."<sup>61</sup>

### III. AN EMPLOYERS' ANTITRUST EXEMPTION

Certain other types of concerted employer action, such as a lockout and mutual aid in support of a lockout, have a clear and drastic impact upon commercial markets. But for the employers' share of labor's antitrust exemption described below, the antitrust laws would apply.

The Danbury Hatters case, *Loewe v. Lawlor*,<sup>62</sup> which held that unions were subject to the Sherman Act, accelerated labor's drive to gain an exemption from that statute.<sup>63</sup> In 1914, Samuel Gompers believed that the "industrial Magna Charta"<sup>64</sup> had arrived in the form of sections 6 and 20 of the Clayton Act.<sup>65</sup> Section 6 declared that "[t]he labor of a human being is not a commodity or article of commerce." Moreover, the antitrust laws were not to "be construed to forbid the existence and operation of labor . . . organizations . . ."<sup>66</sup> The first paragraph of section 20 merely codified the traditional rules of equity and applied them to any case "between employers and employees" arising from a "dispute concerning terms or conditions of employment."<sup>67</sup> The crucial second paragraph stated that the federal courts could not grant an injunction to prohibit the performance of certain specified activities<sup>68</sup> by any party to a labor dispute even if the petitioner would suffer irreparable harm and had no adequate legal remedy. Most importantly, all the activities enumerated in the second paragraph of section 20 were not to be held violations "of any law of the United States."<sup>69</sup>

The exemption was first interpreted by the Supreme Court seven years later in *Duplex Printing Press Co. v. Deering*.<sup>70</sup> Plaintiff, the only non-unionized

60. *Id.* at 370. Union members received over a million dollars in strike benefits during the same period, most of which was paid by the railroads as required by statute. *Id.*

61. *Id.* at 372-73; accord, *Six-Carrier Mut. Aid Pact*, 29 C.A.B. 168, 174-75 (1959).

62. 208 U.S. 274 (1908).

63. "In all, there appear to have been twelve bills introduced in Congress prior to the passage of the Clayton Act which would have exempted labor, to one degree or another, from application of the Sherman Act." Siegel, *supra* note 36, at 420 n.36 (listing the various bills).

64. "Those words, 'the labor of a human being is not a commodity or article of commerce,' are sledge-hammer blows to the wrongs and injustices so long inflicted upon the workers. This declaration is the industrial Magna Charta upon which the working people will rear their construction of industrial freedom." 21 *Am. Federationist* 971 (1914).

65. 15 U.S.C. §§ 12-27, 44 (1970) and 29 U.S.C. §§ 52, 53 (1970).

66. 15 U.S.C. § 17 (1970).

67. 29 U.S.C. § 52 (1970).

68. See text accompanying note 177 *infra*.

69. 29 U.S.C. § 52 (1970).

70. 254 U.S. 443 (1921).

manufacturer of printing presses in the country, was able to charge lower prices than its competitors because of its correspondingly lower labor costs. As a result, the unionized manufacturers indicated that they would have to terminate their collective bargaining agreements unless Duplex were forced to sign a similar agreement.<sup>71</sup> The union, having been unsuccessful in organizing Duplex, instituted a secondary boycott against both Duplex customers and those who shipped or installed Duplex products.<sup>72</sup> Relying on the second paragraph of section 20, the lower courts denied an injunction against the union members who were carrying on the boycott, but the Supreme Court reversed, holding that the exemption applied only to the parties immediately involved in a labor dispute.<sup>73</sup> The facts would appear to indicate that every union member had a personal economic stake in the outcome of the struggle with Duplex.<sup>74</sup> The Court, however, imported the phrase "between employers and employees" from the first paragraph of section 20 into the second paragraph and used it as the definition of a labor dispute. Justice Pitney, writing for the Court, reasoned that the statute, as a limitation upon the powers of equity, should be strictly construed. Therefore, the exemption it provided extended only to those union members who were also "past, present, or prospective" employees of Duplex.<sup>75</sup> The Justice may have expressed some underlying fears when he concluded that "Congress had in mind particular industrial controversies, not a general class war."<sup>76</sup>

A decade later Congress responded to *Duplex* with the Norris-LaGuardia Act.<sup>77</sup> The new statute reiterated much of section 20<sup>78</sup> and expanded the definition of labor dispute to include any economic or organizational controversy "regardless of whether or not the disputants stand in the proximate relation of employer and employee."<sup>79</sup>

In *United States v. Hutcheson*,<sup>80</sup> the Court read the Norris-LaGuardia Act as a reaffirmation and expansion of the Clayton Act, creating a broad antitrust immunity for both primary and secondary union activity.<sup>81</sup> Undoubtedly, Congress intended this Act to prohibit the use of an injunction against secondary activity. The legislative history of the statute, however, fails to disclose any larger purpose.<sup>82</sup> Moreover, there is no language in the

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71. *Id.* at 480 (Brandeis, J., dissenting).

72. *Id.* at 463-64.

73. 247 F. 192 (S.D.N.Y. 1917), *aff'd*, 252 F. 722 (2d Cir. 1918), *rev'd*, 254 U.S. 443, 470-71 (1921).

74. 254 U.S. at 480-81 (Brandeis, J., dissenting).

75. *Id.* at 472.

76. *Id.*

77. 29 U.S.C. §§ 101-15 (1970).

78. *Id.* § 104.

79. *Id.* § 113(c).

80. 312 U.S. 219 (1941).

81. See text accompanying note 88 *infra*.

82. H.R. Rep. No. 669, 72d Cong., 1st Sess. (1932); S. Rep. No. 163, 72d Cong., 1st Sess. (1932). Senator Norris stated that "[t]he bill does not protect anyone . . . from punishment for the commission of any unlawful act . . ." 75 Cong. Rec. 4507 (1932). And, in the House,

statute comparable to the closing provision of section 20 which expressly rendered all the activities enumerated therein legitimate under federal law.<sup>83</sup> In view of that omission and the legislative history of this "anti-injunction" Act,<sup>84</sup> the logic of the opinion is questionable. Justice Frankfurter may have transformed a mere prohibition of equitable remedies into a decriminalization and a bar to actions for damages.<sup>85</sup>

Nonetheless, *Hutcheson* remains the starting point for any discussion of labor's antitrust exemption.<sup>86</sup> Unions appeared to gain a well-nigh absolute immunity<sup>87</sup> from the Court's holding.

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding . . . the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.<sup>88</sup>

The self-interest requirement has been easy to satisfy.<sup>89</sup> The second proviso concerning combinations with "non-labor groups" has proven to be far more troublesome. In the early case of *Allen Bradley Co. v. Local 3, IBEW*,<sup>90</sup> a powerful union, through the legitimate economic pressure of strikes and boycotts, had imposed collective bargaining agreements upon balkanized employers within its jurisdiction, New York City. Both building contractors and manufacturers of electrical equipment agreed to confine their purchases and sales to firms which operated under a Local 3 closed shop. The union, clearly in pursuit of its own best interests, utilized its legal weapons to prevent non-union operations within the city. "The result was higher wages and

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Congressman Celler remarked: "All we do by passage of this bill is to follow the English practice and relegate the disputants to the criminal side of the law and to actions for damages." *Id.* at 5490.

83. Compare 29 U.S.C. § 52 (1970), with *id.* § 104.

84. H.R. Rep. No. 669, 72d Cong., 1st Sess. (1932). In an influential book, which aided in the passage of the Norris-LaGuardia Act, the proposed exemption was described as "circumscribed: it is not immunity from legal as distinguished from equitable remedies,—hitherto unlawful conduct remains unlawful . . ." F. Frankfurter & N. Greene, *The Labor Injunction* 215 (1930) [hereinafter cited as Frankfurter & Greene]. Obviously, Justice Frankfurter, who wrote the *Hutcheson* opinion eleven years later, did not find Professor Frankfurter's viewpoint very convincing.

85. 312 U.S. at 245 (Roberts, J., dissenting); Siegel, *supra* note 36, at 442-43.

86. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 621-22 (1975); *Bodine Produce, Inc. v. UFW*, 494 F.2d 541, 554 (9th Cir. 1974).

87. "In short, union activity in pursuit of economic self-interest is exempt from the antitrust laws." Winter, *supra* note 25, at 44.

88. 312 U.S. at 232 (footnote omitted).

89. Anything that will improve wages, working conditions, job security or organizational strength is in a union's self-interest. E.g., *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 809 (1945) (product market monopoly would be in union's self-interest and lawful so long as there were no combination with a business group); *Hunt v. Crumboch*, 325 U.S. 821, 824-25 (1945) (personal antagonism against a particular employer enough to satisfy the self-interest requirement).

90. 325 U.S. 797 (1945).

shorter hours for Local 3's members, greater profits for the manufacturers and contractors, exclusion for outsiders and monopolistic prices for the public."<sup>91</sup>

The district court avoided the labor exemption problem by finding that the case did not arise from a labor dispute.<sup>92</sup> This was rejected by the Supreme Court because the union's actions had always been motivated by a desire for better wages and working conditions.<sup>93</sup> Although the out-of-town manufacturers who brought the suit apparently did not consider the employers significant enough to name as defendants,<sup>94</sup> the Court found a "business monopoly" in violation of sections 1 and 2 of the Sherman Act which could not be redeemed by union participation.<sup>95</sup> Justice Black explained that the "holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."<sup>96</sup> In itself the product market monopoly was permissible; only the way in which it was achieved was unlawful.<sup>97</sup>

The point at which Local 3 had ceased to act alone was not identified.<sup>98</sup> The Court stated that the collective bargaining agreements which created the monopoly were presumably legal. They were, however, "but one element in a far larger program."<sup>99</sup> The "larger program" was the enforcement of the collective bargaining agreements. It is submitted that there could be no effective agreements and, ultimately, no union, unless such a "combination" had been created. If the Court's decision were to be taken literally it would conflict with section 6 of the Clayton Act<sup>100</sup> which shielded both the "existence and operation" of labor unions from the antitrust laws.

An alternative to the Court's explanation of the case is that the product market monopoly which the union sought and achieved through economic pressure and collective bargaining was not a goal unions could legitimately attain.<sup>101</sup> Yet, the broad language of *Hutcheson*, quoted above,<sup>102</sup> had purportedly taken the judiciary out of the labor policy arena. Confronted with an outrageous situation, the Court was willing to use any means still available

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91. Winter, *supra* note 25, at 45.

92. 51 F. Supp. 36, 37-39 (S.D.N.Y. 1943).

93. 325 U.S. at 807 n.12.

94. Winter, *supra* note 25, at 49 & n.175.

95. 325 U.S. at 811.

96. *Id.* at 810.

97. *Id.* at 809.

98. See St. Antoine, *Secondary Boycott: From Antitrust to Labor Relations*, 40 *Antitrust L.J.* 242, 255-56 (1971).

99. 325 U.S. at 809.

100. 15 U.S.C. § 17 (1970); see text accompanying note 66 *supra*.

101. The Court appeared to be on the verge of admitting this when it dismissed section 6 of the Clayton Act because "the purpose of mutual help' can hardly be thought to cover activities for the purpose of 'employer-help' in controlling markets and prices." 325 U.S. at 808. But then it immediately withdrew from the discussion of union purposes to rely on the "business combination." *Id.* at 809.

102. See text accompanying note 88 *supra*.

to remedy it and chose the combination proviso. The Court had reluctantly resumed making labor policy decisions, albeit far narrower in scope than in earlier cases.<sup>103</sup> Nevertheless, it had limited the use of "hot cargo" clauses fourteen years before Congress outlawed them in the Landrum-Griffin Act.<sup>104</sup> Despite protestations that, so long as it acted unilaterally, the union remained free to do whatever it wished with its legitimate economic weapons, labor's exemption had been fundamentally restricted.<sup>105</sup>

If there were any doubts, *UMW v. Pennington*<sup>106</sup> expressly stated that a collective bargaining agreement could constitute a forbidden combination with business which would deprive a union of its antitrust exemption.<sup>107</sup> Moreover, the recent decision in *Connell Construction Co. v. Plumbers Local 100*<sup>108</sup> indicated that the Clayton/Norris-LaGuardia statutory exemption does not shield a collective bargaining agreement.<sup>109</sup> In *Pennington*, the Court held that a wage agreement between a union and a multiemployer group could expose both parties to treble damage liability for eliminating competition from marginal producers.<sup>110</sup> The union had allegedly promised to demand the same wages from smaller, less mechanized mines, although such employers would be unable to pay and still survive. As in *Allen Bradley*, the union could theoretically implement the same scheme if it did so unilaterally.<sup>111</sup> However, a jury may find an illegal combination with business in the ambiguous conduct of the parties, supplemented by "additional direct or indirect evidence of the conspiracy."<sup>112</sup> This threat of antitrust liability encourages strikes, or at least bellicose rhetoric, in order to prevent any inference of collusion.<sup>113</sup>

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103. See notes 25-33 *supra* and accompanying text.

104. 29 U.S.C. § 158(e) (1970), as amended, (Supp. IV, 1974). Under a "hot cargo" clause, an employer agrees not to handle products which were manufactured or shipped under non-union conditions. As the term might indicate, it was coined in the trucking industry.

105. Winter, *supra* note 25, at 55.

106. 381 U.S. 657 (1965).

107. "This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny . . . [T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." *Id.* at 664-65.

108. 421 U.S. 616 (1975), noted in 44 *Fordham L. Rev.* 191 (1975).

109. The Norris-LaGuardia and Clayton Acts "do not exempt concerted action or agreements between unions and nonlabor parties." 421 U.S. at 622.

110. 381 U.S. at 665-66. Continuing the tradition of confusion in this area of the law, Justice White stated that, even absent predatory intent, the agreement in question would still contravene antitrust policy because it would limit the freedom of action of an economic unit, the union. *Id.* at 668. It has been suggested that the Court's theory runs counter to the law of contracts since every agreement involves a limitation to some extent upon the freedom of action of the parties. Handler, *Labor and Antitrust: A Bit of History*, 40 *Antitrust L.J.* 233, 240 (1971).

111. 381 U.S. at 665 & n.2; see text accompanying notes 98-105 *supra*.

112. 381 U.S. at 665 n.2. See also *id.* at 673 (Douglas, J., concurring).

113. *Id.* at 720-21 (Goldberg, J., concurring).

Indeed, it appears that the *Duplex*<sup>114</sup> and *Coronado*<sup>115</sup> cases have been resurrected under a new rubric. The only difference is that employers must now be joined with the union as defendants. It will be recalled that in *Duplex*, for example, the employers indicated that they would withdraw from their collective bargaining agreements unless the Duplex Company was forced to pay similar wages and benefits. Such statements by employers, followed by union action against a competitor like Duplex, could constitute the indirect evidence of a conspiracy which would justify antitrust liability under *Pennington*. The significance of this should not be underestimated. Especially where a union has not yet organized the employees of all the competitors in a particular product market,<sup>116</sup> one of the primary topics in negotiations will be the probable effect of an agreement on the employer's competitive position.<sup>117</sup> The survival of both sides could hinge on the union's ability to subject other employers to comparable labor costs.<sup>118</sup> It is totally unrealistic to expect the bargaining parties to ignore these considerations and it is likely that, before a settlement is reached, there will be a tacit understanding on the union's intentions in regard to competitors.

#### A. A Derivative Exemption

A collective bargaining agreement may nevertheless enjoy a limited nonstatutory exemption if it is determined that, under the federal labor and antitrust laws, the competing national policies favoring collective bargaining and commercial competition can best be accommodated by granting such an exemption.<sup>119</sup> The leading case is *Local 189, Meat Cutters v. Jewel Tea Co.*,<sup>120</sup> where an agreement between several local unions and an employers' association included a restriction on marketing hours which deprived large self-service markets of their competitive advantage in longer, more convenient shopping periods.<sup>121</sup> Emphasizing that the union had not conspired with the small shopowners to impose the restraint for the latter's benefit,<sup>122</sup> three Justices agreed that in this instance the product market restriction was "so intimately related" to the conditions of employment that it "[fell] within the protection of the national labor policy and [was] therefore exempt from the Sherman Act."<sup>123</sup> The opinion set its own guidelines, citing the "relative

114. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); see notes 70-76 supra and accompanying text.

115. *Coronado Coal Co. v. UMW*, 268 U.S. 295 (1925); *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922); see notes 30-32 supra and accompanying text.

116. In the rubber industry negotiations this spring, for example, employers will be demanding lower wages in non-tire plants because of the competition they face in that area from "scores of nonunionized companies." *Wall St. J.*, Jan. 26, 1976, at 4, col. 4.

117. 381 U.S. at 714 (Goldberg, J., concurring).

118. See note 33 supra and accompanying text.

119. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 622 (1975).

120. 381 U.S. 676 (1965).

121. *Id.* at 682.

122. *Id.* at 688.

123. *Id.* at 689-90.



impact on the product market and the interests of union members" as the "crucial determinant."<sup>124</sup> Three other Justices dissented, arguing that the collective bargaining agreement was itself an antitrust violation which could not be distinguished from *Allen Bradley*.<sup>125</sup> Finally, the remainder of the Court threw the balance in favor of exemption,<sup>126</sup> but based its opinion on an automatic immunity for bona fide agreements concerning mandatory subjects of collective bargaining,<sup>127</sup> a theory which has never been accepted by a majority of the Court and which directly conflicts with the prevailing view that such agreements may be exempted only after labor and antitrust policies have been accommodated.<sup>128</sup>

The single majority opinion in *Connell*, using language reminiscent of *Apex*, defined this nonstatutory exemption as a "tolerance for the lessening of business competition based on differences in wages and working conditions."<sup>129</sup> On the other hand, the *Pennington* case, which involved an alleged conspiracy to remove "differences in wages," was cited with apparent approval.<sup>130</sup> Furthermore, the Court warned that substantial restraints which do not "follow naturally" from the elimination of labor market competition will be subject to the antitrust laws and their severe remedies.<sup>131</sup>

The precise boundaries of the nonstatutory exemption remain undefined,<sup>132</sup> in part because balancing tests are inherently unpredictable. Indeed, this nonstatutory exemption differs little, except in terminology, from a full scale scrutiny under the rule of reason.<sup>133</sup> Also, *Connell* involved secondary union action against a company which the union had no interest in organizing.<sup>134</sup> In a case where a collective bargaining relationship could exist, even the *Connell* Court might find a broader immunity.<sup>135</sup> Whatever exemption is allowed for collective bargaining agreements is, of course, equally applicable to both the labor and business organizations that are parties to them.<sup>136</sup> Employers, such as the retailers' association in *Jewel Tea*, will or will not be exposed to

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124. *Id.* at 690 n.5.

125. *Id.* at 735-37 (Douglas, J., dissenting).

126. *Id.* at 697, 710 (Goldberg, J., concurring).

127. These include "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1970), as amended, (Supp. IV, 1974).

128. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 622 (1975); *UMW v. Pennington*, 381 U.S. 657, 662 (1965); *Allen Bradley v. Local 3, IBEW*, 325 U.S. 797, 806 (1945).

129. 421 U.S. at 622.

130. *Id.*; see notes 106-18 *supra* and accompanying text.

131. 421 U.S. at 625.

132. *Bodine Produce, Inc. v. UFW*, 494 F.2d 541, 551 (9th Cir. 1974).

133. *Handler, Labor and Antitrust: A Bit of History*, 40 *Antitrust L.J.* 233, 239-40 (1971).

134. The union, which represented employees of subcontractors, picketed general contractors and gained an agreement that they would subcontract work to be done at the construction site only to unionized subcontractors. 421 U.S. at 618-19.

135. *Id.* at 625-26.

136. *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 729-30 (1965) (Goldberg, J., concurring); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 498-500 (E.D. Pa. 1972).

antitrust suits based on such agreements, depending entirely upon whether the unions with which they bargain are held exempt.

### B. *A Countervailing Exemption*

Unlike joint activity between labor and management such as a collective bargaining agreement, lockouts and mutual aid are strictly employer actions. They are, nevertheless, essentially elements of labor-management relations which may warrant a nonstatutory exemption similar to that granted to certain collective bargaining agreements.<sup>137</sup> Just as there is a tolerance for commercial restraints which naturally flow from the elimination of labor market competition,<sup>138</sup> so also should there be indulgence for limitations upon commercial competition arising from labor disputes.<sup>139</sup> The national labor laws represent a policy of encouraging private settlement of union-employer disagreements, as well as a policy of encouraging collective bargaining, and both policies presume the freedom of the parties to resort to self-help to the limits of their resources once impasse has been reached.<sup>140</sup>

The case law on the subject is limited because unions have enjoyed an automatic exemption for any kind of unilateral activity since the passage of the Norris-LaGuardia Act<sup>141</sup> in 1932, and the national labor law did not begin to develop generally until the passage of the Wagner Act in 1935.<sup>142</sup> In the few antitrust actions brought against employers for their unilateral activities, decisions have usually rested on grounds such as the inapplicability of the antitrust laws to the labor market<sup>143</sup> and a possible statutory exemption for employers.<sup>144</sup> Still, the courts have been impressed with the eminent good sense of utilizing the labor laws rather than the antitrust laws when dealing with activities which are an integral part of labor-management relations.<sup>145</sup> The concept has not been expressly stated but awkwardness can be sensed as the court, like a surgeon operating with a mechanic's tool kit, applies the

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137. See notes 119-36 *supra* and accompanying text.

138. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 625 (1975).

139. An employers' combination to defend against strikes is "so vitally an element in a clash between labor and management that it could only be dealt with on that basis, i.e., the controls imposed by our labor law statutes on the balances or imbalances of power allowable in a collective bargaining confrontation." Christensen, *The Abuse of Power in Labor-Management Relations*, 40 *Antitrust L.J.* 259, 264 (1971).

140. See notes 202-03 *infra* and accompanying text.

141. 29 U.S.C. §§ 101-15 (1970); *United States v. Hutcheson*, 312 U.S. 219 (1941); see notes 77-88 *supra* and accompanying text.

142. 29 U.S.C. §§ 151-70 (1970), as amended, (Supp. IV, 1974); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

143. *Kennedy v. Long Island R.R.*, 319 F.2d 366, 372-73 (2d Cir.), cert. denied, 375 U.S. 830 (1963); see notes 59-61 *supra* and accompanying text.

144. *Clune v. Publishers' Ass'n*, 214 F. Supp. 520, 528-29 (S.D.N.Y.), *aff'd mem.*, 314 F.2d 343 (2d Cir. 1963); see notes 153-92 *infra* and accompanying text.

145. Christensen, *The Abuse of Power in Labor-Management Relations*, 40 *Antitrust L.J.* 259, 264 (1971); *St. Antoine, Secondary Boycott: From Antitrust to Labor Relations*, *id.* at 242, 257; *Winter*, *supra* note 25, at 66.

sweeping prohibitions of the Sherman Act to the delicate balance of organized labor and capital.

An illustrative case is *Clune v. Publishers' Association*,<sup>146</sup> where a craft union whipsawed several newspapers.<sup>147</sup> Pursuant to an agreement, the non-struck papers locked out members of the striking union and laid off the rest of their employees. Members of a non-striking union claimed this concerted action was in violation of the Sherman Act.<sup>148</sup> Intuitively rejecting the application of the antitrust laws to a labor dispute, the court suggested that there was no commercial restraint.<sup>149</sup> Then, quite accurately, it described the employers' actions as basically an "attempt to maintain a bargaining position with the union . . . to counter a 'whipsaw' strike."<sup>150</sup> Although it placed a heavy burden on the public by terminating all newspaper service, the lockout could be justified because it was in furtherance of this legitimate labor market purpose.

The primary advantage of such a nonstatutory approach is flexibility. It permits the public interest to be considered as well as the interests of the parties. On the other hand, this very flexibility requires judges to make broad policy decisions, based largely upon their own attitudes and prejudices,<sup>151</sup> concerning labor-management relations. Moreover, the mere possibility of antitrust liability may preclude any effective coordinated action by employers. In those industries where a large union faces a group of small businesses the imbalance in bargaining power<sup>152</sup> might be immutable without a more reliable antitrust exemption.

### C. A Statutory Exemption

Federal courts, both before and after passage of the Clayton Act, tended to support the position of employers in industrial disputes.<sup>153</sup> They granted injunctions to enforce or to prohibit interference with "yellow dog" contracts,<sup>154</sup> which one would have thought beyond the protection of equity.<sup>155</sup>

146. 214 F. Supp. 520 (S.D.N.Y.), aff'd mem., 314 F.2d 343 (2d Cir. 1963) (per curiam).

147. The International Typographical Union struck four of the nine members of the association. Id. at 522.

148. Id. at 522-24.

149. Id. at 525; see Christensen, *The Abuse of Power in Labor-Management Relations*, 40 *Antitrust L.J.* 259, 264 (1971).

150. 214 F. Supp. at 524.

151. See note 29 supra.

152. See generally F. Peterson, *American Labor Unions—What They Are and How They Work* 127-39 (2d rev. ed. 1963).

153. See Frankfurter & Greene, *supra* note 84, at 32-35, 96-105.

154. See, e.g., *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 261 (1917). Senator Norris described the yellow dog contract in the Norris-LaGuardia Act debates: "It requires the employee, as a condition of obtaining employment, to agree that he will not join a union . . . ; that he recognizes the right of the employer to discharge him without notice; that he will not quit his employment without giving sufficient notice to his employer to enable him to hire some one to take his place. The employee . . . agrees in advance to accept such conditions of labor, hours of labor, and so forth, as may from time to time be decided upon by the employer." 75 Cong. Rec. 4504 (1932).

155. Although theoretically the worker was free to refuse to sign the contract, the practical

They also enjoined alleged violations of the Sherman Act, issuing decrees at once broad in scope and detailed in provisions. In *Gompers v. Bucks Stove & Range Co.*,<sup>156</sup> the union was enjoined from "interfering in any manner with . . . the complainant's . . . business."<sup>157</sup> In other cases, the courts imposed patently unconstitutional "restraints against speech,—'abusive language', 'annoying language', 'indecent language', 'bad language', 'opprobrious epithets',—and against specific words such as 'scab', 'traitor', 'unfair'.<sup>158</sup> The results were broken strikes<sup>159</sup> or, where there was sufficient worker solidarity, defiance followed by violence.<sup>160</sup> Employers as a class had not only economic but also legal superiority.<sup>161</sup> Certainly they were not in need of legislative relief.

This economic and judicial history was the impetus for enactment of the labor sections of the Clayton Act and later for the Norris-LaGuardia Act.<sup>162</sup> The descriptions of judicial absurdities and industrial imbalance in the legislative history of the statutes has led some to believe that any exemption the Acts created was for the benefit of labor organizations alone.<sup>163</sup> It is asserted that, except for the few instances when the two statutes specifically mention employers, business groups can use labor's antitrust shield only derivatively as a defense to suits based upon joint union-employer activity such as collective bargaining agreements.

It is submitted, however, that section 20 of the Clayton Act, as supplemented by the Norris-LaGuardia Act, exempts lockouts and employers' mutual aid or strike insurance plans from the antitrust laws. The rather ambiguous legislative history of the statutes<sup>164</sup> indicates an assumption of

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consequence of such a refusal would be to go without means of support, since in many industries every employer required the signing of such a contract as a condition of employment. It may also have been contrary to public policy because it prevented workers from having any say in setting the terms or conditions of their employment. 75 Cong. Rec. 4504 (1932) (Senator Norris); see Frankfurter & Greene, *supra* note 84, at 212.

156. 221 U.S. 418 (1911).

157. *Id.* at 421 n.1.

158. Frankfurter & Greene, *supra* note 84, at 98 (footnotes omitted); see *id.* at 253-74 (texts of various injunctions).

159. E.g., *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 245 (1917); see Frankfurter & Greene, *supra* note 84, at 277-78.

160. Frankfurter & Greene, *supra* note 84, at 275-76.

161. Of course, at least in theory, employers were subject to the same legal attacks as the unions. E.g., *Industrial Ass'n v. United States*, 268 U.S. 64, 77 (1925) (Coronado standard applied to employers' group but no finding of intent to restrain product market); *Cornellier v. Haverhill Shoe Mfrs.' Ass'n*, 221 Mass. 554, 560, 109 N.E. 643, 645 (1915) (blacklisting held unlawful conspiracy).

162. See *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 700-13 (1965) (Goldberg, J., concurring).

163. *Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R.*, 310 F.2d 513, 516-18 (7th Cir. 1962); *Robertson v. NBA*, 389 F. Supp. 867, 884-89 (S.D.N.Y. 1975); *Strike Insurance Note*, *supra* note 56, at 138; cf. *Allen Bradley v. Local 3, IBEW*, 325 U.S. 797, 803 (1945); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 496-500 (E.D. Pa. 1972); *Cordova v. Bache & Co.*, 321 F. Supp. 600, 605-08 (S.D.N.Y. 1970).

164. It has been suggested that finding legislative intent, particularly in the congressional history of the Clayton Act, may well be a fiction. Frankfurter & Greene, *supra* note 84, at 144-45.

equality in application, perhaps based on a fear that the Court would otherwise find the section in violation of the equal protection clause.<sup>165</sup> Whatever the reason, the House Judiciary Committee Report on the Clayton Act describes the specific conduct listed in section 20 as "within the right of parties involved on one side or the other of a trades dispute."<sup>166</sup> The Senate Judiciary Committee Report on the Norris-LaGuardia Act declares:

Moreover, it will be observed that this section [6], as do most all of the other prohibitive sections of the bill, applies both to organizations of labor and organizations of capital. The same rule throughout the bill wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees.<sup>167</sup>

The early case law and commentary on the Clayton Act tended to support applicability to both unions and management. In *Duplex*,<sup>168</sup> the first Supreme Court case interpreting the Act,<sup>169</sup> the Court divided on the issue of whether the exemption extended to persons involved in secondary disputes, but again equal application appears to have been assumed. The majority felt that Congress had confined the section to "parties standing in proximate relation to a controversy."<sup>170</sup> Justice Brandeis' dissent, which has "carried the day in the courts of history,"<sup>171</sup> stated that the statute created a "right of industrial combatants to push their struggle to the limits . . . of self-interest."<sup>172</sup> The Act was described as removing "all restrictions which now prevent the freedom of action of both parties to industrial disputes . . . thus legalizing the strike, the lockout, the boycott, the blacklist, the bringing in of strikebreakers, and peaceful picketing."<sup>173</sup> Indeed, it was frightening to one early commentator who argued that "[t]o allow labor disputes to settle themselves by protracted struggles of might smacks of the primitive administration of justice by self-help."<sup>174</sup>

The Clayton Act, and later the Norris-LaGuardia Act, demanded the withdrawal of the judiciary from industrial wars and left both parties free to engage in a limited number of specified activities without fear of incurring legal liability and without interference from equity.<sup>175</sup> A reading of the statutes also tends to support this conclusion, although it must be noted that the Clayton Act in particular is laden with ambiguities.

The second paragraph of section 20<sup>176</sup> prohibits injunctions against "any

165. See *id.* at 139 n.16.

166. H.R. Rep. No. 627, 63d Cong., 2d Sess. 30 (1914).

167. S. Rep. No. 163, 72d Cong., 1st Sess. 19 (1932).

168. 254 U.S. 443 (1921); see notes 70-76 *supra* and accompanying text.

169. The Clayton Act had been discussed in *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917), but the Court held that it had been passed too late to be applicable in that case. See *Frankfurter & Greene*, *supra* note 84, at 145, 166.

170. 254 U.S. at 470-71.

171. *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 703 (1965) (Goldberg, J., concurring).

172. 254 U.S. at 488 (Brandeis, J., dissenting).

173. *Id.* at 486-87 n.2, quoting Report of the Commission on Industrial Relations 136 (1915).

174. 30 Harv. L. Rev. 632, 637 (1917).

175. Cox, *The Role of Law in Labor Disputes*, 39 Cornell L.Q. 592, 595-96 (1954).

176. 29 U.S.C. § 52 (1970).

person or persons," while the immediately preceding paragraph distinguished between "employers and employees." It would appear that, if the paragraph and its historic exemption were to be limited to workingmen and their organizations, even minimally competent draftsmen would have used more specific language or expressly omitted employers. Moreover, the section includes a series of disjunctions which could apply to either side of a controversy:

terminating any relation of employment, or . . . ceasing to perform any work or labor . . . or . . . peacefully persuading any person to work or to abstain from working; or . . . ceasing to patronize or to employ any party to such dispute . . . or . . . giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value . . . .<sup>177</sup>

The paragraph concludes by totally exempting all the enumerated conduct from "any law of the United States."<sup>178</sup>

In the Norris-LaGuardia Act, Congress was far more specific, perhaps sensing after *Duplex*, the necessity of being explicit. The purpose clause, section 2, indicates that the motivation was again the protection of labor: "Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless . . . it is necessary that he have full freedom of association . . . and that he shall be free from the interference . . . of employers of labor . . . ." <sup>179</sup> The means to this end was again to be the removal of judges, biased or otherwise, from industrial struggles.<sup>180</sup> The definition of "a person participating or interested in a labor dispute,"<sup>181</sup> which was incorporated into section 20 by the *Hutcheson* case,<sup>182</sup> includes employers and associations of employers. The Act deprives the federal courts of jurisdiction to enjoin any such persons "(as these terms are herein defined) from doing, whether singly or in concert, any of the following acts . . . ." <sup>183</sup> There follows a list which covers essentially all the conduct specified in section 20. Impartiality reached an extreme when, in rendering "yellow dog" contracts unenforceable in federal courts, the Act included agreements which barred membership in an employers' association.<sup>184</sup>

Despite the apparently reciprocal nature of the statute, the Seventh Circuit ruled in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R.*<sup>185</sup> that Norris-LaGuardia afforded employers no protection against injunctions and, in dictum, implied that the Clayton exemption was similarly one-sided.<sup>186</sup> There is a division of authority on the issue since the *Clune*<sup>187</sup>

177. *Id.*

178. *Id.*; see text accompanying notes 68-69 *supra*.

179. 29 U.S.C. § 102 (1970).

180. Cox, *The Role of Law in Labor Disputes*, 39 *Cornell L.Q.* 592, 595-96 (1954).

181. 29 U.S.C. § 113(b) (1970).

182. 312 U.S. at 234-36.

183. 29 U.S.C. § 104 (1970).

184. *Id.* § 103.

185. 310 F.2d 513 (7th Cir. 1962).

186. *Id.* at 516-18.

187. 214 F. Supp. 520, 528 (S.D.N.Y.), *aff'd mem.*, 314 F.2d 343 (2d Cir. 1963) (*per curiam*).

opinion, which principally relied on section 20 and the Norris-LaGuardia Act to deny an injunction against a group of employers, was affirmed by the Second Circuit. It appears that the *Clune* decision is correct.

In accord with *Locomotive Engineers*, the recent decision in *Robertson v. NBA*<sup>188</sup> emphatically rejected the concept of dual applicability for the Clayton/Norris-LaGuardia exemption: "A simple and concise answer to defendants' contention is that the exemption extends only to labor or union activities, and not to the activities of employers."<sup>189</sup> The product market monopoly challenged in the case was a clear Sherman Act violation and the defendants' conduct could never come within section 20, so the court's discussion of the exemption issue did not lead to the wrong result. Nevertheless, the opinion is noteworthy for its use of a new argument against a reciprocal exemption. Citing *Allen Bradley* and the subsequent cases which have toiled mightily with the problem, the court reasoned that since labor loses its exemption when it combines with business groups, it would be strange indeed to find that business groups by themselves could enjoy an exemption based upon the same statutes.<sup>190</sup> However, the line of "combination" cases from *Allen Bradley* to *Jewel Tea*<sup>191</sup> is fundamentally inapposite to any discussion of a statutory exemption which is concerned only with certain unilateral conduct by alliances on opposing sides of industrial disputes. They should not be read to deny the protection provided by the Clayton and Norris-LaGuardia Acts for the activities of employers prior to entering a labor agreement. Of course, it must be noted that *Robertson* was written before the *Connell*<sup>192</sup> decision in which the Supreme Court clearly distinguished between the statutory and nonstatutory exemptions. The latter deals with collective bargaining agreements and other concerted action by labor and management, the former with the weapons of industrial war.

#### IV. THE LABOR LAWS

The NLRA<sup>193</sup> is a regulatory code, primarily administered by the NLRB,<sup>194</sup> which injects the government into the center of labor-management relations.<sup>195</sup> The Act protects the right of workers to organize and act collectively through a union,<sup>196</sup> imposes a duty to bargain in good faith upon both sides<sup>197</sup> and grants the Board wide authority to decide whether these

188. 389 F. Supp. 867 (S.D.N.Y. 1975).

189. *Id.* at 884-85.

190. *Id.* at 885-89.

191. See notes 90-136 *supra* and accompanying text.

192. 421 U.S. 616, 621-22 (1975).

193. 29 U.S.C. §§ 151-68 (1970), as amended, (Supp. IV, 1974).

194. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). The federal courts, nevertheless, may decide labor law questions that arise as collateral issues in antitrust cases without first seeking the Board's opinion. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 626 (1975).

195. See Cox, *The Role of Law in Labor Disputes*, 39 *Cornell L.Q.* 592, 596 (1954).

196. 29 U.S.C. § 157 (1970).

197. *Id.* §§ 158(a)(5), (b)(3), (d); Cox, *The Duty to Bargain in Good Faith*, 71 *Harv. L. Rev.* 1401 (1958).

rights and duties have been properly observed in a particular case.<sup>198</sup> The Act prohibits certain activities, such as secondary boycotts<sup>199</sup> and blacklists,<sup>200</sup> and has been interpreted to limit the purposes for which others may be used.<sup>201</sup> Congress, however, has not authorized the NLRB or anyone else to dictate the terms of a labor agreement.<sup>202</sup> It follows that any weapons, not prohibited by Congress, are generally free from government regulation under the labor laws when used for economic advantage in a dispute over terms of employment, because control of these weapons would ultimately determine the substance of a settlement.<sup>203</sup>

Thus, like the single employer,<sup>204</sup> a group of employers, including those who have locked out union members in response to a whipsaw, need not remain idle during a strike.<sup>205</sup> Where practicable, they may hire strikebreakers, at least as temporary replacements, and attempt to continue business.<sup>206</sup> Moreover, in the two suits which have challenged the use of strike insurance or mutual aid, plaintiffs have failed to establish any violation of national labor policy.<sup>207</sup> Nevertheless, in a particular case such concerted employer action could conceivably infringe upon employees' rights or violate employers' duties as established by the labor laws.<sup>208</sup>

#### A. *The Duty to Bargain Within an Appropriate Unit*

The Buffalo Linen case<sup>209</sup> determined that employers who have bargained as a unit may respond to a whipsaw strike with a multiemployer lockout. In

198. 29 U.S.C. § 160(e) (1970).

199. *Id.* § 158(b)(4).

200. *Id.* § 158(a)(3).

201. *E.g.*, NLRB v. Great Atl. & Pac. Tea Co., 340 F.2d 690, 692-93 (2d Cir. 1965) (lockout cannot be used to impose multiemployer bargaining without union consent); see notes 209-16 *infra* and accompanying text.

202. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 485-87 (1960).

203. *Id.* at 497-98; NLRB v. Brown, 380 U.S. 278, 283 (1965) (multiemployer group may use strikebreakers as temporary replacements to ensure success of their defensive lockout); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317 (1965) (offensive or bargaining lockout permissible since it has not been prohibited by Congress).

204. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938) (hiring strikebreakers not an unfair labor practice).

205. NLRB v. Brown, 380 U.S. 278 (1965).

206. *Id.* at 285.

207. Air Line Pilots Ass'n Int'l v. CAB, 502 F.2d 453 (D.C. Cir. 1974), cert. denied, 420 U.S. 972 (1975); Kennedy v. Long Island R.R., 319 F.2d 366 (2d Cir.), cert. denied, 375 U.S. 830 (1963); accord, Six-Carrier Mut. Aid Pact, 29 C.A.B. 168, 170-73 (1959). A complaint against the mutual aid pact in the rubber industry was dismissed by the Regional Director of the NLRB as insufficient "to sustain the charge that the rubber companies bargained in bad faith." Hirsch, *supra* note 14, at 403.

208. See NLRB v. Brown, 380 U.S. 278, 287 (1965) (dictum); American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965). For earlier discussions of possible labor law violations arising from the use of mutual aid see Comment, Six Carrier Mutual Aid Pact: A New Concept of Management Strike Strategy in the Airline Industry, 60 Colum. L. Rev. 205, 209-21 (1960); Strike Insurance Note, *supra* note 56, at 138-44.

209. NLRB v. Teamsters Local 449, 353 U.S. 87 (1957); see notes 11-13 *supra* and accompanying text.



the absence of an established multiemployer unit, however, the Second Circuit, in *NLRB v. Great Atlantic & Pacific Tea Co.*,<sup>210</sup> held that the same tactic was an unfair labor practice. Despite the clear threat to the non-struck employers,<sup>211</sup> the concerted action was viewed as an attempt to impose multiemployer bargaining without union consent in violation of the NLRA.<sup>212</sup> Distinguishing the defensive lockout in Buffalo Linen, the court described the employers' action as "an offensive weapon which would unfairly advantage the employers in their demands for a multi-employer unit."<sup>213</sup> The reasoning, or at least the language, of the *A & P* opinion is questionable in light of the Supreme Court's decision in *American Ship Building Co. v. NLRB*,<sup>214</sup> which upheld the use of such an "offensive" lockout by a single employer "solely as a means to bring economic pressure to bear in support of the employer's bargaining position . . ." <sup>215</sup> once negotiations had reached an impasse. However, the holding in *A & P* is still valid. Employers may not use their otherwise legitimate weapons for prohibited purposes<sup>216</sup> such as the unilateral imposition of a new bargaining structure.

Strike insurance could be used in an attempt to create multiemployer bargaining.<sup>217</sup> Certainly it may pressure a union into a change of tactics. Recently, the United Rubber Workers (URW), attributing the ineffectiveness of its 1973 whipsaw to an employers' mutual aid pact, began considering a market-wide strike rather than its traditional selective tactics.<sup>218</sup> However, a loss of tactical power does not, in itself, force a union to bargain with employers as a group.<sup>219</sup> Some additional evidence is needed to show an illegal intent on the part of the employers.<sup>220</sup> For example, if it were proven

210. 340 F.2d 690 (2d Cir. 1965).

211. See notes 3-10 supra and accompanying text.

212. 340 F.2d at 692-93; see 29 U.S.C. §§ 158(a)(5), 159(a, b) (1970).

213. 340 F.2d at 693.

214. 380 U.S. 300 (1965).

215. *Id.* at 308; see note 232 infra.

216. "It is important to note that there is here no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining." 380 U.S. at 308; cf. *Air Line Pilots Ass'n Int'l v. CAB*, 502 F.2d 453, 456 & n.12 (D.C. Cir. 1974), cert. denied, 420 U.S. 972 (1975); *NLRB v. Bagel Bakers Council*, 434 F.2d 884, 888-89 (2d Cir. 1970), cert. denied, 402 U.S. 908 (1971).

217. *Six-Carrier Mut. Aid Pact*, 29 C.A.B. 168, 181-83 (1959) (Minetti, Member, dissenting); *Strike Insurance Note*, supra note 56, at 141-44.

218. *Wall St. J.*, Jan. 26, 1976, at 4, col. 4. However, the employers' ability to stockpile in this manufacturing industry may have been more crucial than the mutual aid pact. In 1967, the companies had sufficient materials on hand to satisfy demand for several weeks during a strike. Hirsch, supra note 14, at 403.

219. One author predicted that the airlines' mutual aid pact would force the unions into multiemployer bargaining, but now nearly twenty years later they are still bargaining on a single carrier basis. Kahn, *Mutual Strike Aid in the Airlines*, 11 *Lab. L.J.* 595, 604 (1960). However, at its own request, the International Association of Machinists bargained with a multiemployer group during 1965. Hirsch, supra note 14, at 405.

220. *NLRB v. Brown*, 380 U.S. 278, 283 (1965); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308-09, 313 (1965); see *Strike Insurance Note*, supra note 56, at 142.

that the plan permitted contributors to control the terms upon which the struck employer could settle, then it would appear that the union was being required to bargain on a multiemployer basis without its consent.<sup>221</sup>

Both of the agreements which have been examined in litigation involved employers who bargained separately, but neither was found to impose multiemployer bargaining.<sup>222</sup> The airlines' mutual aid pact provides financial assistance to the struck employer "without regard to the popularity of its bargaining posture among the other parties."<sup>223</sup> In like manner, the railroad strike policy specifically stated that the insured was free to settle at any time.<sup>224</sup> The probative value of these self-proclamations of innocence<sup>225</sup> may be slight, but plaintiffs have been unable to overcome them. Most other mutual aid pacts are shrouded in secrecy—indeed, in some industries there is only speculation that they exist<sup>226</sup>—so whether they restrain the freedom of the struck employer to bargain in his individual interest is unknown. It appears, however, that the evidence problem may be insurmountable, especially since the employers are free to exchange information on labor costs and frequently indicate to one another the range within which they intend to settle.<sup>227</sup>

### B. *The Duty to Bargain in Good Faith*

In analyzing the impact of strike insurance upon collective bargaining, a wide range of factors can be considered including the circumstances in which an employer would be entitled to aid, "any history of employer animus toward the union, the extent of insurance coverage (for example, whether there is reimbursement of only fixed costs . . . or of lost profits as well) . . . and [the] extent of economic pressures exerted by the union . . ."<sup>228</sup> To determine whether an employer has bargained in good faith, however, primary attention must be given to his behavior at the bargaining table.<sup>229</sup> Although at one time

221. *Kennedy v. Long Island R.R.*, 211 F. Supp. 478, 488 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963); *Six-Carrier Mut. Aid Pact*, 29 C.A.B. 168, 172 (1959).

222. *Air Line Pilots Ass'n Int'l v. CAB*, 502 F.2d 453, 456 & n.12 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *Kennedy v. Long Island R.R.*, 211 F. Supp. 478, 488 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963). Labor relations in both the airline and railroad industries are regulated by the Railway Labor Act, 45 U.S.C. §§ 151-88 (1970), rather than the NLRA. However, an appropriate bargaining unit requirement has been found in 45 U.S.C. § 152, which states that bargaining is to be between "parties to the dispute." *Kennedy v. Long Island R.R.*, *supra* at 488.

223. *Six-Carrier Mut. Aid Pact*, 29 C.A.B. 168, 172 (1959).

224. *Kennedy v. Long Island R.R.*, 211 F. Supp. 478, 488 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963).

225. *Strike Insurance Note*, *supra* note 56, at 143.

226. *Hirsch*, *supra* note 14, at 400; *Strike Insurance Note*, *supra* note 56, at 127 n.4.

227. *McPherson, Cooperation Among Auto Managements in Collective Bargaining*, 11 *Lab. L.J.* 607 (1960); *Stieber, Company Cooperation in Collective Bargaining in the Basic Steel Industry*, 11 *Lab. L.J.* 614 (1960).

228. *Kennedy v. Long Island R.R.*, 319 F.2d 366, 371 & n.4 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963).

229. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960).

the good faith requirement had expanded to control the use of certain weapons,<sup>230</sup> it is now settled that bad faith may not be inferred from the mere exertion of economic pressure absent evidence of insincerity or hostility in bargaining.<sup>231</sup> If the procedures established by the labor laws are satisfied, use of financial aid to enhance an employer's bargaining power will not render his behavior objectionable.<sup>232</sup>

### C. *The Right to Strike*

Unlike the Railway Labor Act (RLA)<sup>233</sup> which regulates labor relations in both the railroad and airline industries, the NLRA expressly protects the right to strike.<sup>234</sup> Any attempt by employers to limit this right is an unfair labor practice.<sup>235</sup> On the other hand, "an employer may legitimately blunt the effectiveness of an anticipated strike . . . even if he thereby makes himself 'virtually strikeproof.'"<sup>236</sup> Moreover, strike insurance, unlike a bargaining lockout, operates only after employees have exercised their right to strike.<sup>237</sup> The economic pressure it brings to bear upon a union will be held lawful unless its purpose is to punish employees for using their protected weapon.<sup>238</sup> As with the appropriate bargaining unit requirement,<sup>239</sup> independent evidence is needed to show this hostile intent.<sup>240</sup>

However, even absent illegal intent, there are some broad limits on employers' weapons. If strike insurance proved to be "demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end"<sup>241</sup> it could then be in violation of the Act. Obviously, it would be difficult to meet this standard. In both the airline and railroad

230. Cox, *The Duty To Bargain In Good Faith*, 71 Harv. L. Rev. 1401, 1428-42 (1958).

231. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960); Cox, *The Duty To Bargain In Good Faith*, 71 Harv. L. Rev. 1401, 1418-28 (1958) (examples of bad faith bargaining).

232. "[O]nce these [collective bargaining] procedures are exhausted without a settlement, either side is free to resort to economic self-help in an attempt to force a settlement most favorable to it." *Air Line Pilots Ass'n Int'l v. CAB*, 502 F.2d 453, 456 (D.C. Cir. 1974), cert. denied, 420 U.S. 972 (1975); accord, *Kennedy v. Long Island R.R.*, 319 F.2d 366, 371 (2d Cir.), cert. denied, 375 U.S. 380 (1963).

233. 45 U.S.C. §§ 151-88 (1970).

234. Compare 29 U.S.C. §§ 157, 163 (1970), with 45 U.S.C. § 152 Fourth (1970).

235. 29 U.S.C. § 158(a)(1) (1970).

236. *NLRB v. Brown*, 380 U.S. 278, 283 (1965).

237. "It cannot reasonably be claimed that [a multiemployer defensive] lockout has deprived the employees of their right to strike, as they did strike, and the scope or scale of the strike was a strategic or tactical decision and not one that should alter substantive rights . . . . [T]he overriding public policy at this point would seem to favor the rapid conclusion of the labor battle by submerging the disputed matters in a collective bargaining agreement, and any limitation of otherwise legitimate economic weapons and counter-weapons constitutes a barrier to this objective." *Duvin, The Bargaining Lockout: An Impatient Warrior*, 40 *Notre Dame Law* 137, 155-56 (1965) (footnotes and emphasis omitted).

238. See *NLRB v. Brown*, 380 U.S. 278, 282 (1965).

239. See notes 209-27 *supra* and accompanying text.

240. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308-09 (1965).

241. *NLRB v. Brown*, 380 U.S. 278, 286 (1965).

industries, unions have remained strong despite strike insurance. Indeed, they have achieved such substantial victories that the effectiveness of strike insurance in these industries is clearly limited.<sup>242</sup> In the rubber industry, however, workers feel they were defeated in their last strike by an employers' mutual aid pact.<sup>243</sup> The URW is in such a weak position that skilled craftsmen are attempting separate unionization. Most importantly, in this manufacturing industry there is much less need for strike insurance since the more effective weapon of stockpiling is available.<sup>244</sup> In an apparent attempt to regain the confidence of both skilled and production workers, the URW intends to demand a fifty percent increase in compensation in its contract negotiations this spring.<sup>245</sup> The companies are unlikely to come anywhere near this level in their proposals and, with a full array of weapons, they are in a position to prevail. If the union fails to obtain even reasonable gains, a further weakening in its organization will result and, at that point, there might be enough to challenge successfully the mutual aid pact and have it eliminated from management's arsenal.

## V. CONCLUSION

Labor disputes engender hostile public opinion because they impose inconvenience and occasionally hardship upon consumers. If, as expected, there is an increase in the number and duration of such controversies during this period of recession, the resulting public opposition could bring greater governmental regulation of the economic pressures exerted by labor and management. Employers' mutual aid could become a scapegoat since, at least overtly, it is a relative newcomer to labor disputes and might be identified as the cause of their prolongation. Certainly, mutual aid enables a marginal employer or a whipsaw target to hold out for more favorable terms and, in contrast to a union strike benefit fund, it lacks the human justification of the need to sustain a striker and his family. On the other hand, where a union is aware of an employers' support plan, the chances of settlement without interruption of business may be enhanced because the decision to strike must be made with knowledge that the struggle could be longer and victory less likely. In addition, by their reflection in more stable prices, lower increases in labor costs would probably benefit consumers.<sup>246</sup>

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242. *Air Line Pilots Ass'n Int'l v. CAB*, 502 F.2d 453, 458 (D.C. Cir. 1974), cert. denied, 420 U.S. 972 (1975); *Kennedy v. Long Island R.R.*, 319 F.2d 366, 370 n.2 (2d Cir.), cert. denied, 375 U.S. 830 (1963).

243. *Wall St. J.*, Jan. 26, 1976, at 4, col. 4.

244. *Hirsch*, supra note 14, at 403.

245. *Wall St. J.*, Jan. 26, 1976, at 4, col. 4.

246. Ordinarily, this might be an overly sanguine expectation since cost savings can increase profits as well as stabilize prices. However, employer resistance to union demands, particularly organized multiemployer resistance, tends to increase as the ability to pass such costs along to the consumer decreases. Thus, the strike insurance and mutual aid agreement in the railroad and airline industries are probably related to the comparatively easy substitution of other transport services and the inability of employers to raise prices without the approval of regulatory agencies.

If Congress were nevertheless to decide that the public burdens of labor disputes had grown to intolerable proportions, it should realize that control of economic weapons is tantamount to government determination of employees' compensation. With such awareness, it is unlikely that regulation would be politically acceptable. Even assuming that legislation could be enacted, the issue would be handled more rationally by comprehensive planning, considering such factors as productivity, inflation and labor supply, rather than by indirect tinkering through regulation of the activities of the opposing parties. Unless and until Congress moves toward a more controlled economy, the ability of each side to exert pressure against the other will be an essential part of any non-governmental settlement of labor disputes. As under present federal law, once the procedural requirements of collective bargaining have been satisfied, employers as well as unions will remain free "to push their struggle to the limits of the justification of self-interest."<sup>247</sup>

*Eugene Cronin*

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The major manufacturing oligopolies may also be stiffening their bargaining position in response to the impressive market shares gained by imports and the traditional increase in the price elasticity of consumer demand during a recession. In a stronger economy, automobile purchasers, for example, would be willing to pay more for a new car, while now a significant number would keep their old model or consider purchasing a foreign car, often smaller in price as well as size.

247. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting).