Indiana Law Journal

Volume 27 | Issue 4 Article 6

Summer 1952

Union, Self-Employed, Consumer: A Three-Sided Controversy

UNION, SELF-EMPLOYED, CONSUMER: A THREE-SIDED CONTROVERSY

The rapid growth and concentration in our industrial framework have awakened the realization that progress toward optimum utilization of our productive resources can only be achieved when natural competitive forces are supplemented by measures carefully designed to iron out inevitable wrinkles in the economic system. With increasing acceptance of public regulation, governmental agencies have exercised surveillance over both business and labor organizations in the interest of those who consume the goods and services produced by the combined efforts of these two major factions in our economy. Intrastate enterprise, however, often has escaped the impact of regulation. Official indifference and consumer apathy have resulted in an improvident toleration of practices injurious to the public interest.

The troublesome interrelation between unions and self-employed in intrastate trades has been a prominent factor contributing to this difficulty. This relationship and its effect upon the public merit further consideration.

The term "self-employed"[1] implies the unique status of the class under discussion; that is, its members possess attributes of both employer and employee. They are businessmen in the sense that they own their own equipment or are responsible for the capital sustaining their undertakings; to the extent that they frequently discharge traditionally managerial functions, such as contracting, price setting, and ultimate supervision; and from the standpoint that their remuneration is in the form of fluctuating profits rather than wages. Insofar as they perform tasks identical to those engaged in by full-fledged employees,[2] they are laborers. Indeed, the self-employed estate is a hybrid of two of the major segments of the economy, business and labor, toward which governmental regulatory programs are directed.[3]

It is interesting to note that it was essentially this group which dominated the economic scene in the period when Anglo-Saxon law first

1. "Businessman-worker" is a frequently used synonym and is also descriptive of the class. See GREGORY & KATZ, LABOR LAW 343 (1948).

2. Since the self-employer may hire labor rather than working entirely independently, it often happens that he is performing the identical tasks as his own employees.

3. It is not easy to determine precisely the limits of this classification. Theoretically, it could include the housewife who does her own housecleaning and the building contractor who occasionally takes time out to pound a nail or two. More obvious and more important examples arise in the service trades, such as barbering, plumbing, etc., and in the retail merchandising field.

began to impose restraints upon producers in the interests of the public.[4] Early statutory and common law developments were designed to deter both individual and combined restraints upon free competition. No distinction was drawn between laborers and entrepreneurs. Not until the Industrial Revolution and the appearance of large units of production was the labor exemption from the law of illegal combinations in restraint of trade first recognized. Justifications commonly advanced in support of this exception are twofold: (1) the growth of productive units left the laborer at a distinct bargaining disadvantage with the result that he was usually subjected to terms of employment dictated by his employer; (2) in order to preserve favorable standards, the working man needed a free hand to induce employees of competing producers to organize and insist on improved working conditions.

When a labor organization today invokes the exemption in defense of its activities directed against the self-employed, skepticism is warranted by the fact that the *union* enjoys an inordinate bargaining advantage.[5] Unless combinations intended to achieve the second objective were condoned, however, unionized employers would be unable to compete with non-union concerns. This basis for the labor exception thus argues, with equal vigor, for the vindication of union efforts to organize the self-employed.

Recognition of this has induced many courts to approve coercive tactics aimed by unions at the small businessman. This has been true despite absence of the added incentive to equate bargaining power by permitting employee combination. These cases fall into two broad categories: decisions sanctioning attempts to secure self-employers' conformity with union standards, and those upholding efforts to obtain additional work opportunities by compelling entrepreneurs to surrender those functions in which union members normally engage.[6]

Evans v. Retail Clerks Union[7] is illustrative of the first group of cases. A father and two sons who operated a grocery store without outside help maintained long business hours. Perceiving that this practice

4. Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, 28 CALIF. L. REV. 297, 310 (1939-40).

5. Rogers v. Poteet, 355 Mo. 986, 199 S.W.2d 378 (1947).

6. One behind the scene factor which often encourages attempted unionization of the self-employed is the financial prospect of dues and initiation fees. This can be very important in a trade where the percentage of self-employed is high, as in barbering. This factor possibly explains the recent attempts of the A. F. of L. barbering affiliate to unionize the self-employed barbers. See Riviello v. Journeymen Barbers' Union, 88 Cal. App.2d 499, 199 P.2d 400 (1948); Foutts v. Journeymen Barbers' Union, 155 Ohio St. 573, 99 N.E.2d 782 (1951); Wisconsin Employment Relations Board v. Journeymen Barbers' Union, 256 Wis. 77, 39 N.W.2d 725 (1949).

7. 66 Ohio App. 158, 32 N.E.2d 51 (1940).

jeopardized the favorable standards established in the community by the union, the court refused to enjoin organizational picketing calculated to avert that threat.[8] The second classification is typified by *Steerman v. Krouse*.[9] There the proprietors of a motion picture theater were requested to cease operating their projectors and engage union members to perform that task. Construing the term "labor dispute" in an anti-injunction statute to embrace these facts, the court approved the union's coercive activities intended to achieve this objective.[10] A similar holding constituting a more drastic inroad upon the prerogatives of the small tradesman is *Senn v. Tile Layers Protective Union*.[11] In this case the court indorsed the union's exertion of coercive measures to prevent a small contractor from participating in the mechanical operations incident to his trade. Since his volume of business did not warrant full time performance of managerial functions, the decision virtually deprived him of his livelihood.

In contrast to the above cases sanctioning the unions' imposition of restrictions, another line of authority condemns such interferences. Thus, the Supreme Court of Washington[12] recently frustrated an endeavor to unionize self-employed used car dealers for the purpose of requiring maintenance of uniform business hours.[13] In a Minnesota litigation,[14] analogous on the facts to the *Steerman* case, the court declared that an attempt to force a theater owner to replace himself with AF of L projector operators infringed his constitutional right to work.[15] Similarly a modern decision[16] is diametrically opposed to the *Senn* holding. A

8. See Glover v. Retail Clerks' Union, 10 Alaska 274 (D. Alaska 1942); *Ex parte* Lyons, 27 Cal. App.2d 293, 81 P.2d 190 (1938); Baker v. Retail Clerks' Union, 313 Ill. App. 432, 40 N.E.2d 571 (1942).

9. 36 Pa. D. & C. 475 (1939). See Rohde v. Dighton, 27 F. Supp. 149 (D. D.C. 1939); *cf.* Finke v. Schwartz, 28 Ohio N.P., N.S. 407 (1931).

10. The Court held the act wide enough to cover a "dispute of ideas" which in the instant case was whether a man had the right to be "both a capitalist and a laborer." *Id.* at 477. If this were the accepted judicial or legislative attitude, the unions would be completely free (as long as they used legitimate methods) to annihilate the self-employer class. This position is at the opposite pole from that of the Taft-Hartley Act. See note 26 *infra*.

11. 222 Wis. 383, 268 N.W. 270 (1936), *aff'd*, 301 U.S. 468 (1937).

12. Hanke v. Teamsters' Union, 33 Wash.2d 646, 207 P.2d 206 (1949), *aff'd*, 339 U.S. 470 (1950).

13. *Accord*, Seveall v. Demers, 322 Mass. 70, 76 N.E.2d 12 (1947); Lyle v. Local Union 452, 174 Tenn. 222, 124 S.W.2d 701 (1939).

14. Roraback v. Motion Picture Machine Operators' Union, 140 Minn. 481, 168 N.W. 766 (1918).

15. See Hughes v. Kansas City Operators' Union, 282 Mo. 304, 221 S.W. 95 (1920); *cf.* Jenson v. St. Paul Operators' Union, 194 Minn. 58, 259 N.W. 811 (1935) (under an anti-injunction statute). *But cf.* Glover v. Minneapolis Bldg. Trades Council, 215 Minn. 533, 10 N.W.2d 481 (1943) (picketing as free speech).

16. Bautista v. Jones, 25 Cal.2d 746, 155 P.2d 343 (1944). See for a discussion of the case, 44 Mich. L. Rev. 314.

Milk Drivers Local was enjoined from pressuring several creameries with the objective of forcing them to discontinue dealings with independent vendors of dairy products. The court observed that the conflict between the union and independents might present a "labor dispute", thereby condoning attempts to unionize these vendors. It determined, however, that the union could not resort to tactics designed to destroy their means of subsistence while simultaneously denying them the opportunity to affiliate. These random selections from the sizeable hodgepodge of precedent disclose the diversity of judicial attitudes toward coercion of the self-employed.

The background of the union self-employer controversy would be incomplete, however, without a discussion of the various theories upon which the courts rely in reaching their conclusions.[17] Frequently these rationales have been utilized as convenient pegs upon which to support decisions previously formulated and as substitutes for investigation into the real merits of competing solutions. Such a technique inevitably circumvents consideration of those ramifications of the decree which subvert the public welfare.

The doctrine that peaceful picketing is a constitutional protected adjunct of free speech acquired stature in *Thornhill* v. *Alabama,*[18] in 1939, and has been frequently reiterated by state[19] and federal courts[20] alike. While the current attitude of the Supreme Court is uncertain, it does appear that picketing has not maintained the inviolable status accorded it in the early 1940's. The latest pronouncements upon the question authorize a state to forbid picketing where its purpose is to accomplish some objective inconsistent with state enactments[21] or judicially declared policy.[22] It may safely be predicted that the Court will im-

17. A survey of the cases discloses that with the exception of the picketing and free speech doctrine the several methods used by the unions have had little effect on the decisions. Consequently, the note will accordingly limit its discussion.

18. 310 U.S. 88 (1940).

19. Naprawa v. Chicago Janitors' Union, 315 Ill. App. 328, 43 N.E.2d 198 (1942), *leave to appeal dismissed,* 382 Ill. 124, 46 N.E.2d 27 (1943); Glover v. Minneapolis Bldg. Trades Council, 215 Minn. 533, 10 N.W.2d 481 (1943); Friedman v. Blumberg, 342 Pa. 387, 23 A.2d 412 (1941); O'Neil v. Bldg. Service Employees' Union, 9 Wash.2d 507, 115 P.2d 662 (1941).

20. Cafeteria Employees' Union v. Angelos, 320 U.S. 293 (1943); Bakery and Pastry Drivers v. Wohl, 315 U.S. 769 (1942); American Federation of Labor v. Swing, 312 U.S. 321 (1941); Carlson v. California, 310 U.S. 106 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940).

21. Building Service Employees v. Gazzam, 339 U.S. 532 (1950) (labor statute); Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949) (antitrust statute); Carpenters and Joiners' Union v. Ritter's Cafe, 315 U.S. 722 (1942) (antitrust statute).

22. Hughes v. Superior Court, 339 U.S. 460 (1950) (racial discrimination); International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950) (protection of self-employed).

pose no greater constitutional restraint upon state regulation of picketing in the near future than it now wields over legislation of a purely economic character. It is significant that, in *Hanke v. Teamsters' Union,*[23] a majority of the Court clearly articulated the power of a state to prohibit picketing intended to require unionization of self-employed.

Various statutory provisions also have supplied doctrinal vehicles to which the courts have resorted in resolving union-self-employed controversies. The Norris-LaGuardia Act and its state counterparts have had a telling influence upon the law in this respect. Basically, these statutes forbid use of the injunction in situations concerning so-called "labor disputes." Because the statutory definition of such a dispute is necessarily couched in broad phraseology, and because of the unique status of the self-employed, the courts have not been in complete accord as to what constitutes a "labor dispute" between union and businessman-worker. One consequence of the application of these statutes, however, is the revelation of a propensity toward uncritical reliance on precedent in ascertaining the scope of "labor dispute." Reference to an inflexible formula has supplanted realistic appraisal of the interests involved.

Other more detailed labor relations statutes, following the pattern of the Wagner Act, have been invoked in this context.[24] Oriented to the more familiar labor-management disorders, such legislation is adapted to the union-self-employed conflict only through strained interpretation. An example is found in *Wisconsin Employment Relations Board v. Journeymen Barbers Union,*[25] involving an endeavor by the defendant union to organize self-employed barbers who were themselves employers of journeymen barbers. Since the Wisconsin labor statutes precluded employer financial support to unions, the court denounced the attempted unionization as illegal. It is apparent, however, that this legislation condemned employer domination of the union, rather than union domination of the self-employed.

The National Labor Relations Act specifically characterizes union coercion attempting to regiment the self-employed as an unfair labor practice.[26] But many of the divergent, complex issues which arise defy

23. International Brotherhood of Teamsters v. Hanke, *supra* note 22.

24. By 1947, forty-two states had some type of statute affecting labor and management relationships. Millis and Katz, *A Decade of State Labor Legislation,* 15 U. OF CHI. L. REV. 282 (1947-48).

25. 256 Wis. 77, 39 N.W.2d 725 (1949). See for a discussion of the cited case, 34 MARQ. L. REV. 45 (1950-51).

26. "It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal . . . where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization." 61 STAT. 141 (1947), 29 U.S.C. § 158(b)(4)(A) (Supp. 1951).

appropriate solution within the framework of the Act's rigid proscription. Moreover, the labor problems of small entrepreneurs in this category are customarily governed by state law.[27] If not solely in intrastate commerce, they nevertheless escape the impact of the federal regulation under the *de minimis* principle.[28]

A third instrumentality seized upon by the courts as a basis for settling disputes between union and self-employed is the venerable common law illegal purpose doctrine.[29] This principle discountenances organized coercive tactics where illegal objectives are being sought, or where the injury inflicted upon the self-employed cannot be justified by a showing that it is merely collateral to the advancement of a legitimate union goal. The virtue of this device is its flexibility, making possible judicial scrutiny of all relevant considerations, including the collision of conflicting solutions with the public interest. It is, however, an advantage somewhat dimmed by stare decisis and by the fact that it was originally applied by judges not entirely solicitous toward the labor movement.

It is understandable that these diverse judicial perspectives have failed to establish workable limits to the permissible area of union-self-employed strife. Nor is it surprising that the decisions frequently fail to evidence concern for the public welfare. While this uncertain area has been largely disregarded by legal scholars, one writer has endeavored to devise an orderly method of decision.[30] The foundation of Professor Herzog's approach is the premise that union interference with the prerogatives of the self-employed is indefensible. However, he concedes two qualifications of this general rule. One exception vitiates its application when employees are spuriously clothed with certain attributes of the independent contractor. Such an arrangement is often devised by large companies in an effort to evade burdens incident to the employer-employee relationship. The consistency with which the decisions accord with this exception testifies to its validity.[31] The second modifi-

27. VAN ARKLE, AN ANALYSIS OF THE LABOR MANAGEMENT RELATIONS ACT 1947 (1947).

28. A final type of statute which has been used as a vehicle in reaching decisions is the antitrust statute. Invocation of these statutes, however, has been largely frustrated by the exemption commonly accorded labor organizations. Later in the note, the advisability of extending the application of these statutes and the policy behind them will be discussed.

29. Roraback v. Motion Picture Operators' Union, 140 Minn. 481, 168 N.W. 766 (1918); Lyle v. Local Union 452, 174 Tenn. 222, 124 S.W.2d 701 (1939).

30. HERZOG, *Organization of Self-Employers By Unions*, 27 CHI-KENT REV. 263 (1949).

31. Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U.S. 91 (1940); Mitchell v. Gibbons, 172 F.2d 970 (8th Cir. 1949); Saito v. Waiters and Waitresses' Union, 12 N.Y.S.2d 283 (1939); Berger v. Sailors' Union, 29 Wash.2d

cation is more questionable: coercion is permissible whenever the working standards of union members are threatened by competition from self-employers.[32] Literal application of this exception manifestly emasculates the basic premise. By definition, the self-employed perform some functions similar to those of the union members; consequently, they are always competing to some extent. For example, they detract from the available volume of work and often engage in vigorous price rivalry. But the greatest deficiency inherent in Professor Herzog's trichotomy is its failure to recognize the vital interests of consumers in the outcome of these antagonisms. The urgency of analyzing these disputes with reference to their effect on the public welfare needs constant re-emphasis.

While it may be difficult to foresee all the consumer interests potentially affected by the reconciliation of union-self-employed differences, certain of those interests are easily detected. An example is the implementation of full competition in the expectation of securing to the public the most efficient production of goods and services.[33] An incident of this objective is the economic allocation of manpower. Wasteful allotment of human resources may occur when a small businessman is required to surrender employee-like tasks to union laborers. If the self-employer's business is not of sufficient magnitude to warrant full time performance of managerial duties, such regulation by the union amounts to featherbedding and unduly inflates prices charged to the consumer.

The public interest in effective competition acquires added significance when the union purpose is not merely to exact conformity with established working conditions, but is to deprive self-employers of the opportunity to work. Toleration of coercion calculated to achieve this end will foster union monopoly. Ultimately, it may severely limit the number of workers engaged in the trade, since a dominant union frequently restricts freedom of entrance into its ranks. A natural tendency will be to augment prices, subvert standards of quality and service, and foist upon the consumer products of the union's choosing. The most drastic result may be a gradual diminution of small business, the exist-

810, 189 P.2d 473 (1948); *cf.* National Labor Relations Board v. Hearst Publications 322 U.S. 111 (1944). See for discussion of problem of distinguishing sham and genuine self-employed, Herzog, *supra* note 27, at 280.

32. "A union may, by peaceful conduct, attempt the organization of a self-employer if . . . (2) the self-employer, by virtue of the lower working conditions under which he performs his work, either alone or with the aid of a few helpers, effectively competes with the union men and unionized businesses so as to undermine or threaten to influence disadvantageously the working conditions or the wage and living standards of the union men." Herzog, *supra* note 27, at 278.

33. One bright aspect of this full competition would be minimum prices. As for hours of doing business, if a self-employed grocer desired to stay open on Saturday nights, it would certainly seem to be to the advantage of the shopping public to have him do so.

ence of which has been considered a prerequisite to a healthy, progressive community. In an economy characterized by small productive units, responsibility and authority are dispersed; incentive and innovation are encouraged. An ample supply of community leadership is assured. Even at the cost of instability and short run inefficiency, the advantages of an economic system posited upon numerous individual enterprises are weighty.[34]

Several courts have recognized the importance of adopting a three dimensional perspective, weighing consumer requirements, as well as labor and the interests of small business, in deriving a solution to the difficulties which emanate from the union-self-employed controversy. In *Seveall v. Demers*,[35] where the underlying purpose of a picket line was to insure conformity to established prices, the court enjoined the activity, perceiving that the exercise of the right of the individual businessman to establish his own charges was for the public benefit and therefore entitled to judicial acknowledgement. Decisions under state antitrust laws have also injected vitality into this approach.[36] In *Rogers v. Poteet*,[37] such an enactment was invoked to forestall attempts to unionize a group of independent contractors, each of whom hauled milk from the producers to various dairies. Characterizing such organizational activities as an illegal restraint of trade, the court stated that the usual labor union exemption from the antitrust laws was inapplicable under these circumstances. That exemption, the court insisted, was based upon the disparity of bargaining power between the individual laborer and large industry. In this case, however, enforcement of a state antitrust law was necessitated in order to safeguard the public, as well as a small entrepreneur, from aggrandizement by a powerful economic unit.

Less frequently, public interests sustaining union objectives have emerged from the cases. As previously mentioned, the self-employed

34. *See* Standard Oil of California v. United States, 337 U.S. 293, 318 (1949) (dissenting opinion); Liggett Co. v. Lee, 288 U.S. 517, 541 (1933) (dissenting opinion); United States v. Aluminum Company of America, 148 F.2d 416, 427 (2nd Cir. 1945). See also, BRANDEIS, THE CURSE OF BIGNESS 100 (1934); WEISSMAN, R. L., SMALL BUSINESS AND VENTURE CAPITAL (1945).

35. 322 Mass. 70, 76 N.E.2d 12 (1947).

36. In Harper v. Brennan, 311 Mich. 70, 76 N.E.2d 12 (1947), the court enjoined attempts to unionize a self-employed as a violation of the state's antitrust law. Plaintiffs were partners who ran a funeral home without the aid of employees. The defendant union was not trying to enforce uniform working conditions or to secure work for its members, but seemed merely interested in dues and in seeing that the funeral home handled only union goods and traded only with union businesses. The court in holding that the union's purposes amounted to restraints of trade under the antitrust laws, pointed out that these laws were designed for protection of the public and may be applied to illegal practices of labor unions.

37. 355 Mo. 986, 199 S.W.2d 378 (1947).

status may be merely a sham used by big business to avoid the expense and complications growing out of its operations. For example, although New York has consistently enjoined union attempts to regulate the self-employed, it was decided in *Saito v. Waiters and Waitresses Union*[38] that a legitimate labor dispute existed. It was manifest that plaintiffs had set up a partnership embracing all twelve of their workers merely to avoid the labor problems which plague a typical employer. Most of these "partners" had made only nominal contributions to capital and had not exercised any supervision over the business. The court asserted that such an arrangement was not in the public interest. Not only would it frustrate efforts to elevate the living standards of the "partners" to union levels, but it would also prevent their receipt of such benefits as social security and workman's compensation, which the legislature has prescribed as costs of doing business.

Another instance in which the public interest may be closely allied with union objectives was illustrated by the depressed economic conditions precipitating the *Senn* controversy.[39] The court pointed out that the tile laying trade was experiencing a period of extreme demoralization exemplified by surplus labor, scarcity of work opportunities, and resulting cut-throat competition—particularly from non-union elements. The decision indicated that under existing circumstances union efforts to stabilize the industry, although detrimental to the well being of self-employed tradesmen, advanced the public welfare.

However essential deference to the public interest may be in the rivalry context, it becomes even more urgent when unions and the self-employed actively cooperate. Such combinations constitute a serious menace when they embrace a substantial portion of the participants in any trade within a competitive area. Although the aims prompting the initial alliance may be entirely innocuous, once rapport has been established it may readily be perverted in the pursuit of monopolistic control. The coalition is easily transformed into a mechanism to fix prices, allocate markets or trade areas, and curtail employment opportunities.[40] Private regulation, without the consumer protection which competition affords, ensues.

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38. 12 N.Y.S.2d 283 (1939).

39. Senn v. Tile Layers Protective Union, 301 U.S. 468, 473 (1937).

40. One widespread example of this is the barbering trade. It is the exception rather than the rule to find price differentials within a competitive area for the services of the barbering trade. Such organizations have also at times become quite successful as lobbyists. These efforts are generally directed at obtaining statutory authorization to limit those who may enter the trade through the use of strict licensing qualifications. See People v. Brown, 407 Ill. 565, 95 N.E.2d 888 (1950).

A potential remedy for this breakdown of natural competitive forces may be found in state regulations condemning illegal combination.[41] Theoretically, little difficulty should be encountered in applying these antitrust provisions to union-self-employed combinations despite the widely recognized exemption accorded labor organizations. It is well recognized that this exception does not pertain to a conspiracy between union and employer to achieve an objective which the antitrust laws forbid a combination of employers to pursue. As Justice Black observed in *Allen Bradley v. Local Union, IBEW*:[42] ". . . we think Congress never intended that unions could, consistently with the Sherman Act, aid nonlabor groups to create business monopolies and to control the marketing of goods and services."[43] Precedent for this view can be found in the context of union-self-employer combinations. In *Columbia River Packers Ass'n v. Hinton*,[44] the Sherman Act was successfully invoked to thwart activities of a union comprising both self-employers and their employees. Numerous member-fishermen used the organization as a means of collectively marketing their catch. The court labelled this an illegal restraint of trade, refusing to sanction it under the typical labor union antitrust exemption.[45]

In *Campbell v. People*,[46] it was determined that a like agreement contravened the Colorado antitrust laws. A plumbers' local had secured a contract with a master plumbers' association requiring the latter to employ only members of the union and further, limiting their right to perform employee functions. In return, the constituents of the union agreed to perform services only for master plumbers affiliated with the association. The court summarily sidestepped the labor union exception, perceiving a manifest purpose to establish a plumbing monopoly.

Interestingly, by severely limiting their non-managerial activities, the master plumbers in the *Campbell* case acquiesced in an arrangement which many self-employers have vigorously resisted.[47] It may safely be

41. All of the states have antitrust statutes and some have constitutional provisions. To a large degree these state provisions follow and closely resemble the federal statutes. See STATE ANTI-TRUST LAWS (Marketing Laws Survey 1940).

42. 325 U.S. 797 (1945).

43. *Id.* at 808. *Accord,* United States v. Women's Sportswear Ass'n, 336 U.S. 460 (1949).

44. 315 U.S. 143 (1942).

45. Local 36 of International Fishermen v. United States, 177 F.2d 320 (9th Cir. 1949).

46. 72 Colo. 213, 210 Pac. 841 (1922).

47. The agreement contained the following clause: "Not more than two members of any firm would be allowed to work with tools, and no two members of the same firm would be allowed to work with tools on any job at the same time." *Id.* at 214, 210 Pac. at 842.

assumed that many small entrepreneurs have made similar concessions, detrimental not only to their own interests but also to those of the public, rather than incur the animosity of powerful labor groups. Since the union frequently occupies a dominant economic position, attempted opposition may occasion financial ruin before legal refuge can be secured. Hence, the small businessman may voluntarily submit to burdensome impositions and attempt to pass on to the public ensuing losses. He is compensated for his concessions by the monopolistic competition which characterizes such an industry.

That the public is vitally concerned with the contacts between unions and the self-employed cannot be refuted. Their frequent controversies indicate the necessity of devising a formula flexible enough to accommodate the interests of society with those of the adversaries. A constructive remedial program would include legislation withdrawing this unique problem from the scope of those enactments designed to cope with typical labor-management disturbances.[48] It should embody a provision specifically authorizing the courts to analyze all ramifications of union-self-employed disputes. Assuredly, this would entail delegation of broad discretion to the judiciary. However, the widely divergent circumstances giving rise to such discord demonstrate the importance of a flexible process of decision. Similar in form to the early illegal purpose doctrine but unrestricted by its array of precedent, this approach would permit judicious reconciliation of all the interests involved.

Where the need for protection of the public interest arises out of union-self-employer combination, the problem is one of augmenting inadequate natural competitive forces. Vigorous application of state antitrust provisions presents a convenient solution. That a labor organization is a participant in the alliance does not vitiate this conclusion. Likewise the fact that a localized trade, rather than a nationwide industry, is involved does not mitigate the cumulative ill-effects upon the consumer.