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ANTI-TRUST AND ORGANIZED LABOR: LESSONS FROM THE PAST AND THOUGHTS ON THE FUTURE

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Every lengthy strike which involves large numbers of workers and creates public inconvenience brings demands for more government control of the collective bargaining process. Some groups demand compulsory arbitration while others would use the courts to curb the ability of unions to strike. Included among the proposals has been one to apply anti-trust laws to labor unions. This suggestion was the basis for the national collegiate debate in 1961. The question was not resolved by the debators and it is not likely to be resolved by this article, but a consideration of some of the experience with anti-trust laws and the objectives of applying them to organized labor may provide insights into the appropriateness of the proposed action.

To the student of labor history the question is more properly, should labor unions again be subjected to anti-trust laws? The Sherman Anti-Trust Act of 1890 was applied both directly and indirectly to organized labor until the Norris-LaGuardia Act of 1932 made it clear that this was not the intent of Congress. The Sherman Act caused Samuel Gompers and many other labor leaders to spend as much time in the courts fighting cases, and in the halls of Congress lobbying for relief from this act, as they spent organizing workers. When the Clayton Act was passed in 1914, Gompers called it labor's *Magna Carta* because he thought it had removed labor and unions from the jurisdiction of anti-trust laws. Subsequent interpretations by the courts proved him wrong, however, and only in 1932 was relief successfully granted.[1]

The indirect applications of the Sherman Act came first, in

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1. LIEBERMAN, UNIONS BEFORE THE BAR (1950).

the form of injunctions. Under the Act the Attorney General was authorized to seek an injunction in the federal courts to prevent attempts to monopolize or restrain trade. In the Pullman Strike of 1894 the courts used this, together with the union's interference with the transport of mails and with interstate commerce as the basis for an injunction.[2] Because there were so many other grounds for an injunction in that case, the use of the Sherman Act seemed unnecessary However, the criminal case against Debs broke down in the argument over conspiracy, and a remedy was sought in equity, where Debs was convicted of contempt for refusing to obey an injunction ordering him to stop the strike. The civil remedy in equity was presumably intended to avoid the jury trials in criminal cases in favor of decisions by presiding judges who were inclined to be more cooperative than jurors in opposing union growth.[3] Whatever the intent, the introduction of the Sherman Act in the Pullman Strike paved the way for its use as the basis for many subsequent injunctions.

According to the traditional view, the injunction was a device designed to prevent unrecoverable damages such as the destruction of a grove of trees while the title to the trees was in dispute. In the case of the Sherman Act, it could prevent firms from destroying competitors in an effort to corner a market. When applied to unions, however, it usually meant that the courts were treating a loss of profits during a strike as unrecoverable damages. Such a position was not only a new legal interpreatation of the concept, but was based upon highly questionable economic assumptions. While a strike, if effective, stops the operation of a plant and therefore interferes with the firm's chances of making a profit, profits are not the certain result of operating a plant. Where damage to tangible property such as buildings and machines is imminent, injunctions are in order, and in fact are still used, but profits are an intangible and unrealized form of property when a strike is initiated. The court made no distinction in this matter between firms making profits when the strike started and those losing money The broad interpretation of what constitutes irreparable damages plagued the union movement for several decades. About 2,000 injunctions were issued in labor disputes between 1880 and 1931.[4] These injunctions usually were based either on the Sherman Act or the so-called "yellow-dog" contracts. Yellow-dog contracts were agreements between employees and employers under which workers

2. *In re* Debs, 158 U.S. 564, 578, 579, 581, 582 (1895).
3. MANNING, THE CHICAGO STRIKE OF 1894, 52, 53 (1960).
4. WITTE, THE GOVERNMENT IN LABOR DISPUTES, 84 (1932).

agreed, as a condition of employment, not to join a union. Injunctions were issued against union organizers to enjoin them from inducing breach of contract. This also represented a new use of injunctions, and a new form of tort liability which the courts allowed to curb the unions.[5]

The direct application of the Sherman Act to unions was initiated in the famous *Danburry Hatters Case* of 1908.[6] The unions used a secondary boycott of Loewe's hats to effect an organization of the company's workers. The company sued for triple damages under the Sherman Act and not only won the case but the Supreme Court made individual union members liable for damages not covered by the union treasury Here again, a traditional legal concept was significantly broadened when applied to the unions. The Sherman Act makes illegal, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. "[7] Restraint of trade at common law referred to the limitation of output by a monopolist interested in raising a price to make excessive returns. Essentially, it meant a restraint of competition. As applied to the unions, however, restraint was treated as a synonym of interference. In this context, physically preventing the shipping or production of goods was treated as restraint of trade. Thus, any strike or boycott would automatically qualify as a monopolistic act whether or not it affected prices or wages.[8]

The *Danburry Hatters Case* generated enough public sympathy to cause the Democrats to make relief from anti-trust laws for unions a part of their platform in 1912. In spite of Woodrow Wilson's reluctance, Congress included provisions restricting the applicability of anti-trust laws to labor unions in the Clayton Act of 1914. This Act basically was designed to strengthen the Sherman Act as applied to business enterprise by designating certain specific practices as illegal. However, Section 6 declared, "That the labor of a human being is not a commodity or article of commerce."[9] This provision was significant because most people assumed that anti-trust laws were intended to prevent monopolizing of commerce in goods, and if labor is not a commodity, these laws would not apply to organizations dealing exclusively in labor services. In Section 20 of the Clayton Act it is stated that disputes arising out of employer-employee relationships shall not be subject to the anti-trust laws or

5. GREGORY, LABOR AND THE LAW, 93-95 (1961).
6. Loewe v. Lawlor, 208 U.S. 274 (1908).
7. JOHNSON, GOVERNMENT-BUSINESS RELATIONS, 306, 307 (1965).
8. GREGORY, *op. cit. supra* note 5, at 208.
9. MANNING, *op. cit. supra* note 3, at 56.

to injunctions based upon these laws.[10] Labor leaders were thereby convinced that they were free from the legal devices which the courts had sanctioned to restrict their growth.

The First World War forced cooperation between unions, management, and government, but when the war ended management resumed its fight to prevent, or at least limit, the organization of labor In 1921, a decision by the Supreme Court in the *Duplex case* upheld an injunction based upon the anti-trust acts and thus demonstrated that the courts would not let the Clayton Act prevent them from cooperating with management's efforts to curb union growth.[11] The Court reasoned that the Clayton Act applied only to direct employees of the firm involved in a dispute, but did not prevent enjoining union organizers or non-employee pickets. In subsequent cases, such as the *Coronado* case in 1912, and the *Bedford Cut Stone* case in 1927, the court went further, declaring that strikers themselves may be considered to have severed their direct relationship with the employer, and thus declared both direct and indirect techniques of organizing workers (*i.e.*, strikes and secondary boycotts) to be subject to the anti-trust acts.[12]

This experience caused the unions and their sympathizers to press for new legislation which would be explicit in its exemption of unions from anti-trust laws and injunctions. Prominent among those advocating such reform legislation was Felix Frankfurter, the late associate justice of the Supreme Court, who denounced the abuse of the injunction in labor disputes in his book entitled, *The Labor Injunction* (1930) Frankfurter's influence was apparent in the Norris-LaGuardia Act of 1932. Co-sponsored by Senator Norris of Nebraska and the colorful ex-mayor of New York, Fiorello LaGuardia, the bill made it very clear that Congress did not want the anti-trust laws applied to labor individually or collectively It severely restricted the use of all injunctions in labor disputes and declared yellow-dog contracts unenforceable in the courts.[13]

This Act, together with the Wagner Act of 1935, legally paved the way for a growth in union membership from about 3 million in 1933 to over 8 million by 1940 and to 14 million by 1950.[14]

Perhaps it should be noted here that labor unions remain subject to anti-trust laws if they collude with management to set prices. In the *Allen-Bradley* case, decided in 1945, an injunction against

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10. *Ibid.*
11. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).
12. Coronado Coal Co. v. United Mine Workers of America, 268 U.S. 295 (1925) Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association, 274 U.S. 37 (1927).
13. MANNING, *op. cit. supra* note 3, at 57, 58.
14. COHEN, LABOR IN THE UNITED STATES, 158 (1960).

the International Brotherhood of Electrical Workers and their various employers to prevent them from establishing a monopoly for local firms on local business in the New York area, was upheld by the Supreme Court. In this case, the union's agreement presumably directly affected the price of the product sold as well as the price of labor services.[15] This decision raises an interesting question: if a direct relationship between wages and prices is demonstrated, would unions again be subject to anti-trust laws? In the *Allen-Bradley* case, the Court implied that unions are in violation of anti-trust when their demands influence the price of the product. Many economists contend that this is always the case. The relationship between wages and prices has been analyzed in many lengthy treatises by economists, notably William G. Bowen and John M. Clark.[16] The extent of the effect of wages upon prices is not completely clear, even to economists, but there is little doubt that prices are influenced by wages. The only real argument is over the initial direction of causality; do wages determine prices to a greater degree than prices determine wages? The court did not concern itself with this aspect of the question in the *Allen Bradley* case, but was content to conclude that when collusion is present, unions are affecting prices of goods, but when there is no collusion between unions and management, unions are only influencing the price of labor services. Apparently the court is much more concerned with the means than with the ends of collective bargaining.

The *Allen Bradley* case also raises a question concerning what constitutes collusion between management and labor If the prices of the company's product become a matter for collective bargaining, would the contract which includes agreements on the price to be charged constitute collusion? In 1957 Walter Reuther made overtures to the General Motors Corporation asking that they reduce the average price of their cars in exchange for lower wage demands by the United Auto Workers. The company refused to relinquish its carefully guarded prerogative to set prices, but what if some company eventually capitulates to this demand? In the U.A.W example, the union was interested in lowering the price of the product, but there are easily as many cases in which unions might want prices raised. If prices become a part of the bargaining process, unions would clearly be influencing the prices of products as well as the price of labor services, and where industry-wide bargaining is practiced, these agreements would be closely akin to collusively determined

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15. Allen Bradley Co. v. Local Union No. 3, I.B.E.W., 325 U.S. 797 (1945).

16. BOWEN, THE WAGE-ISSUE: A THEORETICAL ANALSIS (1960), CLARK, THE WAGE PRICE PROBLEM (1960).

prices. The *Allen Bradley* decision establishes a rather clear precedent for applying anti-trust laws to the parties to such contracts.

This review of the experience of unions with the anti-trust law is intended to demonstrate that anti-trust laws were very effective in limiting the growth and effectiveness of organized labor during the early part of this century and to point out that they still apply to unions under certain circumstances. The question remains, however, would the application of anti-trust laws to unions in the present environment, even when they are not colluding with management, improve the outcome of the collective bargaining process?

Unions today are in a very different situation than they were in the early decades of this century Their main activity then was organizing the unorganized while their main activity today is bargaining new contracts for their members. Increases in union membership during the 1960's have been largely attributable to an increased labor force rather than an active organizing effort on the part of established unions. While some unions are actively organizing to retain members where automation is displacing workers, and a new militance is emerging among public employees and migrant workers, many of the well established unions are spending most of their time and money on contract negotiations, grievance settlements, and political activity Much of the organizing effort among some of the more aggressive of the large unions takes the form of raiding existing unions rather than organizing the unorganized.

The significance of this change in union activity over time is that the anti-trust laws were most effective in preventing the organizing of non-union plants, especially by curbing organizing strikes and secondary boycotts. These practices are now outlawed by the Labor-Management Relations Act of 1947 (Taft-Hartley) This Act also limits many other union practices in a much more precise manner than would the anti-trust laws. In fact, the entire body of labor legislation, which includes the Railway Labor Act of 1926 (extended to airlines in 1936), the Wagner Act of 1935, the Taft-Hartley Act of 1947, and the Landrum-Griffin Act of 1959, gives the United States one of the most complete and restrictive legal frameworks for collective bargaining of the major western industrial countries. If the anti-trust laws were added to this body of regulatory laws there would be a great deal of overlapping and duplication, as some practices (such as the secondary boycott) would clearly be in violation of both labor and anti-trust laws. Would the addition of anti-trust laws to the body of labor legislation improve the environment for collective bargaining? Would it make it possible to

break up substantial power blocs within the labor movement? One way to approach the answer to these questions is to examine the effectiveness of the anti-trust laws in accomplishing their original purpose.

There are many and various explanations for the passage of the Sherman Act. It is commonly understood that the law was a reaction to the power wielded by the industrial and financial giants of the day who came to be called the "robber barons." The wording of the law, however, does not suggest an interest in breaking up existing holdings but rather in maintaining competition. At common law, contracts which would seriously reduce competition were simply unenforceable in the courts, but the Sherman Act went a step further and made them illegal. Nevertheless, the law has seldom been used to reduce the size of any firm or to attempt to increase the number of firms in an industry The application of anti-trust laws has not only failed to reduce the size of firms, industrial concentration has increased while these laws have been in force. In 1914, 55.3 per cent of manufacturing employees were in the largest 5 per cent of manufacturing firms while the comparable figure for 1947 was 62.3 per cent. In 1909, 24.6 per cent of all industrial assets were owned by the largest 100 industrial corporations, while in 1948 the figure was 26.7 per cent. Furthermore, with very few exceptions, the list of firms included in the largest 100 has not changed in the past fifty years. Even in the case of the Standard Oil Company, one of the few to be subdivided by an anti-trust action, each of the resulting divisions remained among the largest oil companies in the country[17] The courts have assumed that the intent of the law and the best interest of the nation would be served better by attempting to preserve competitive practices among already large firms rather than by attempting to break up the giant corporations into small competitive units.

The commitment to competition in our society stems, in part, from the suggestion by Adam Smith and others that competition would regulate a market-directed economy in such a manner as to produce the best possible product for the lowest possible price. Competition, however, does not maintain itself but as Smith himself pointed out, businessmen have a strong tendency to conspire to monopolize trade.[18] While conspiracies to monopolize or restrain trade were contrary to common law, Congress and the public were not satisfied with the Court's interpretation and enforcement of the

17. EGGERS AND TUSSIG, THE COMPOSITION OF ECONOMIC ACTIVITY, 58, 59 (1965).
18. SMITH, AN INQUIRY INTO THE SOURCES AND CAUSES OF THE WEALTH OF NATIONS, 265 (1776).

common law and, therefore, it was formalized in the Sherman Act. Even as the act passed, a contradiction was apparent in the public's goals. Competition requires many firms and circumstances which permit new firms to enter a market if present firms are overcharging or using less than the best techniques. However, the best techniques, which would result in the lowest cost per unit of output, were available only to the very large firms. The public faced a dilemma: to enjoy the self-regulatory effects of competition requires a large number of firms in every industry, but with so many firms sharing the market none of them can operate on a scale large enough to permit the low-cost, capital-intensive, assembly-line techniques. To benefit from the economies of large scale production techniques, the market must be given to a small number of firms. Allowing few firms to dominate an industry invites collusion and monopolistic pricing practices.

The dilemma has been resolved, to a degree, by striving for what the noted economist John M. Clark labelled "workable competition." That is, we permit a few large firms to dominate an industry, allowing ourselves the benefits of economies of scale, and simultaneously apply anti-trust laws to prevent these firms from fully exercising their monopoly powers. Consequently, the main emphasis in anti-trust enforcement has been on business practices rather than the size of the firms. Even here the success is questionable. There is a fine line between collusive price setting, parallel action, and price leadership. The first two have been declared illegal because they involve or imply overt collusion. The latter is practiced blatantly in many of our major industries, but because it does not require an actual meeting between the parties, it remains exempt from the anti-trust laws despite the fact that it produces essentially the same result. As mentioned earlier, the courts appear to be more concerned with the means than with the ends of business practices.

The success of our anti-trust statutes is hard to assess. It is clear that large concentrations of few firms dominate most of our industries, especially in manufacturing, and that the degree of concentration is probably increasing. It is also clear that monopolisitc pricing practices are being tolerated. The best that one can honestly say is that the United States has prevented the complete cartelization of major industries, which has occured in some other industrial nations, and that the anti-trust laws have played a role in this process. The enforcement of anti-trust laws has not been consistent, often depending upon the vigor of the individual in the Justice Department charged with prosecuting under the Acts. While the court

claims consistency in the interpretation of the Acts, it is hard for a non-attorney to agree with this claim after observing the rulings. There is little reason to believe that the courts would be much clearer on what practices by unions would be in violation of the Acts than they have been in the case of business enterprise.

It is, then, difficult to anticipate which acts by unions would be declared illegal as restraints of trade with intent to monopolize. If the purpose of the anti-trust acts is to maintain competition and prevent monopolies, then it must be decided to what extent unions are monopolies. In strict economic terms, competition results in a price set by the market, and any single entity which can affect the price of the product it sells has some degree of monopoly power In this context, one might ask, are unions monopolies? If unions cannot at least affect the price of labor services, they would be failing significantly in one of their self-defined goals, namely to raise the wages of their members. According to the economic definition, then, a union must have a degree of monopoly power to be even minimally effective.

It is doubtful, however, that the economic definition of competition would be the basis for establishing violations under the anti-trust acts because the legal definition has never conformed to the economic definition. For example, in the *Standard Oil* case of 1911, the Court developed the "rule of reason" which suggested that only undue or unreasonable acts evidencing a clear intent to monopolize are in violation of the Sherman Act.[19] There is no economic law which provides a basis for the fine distinction between reasonable and unreasonable acts by monopolists. Inasmuch as the words "Every contract," and "Every person" are used in the Sherman Act to indicate the extent of coverage, one can only presume that this is another example of the willingness of the court to interpret the intent of the Congress and to enforce the spirit rather than the letter of the law Which acts by unions would be unreasonable? Perhaps those which threaten the nation's health, safety, or welfare. Legal remedies are already available to deal with such situations. Would the anti-trust laws allow injunctions where Taft-Hartley does not? Historical evidence suggests that it would depend largely on the attitude of the presiding magistrate towards unions. From the passage of the Sherman Act in 1890 until the 1930's, those on the bench were generally unsympathetic with the union movement. With the exception of the most notable dissenters such as Holmes and Brandeis, most justices supported the propertied classes and often interpreted the law accordingly There is little evidence of such

19. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

conservatism on the high court bench today, and few would expect the Warren Court to be very interested in breaking the unions.

Another application of the "rule of reason" declared that size alone was not evidence of a monopoly[20] In later cases, such as the *Alcoa* case decided in 1945, that position was modified so that size does not constitute a monopoly unless the firm produces some very high percentage of the industry's total output.[21] How would this aspect of the "rule of reason" apply to unions? If the percentage of workers in an industry were the criterion (and if the court could agree on the definition of an "industry"), almost all of the craft unions would probably be in violation of the Acts, because they represent 80 to 90 per cent of the craftsmen in each trade, while the largest national union in the country, the Teamsters, could remain unscathed because of its diverse membership.

Allowing companies to be large (if not too large) will, of necessity, result in large unions since the company is the logical unit for bargaining. Allowing industry-wide pricing practices encourages industry-wide bargaining by industry-wide unions. Unless the courts are inclined to assume that the anti-trust laws were intended to break large corporations into smaller units, it is difficult to conclude that they would interpret them this way if applied to unions.

If legislation were passed to apply anti-trust laws to labor unions, there is little evidence that these laws could be used to break up the existing large unions. History suggests that they would be most effective in preventing new groups from being organized. A new union among migrant workers could probably be hurt badly by the anti-trust laws as once interpreted. Large, well-established, and wealthy unions would find the laws much less troublesome. This could force the unorganized workers to rely exclusively on existing unions to organize them and might tend to perpetuate and increase the power of existing unions rather than decrease it.

20. United States v. United States Steel Corporation, 251 U.S. 417 (1920).
21. United States v. Aluminum Co. of America, 148 F.2d 416 (1945).