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Is the Anti-Trust Law Anti-Labor?*

Frank E. Horack Jr.

FOR at least two decades the anti-trust controversy has been quiescent. During the 1920's, business was in the saddle and the laws were forgotten. During the 1930's, business was in the doldrums and anti-trust prosecution was either unnecessary or inadvisable.

With the analysis born of economic necessity, we are today invoking the anti-trust laws as an agency for the wider distribution of economic goods. As we return to this policy we discover business under the impetus of the old NRA now thoroughly organized, and labor grown strong and self-reliant in spite of the adversities of unemployment and the depression.

Today, membership in a union is becoming the rule rather than the exception. Labor leadership is gaining a maturity of judgment from experience and is beginning to feel the sting of responsibility imposed by power. The judgment and responsibility of union leadership is today being tested by the American people. One of those tests is the unions' response to the anti-trust prosecutions.

Business management has been subjected to similar tests. Most of us recall too painfully the era in our national life when business so entrenched itself in the politics and economy of our nation that it no longer felt the responsibility which power implies. We all know the results. One law after another was enacted to force business to maintain those standards of decency which the American people demanded but which business leadership was unwilling or unable to provide.

Labor management is in much the same position as business management and if it is not alert to police its own organization against both the racketeer and the well-intentioned but overzealous advocate, it must face regulation and limitation as unpleasant to it as similar regulations have been to business.

During the early days of the New Deal, when regulation of business was going on apace, business stood shoulder to shoulder in opposition to such legislation as the SEC, the holding company bill, and many others. And this was so, even though many of their representatives would admit privately that abuses did exist, and that they were just as eager to "get" the companies engaging in the practices as was the government. Yet they felt compelled by group loyalty to oppose what they believed because it was proposed by government.

This united front approach only convinced Congress that all business was tarred with the same brush and so the regulations were made more universal and probably more drastic than they would have been had business leaders dealt with the problem more frankly and objectively.

*See note to Mr. Epstein's paper, supra at 1.
Labor can learn much from the experience of business. It would be futile to assert, as some unfortunately have, that all labor unions are vicious. I think, however, that it is equally unwise to ascribe absolute purity to unions.

The best defense the labor movement can receive today is a defense which protects the appropriate functions of the union and of properly managed and properly directed union activities and which is equally forthright in the elimination of those activities and those individuals who have used the union as a machine for the achievement of individual aims and private advantage.

It was the desire for a disproportionate private advantage which brought business into disrepute. A similar desire upon the part of labor organizations will bring public condemnation of the whole labor movement.

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The policy of the anti-trust laws to encourage and to ensure the free flow of commodities unhampere by combination and restraint must obviously require adjustment to the equal policy of encouraging combination and restraint among laborers as a means of gaining adequate bargaining power between employees and management. The cases decided under the Sherman Act have marked out the relations between these two policies with care.

Indeed, the decisions have made it so clear that labor activities must comply with the mandates of the anti-trust laws that our argument in this paper must necessarily consider whether the Sherman Act should be interpreted to include union activities rather than whether it does.

There can be no argument but that the terms of the original act included labor unions. The only question is, what was the effect of Section 6 of the Clayton Act. It seems to me that after the uncertainty that was aroused by the Trans-Missouri\(^1\) and Standard Oil\(^2\) cases, Congress wished to make it perfectly clear that the existence of a union organization was not in itself a combination or conspiracy. In other words, considering the controversy of the time, Section 6 was put in the act to make it clear that unionism as an organization was exempt. There is no evidence to indicate that union activities should be freed from the restrictions of the act unequivocally, but rather that only those activities which were within permissible labor objectives and were accomplished by permissible means were exempt from the sanctions of the law.

In short, the object and purpose of this exception was not to relieve any and all activity engaged in by a union from the operation of the act but rather to make explicit that the mere organization of a labor union did not constitute an unlawful conspiracy.

Subsequent decisions and subsequent legislation has emphasized

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1. United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897); 2. Standard Oil Co. of N. J. v. United States, 221 U. S. 1 (1911).
this basic policy. In the case of business, similar judicial techniques were followed. The mere existence of a combination or association was held to be not necessarily undesirable, for it was found that many associations, indeed, promoted the distributive process of our economy.

Thus we have encouraged the formation of some associations and prosecuted others—and this with perfect consistency. Another phase of business regulation indicates that we are drawing our judgments more exactly today. At the same moment we may prosecute management and protect investors—a distinction which labor management must anticipate if it insists on the inapplicability of the anti-trust statutes. Thus when management fails to assume the responsibility of protecting investment in either labor or money, it must itself be regulated.

Labor organizations are meeting this challenge today. During the period of idealism concerning the growth of the labor movement, the labor management and labor were so consciously associated in the public mind that an attack on one was considered an attack on the other. With a growing frequency, however, we are making critical distinctions between the union and the union man. Thus today many who believe sincerely in the necessity of higher standards of living and who insist on a wider and more effective participation by labor in business management may with honesty of purpose subject to criticism some union activities. In other words, just as we found that there were good and bad trusts, we are finding today that there are good and bad labor organizations. Unfortunately, the test of good and bad is essentially subjective and there will be those who use such a distinction to vilify organizations that many would consider reputable. Thus we are faced with the problem of either protecting both the good and the bad in order to protect the good or else we must make more specific the standards by which we determine those organizations which should be protected and those which should not. Business management adopted the first method, and their defeats in Congress and the state legislatures bear witness to the ineffectiveness of this approach. The American public is too familiar with the whitewashing process.

For these reasons it seems to me that it is futile to argue that any and all labor activity is free from anti-trust regulation.

Basically the argument for exemption may be stated thus: The Sherman Act and Clayton Act confer power which may be abused. If labor is not exempted the act provides the way by which judges may nullify the defensible advances that labor has made. It is, of course, true that the act may be a tool of oppression. Any grant of power may be abused. Note that the exemption of unions from the Sherman Act places power in the union. And the unions, like the courts, may abuse that power. As a consequence our real choice
is the choice between the possibility of abuse of power by unions and by the courts. I am not prepared to say that courts will abuse that power less than unions or that unions will abuse it more than courts; but I am prepared to say that abuse of power by the government may be corrected with greater expedition and with less violence than may the abuse of power by private organizations.

The ability to ferret out private interests, whether it be the interests of management or the interests of labor will be forever difficult. The fact that there is no public responsibility in the private official which may be directly called to account makes it difficult, if not impossible, to rectify abuses quickly. We witnessed the time and energy involved in the effort to increase the responsibility of business management in the interest of a satisfactory economic order. As a general proposition, social responsibility has not been easy for business to accept. There is little reason to believe that responsibility will be discharged more readily by organizations representative of labor. Indeed, there is evidence already of dissatisfaction among the members of labor organizations with the administration of their unions. If labor administration is not always faithful to the trust of labor, there will be times, as there have been, when it will fail to discharge its more extensive social obligations. It seems appropriate, therefore, that if power is to be vested as it must be somewhere, it should be vested where responsibility may be enforced more expeditiously. It is my own belief that the majority demands of our nation can be felt more quickly through the channels of our democratic process than through private organization.

Accepting this premise I shall assume that the Federal Government can and should, within its jurisdiction, enforce the Sherman Act against union management where the union activity has been directed toward non-labor objectives. A determination of the boundary line between proper and improper union objectives becomes our next and last inquiry.

The Sherman Act sought to protect the American public, particularly the consumers, from unreasonable business advantages gained through combination. The experience of the consumers of America convinced them that business combinations existing for the purpose of preserving the status quo usually meant that new products were kept from the market and that old products were only procurable at arbitrary prices.

The maintenance of the old system also had undesirable effects upon labor. Indeed, much labor legislation grew from the same popular dissatisfaction with business management. Under the old system, the production of goods at substandard wages, unconscionable hours, and intolerable working conditions was the rule. The participation of labor in business
agreements was unknown. A better balance between the interests of management, labor and the consumer was inevitable. Thus, business combinations were restricted and labor organization encouraged. The goal, however, in each instance was the same. Labor implemented with organization, is now feeling the same public demand for regulation that business felt. The scope and extent of that regulation is thus the next step in our inquiry.

I think it may be assumed from the start that the standards of our public consciousness not only accept but insist today that labor's wage be adequate to maintain something more than mere subsistence living; that the working man is entitled to reasonable hours of work; that the conditions under which he works must be appropriate for the preservation of his health, and the continuation of a normal life in our society; that the interests of the investor and management do not predominate but that labor shares in management through the channels of collective bargaining. The limits of these objectives have been fairly well marked out, and it is clear that our legislative policy today insures these as accepted objectives for labor organization.

Neither labor objectives nor the anti-trust statutes can be static, however. Thus, the existence of past values does not foreclose the creation of new labor goals, nor does the past application of the Sherman Act necessarily require similar application in the future. To judge present demands solely in the light of previously accepted standards is erroneous—to accept the new demands as valid merely because they are claimed is equally unsatisfactory. We must evaluate them in light of the general objectives of our present society.

Certainly basic to all other claims is the increase in national income with its attendant purchasing power. The achievement of this goal requires, in fact, the inconsistent maintenance or increase of wages and the reduction in the cost of finished products. This result, if obtainable at all, must be achieved through greater efficiency in the methods of finance, production and distribution. Thus when any group, be it management or labor, bands together to prevent reduction in the cost of finished products through more efficient methods they have blocked one of the basic objectives of our present society and may well expect society, through government, to act against them.

The easiest of such cases, a situation which all will agree should be prohibited, is the case of the racketeer who sells “protection” to employers and employees. Although in form a labor union, it is only a gang in fact. Expenditures forced by such racketeers result in no public good, produce no economic wealth, and in no way advances the labor movement. When such activity affects interstate commerce, there can be no doubt but that criminal prosecutions under the Sherman Act are appropriate.
The second situation is somewhat more difficult. Here a valid and legitimate union insists upon the employment of unnecessary men. In this case it is true that a union man receives employment and to that extent the objects of the union are advanced. But are these defensible objectives? I doubt it. Through federal and state security laws we have said that business cannot be capitalized with unnecessary dollars. It seems to me that labor must accept the same standard and not capitalize itself with unnecessary labor.

It must, of course, be recognized that the statement of this general principle will not decide the close question whether the employee is unnecessary or whether in fact the refusal of employment results in the speed-up or in increased hazards to health and safety. The decision of this question, it seems to me, cannot be left successfully to interested parties, but must be decided by specially trained tribunals.

A third situation potentially injurious to the economic system is the employment of labor under antiquated production methods or for the production of unnecessary products. It may be objected that business is permitted to continue uneconomical practices and therefore labor may do likewise. This is not quite accurate. Business may continue uneconomical practices, individually. So can labor. But neither can combine to force upon competitors and the public the cost of these practices.

Thus where a union boycotts particular goods, as in the case of prefabricated materials, whether produced by union labor or not, they have exceeded the limit of permissible activity. The strike or boycott under these circumstances is not to maintain advantageous working conditions or collective bargaining, but rather to relieve itself from the competition of new articles and new methods. In the march of progress it would appear that neither investment, management, nor labor should be free from the pressure of competition. The social benefit from increased productivity at lower costs does not permit of the maintenance of feudal tenures by artificial tariffs created by the combination of special interests.

The fourth situation results from a combination of labor and management to maintain the position of a particular industry. This usually means the maintenance of artificially fixed prices. In one sense this may be said to be a "valid" labor objective, inasmuch as the continuity of employment and the maintenance of existing wage scales gives labor a direct interest in production, prices, and profits. If this is so, and it seems to be, we must first make certain revisions in the old assumption that management and labor are constantly antagonistic. It appears, here, that, as against consumers, the interests of labor and management are identical—whatever their own marital disputes may be.

Thus it would seem that this was a valid labor objective and
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therefore immune from prosecution under the Sherman Act. This, too, is too easy a conclusion. The maintenance of artificial prices by management acting in combination in unreasonable restraint of trade has not been sanctioned. It is doubted that management could defend an action against it on the ground that its labor would strike unless it continued the practices. It likewise may be doubted whether labor would be privileged directly. The exemptions in the Clayton Act were directed at the existence of the labor organization itself—disputes between labor and management were privileged—there is nothing in the act itself to indicate a legislative intent to permit labor to combine with management to gain advantage over other competitors.

The fifth, and indeed the most difficult problem is whether the strike or boycott in furtherance of a jurisdictional dispute amounts to an unreasonable restraint violative of the anti-trust laws. When it is a dispute between an employer and his employees and seeks “recognition” for collective bargaining it appears to have all the objectives which have been permissible under the existing decisions. It is true, of course, that, at the time the exemption of unions was written into the anti-trust laws, no legislative intent could be said to have anticipated this problem. Thus, as a matter of strict statutory interpretation, the jurisdictional dispute may be said to be outside the exemption. But strict interpretation can hardly be favored in this situation, so it may be concluded that although the result of a jurisdictional dispute is extremely unfair to an employer who has signed an agreement with one bargaining agency it is hardly within the sphere of anti-trust regulation. Legislation should be enacted to correct this obvious abuse, but the anti-trust laws seem hardly available to accomplish this result even though admittedly desirable.

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In conclusion, the problem that we are wrestling with is more extensive in coverage than either the anti-trust or labor policy of the Federal Government. We are really concerned with how these two particular manifestations of our basic policy can be coordinated to achieve a maximum of economic stability with a minimum of discord to either labor or business.

It seems to me that both business and labor have proceeded on the theory that they distribute their products to essentially well-to-do or wealthy persons, persons who can afford to pay all the traffic will bear. Actually the consumers of America are laborers, most of whom are receiving salaries considerably below $2,500 a year. This is the group that buys the automobiles, the radios, the furniture and the homes that industry produces. If industry maintains high prices it is labor who pays. If labor maintains high cost of production, labor pays. Most of the homes built in America are
built by laboring men for laboring men. If the costs are high, labor bears the burden.

Thus labor, though it has achieved much by collective bargaining to prevent labor from competing with itself directly, has transferred the competition between itself so that the profit of one becomes the burden of another. I suppose such competition never can be eliminated. But unreasonable burdens can and should be prevented. To the laborer who must pay more than a product is worth, the injury is the same—whether it is inflicted by management or labor is of no consequence.

Consequently, viewed from the broad basis of our national economy and judged from the narrow base of the purpose of the Sherman Act itself it is apparent that whenever business management or labor demands special privilege and seeks to enforce it by unreasonable restraints on trade and commerce it is the responsibility of government to prevent it. Abuses there may be—no system is immune. But the ability of the democratic process to control abuse more readily through government sustains the wisdom of policing human greed through governmental channels.