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"CURRENT PROGRESS AND PROBLEMS OF ANTITRUST LAWS"

ADDRESS

by

HONORABLE VICTOR R. HANSEN
ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES
IN CHARGE OF THE ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

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It is once again my pleasure to appear before you this morning. And it is with particular pride that I address this meeting following last night's commemoration of the anniversary of the Antitrust Division. As I gaze about this audience it is additionally gratifying to make out among you distinguished former heads of this Division.

I feel that I should discuss this morning an area which has received a great deal of news coverage these past few months. Unfortunately for the bulk of those people involved, this recent publicity has not been complimentary. The area to which I refer, deals with the position of organized labor in our national scene. I am not here, however, to discuss matters relating to the charges of scandal in high union places or the pros and cons of a "right-to-work" law. Rather, I should like to discuss the less sensational but vital task of the Antitrust Division in carrying out the intent of Congress in this complex field.

To say the least, our job is difficult since we are assigned the task of discerning how much stress to lay upon two somewhat discordant Congressional policies. The "one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its condition through an agency of collective bargaining." 1/ It is my hope that our role in this area will be better understood if I lay bare the operating structure under which we function.

1/ Allen Bradley Co. v. Local No. 3, Int'l. Brotherhood of Elec. Workers, 325 U.S. 7981, 806 (1945).

It is common knowledge that the Sherman Act outlaws contracts, combinations and conspiracies in restraint of trade; 2/ it requires also that "the several district attorneys of the United States . . . under the direction of the Attorney General, institute proceedings in equity to prevent and restrain such violations." 3/ "It is also well known that Congress has made exceptions to the generality of monopoly prohibitions, exceptions that spring from the necessities or conveniences of certain industries or business organizations, or from the characteristics of the members of certain groups of citizens." 4/ These exceptions express legislative determination of the national economy's need of reasonable limitations on cutthroat competition or prohibition of monopoly. "[W]here exceptions are made, Congress should make them." 5/ Since they modify the reach of the Sherman Act but do not change its prohibition of other monopolies." (Emphasis Supplied)

2/ 15 U.S.C. §1 (Supp. III, 1956).

3/ 15 U.S.C. §4 (1952).

4/ Clayton Act, 15 U.S.C. §17 (1946) (all labor organizations); McCarran-Ferguson Act, 15 U.S.C. §1013 (1952) (Insurance Companies); Webb-Pomerene Act, 15 U.S.C. §62 (1946) (Limited exemption for foreign trade association); Capper-Volstead Act, 7 U.S.C. §§ 291, 292 (1927) (farm cooperatives); Interstate Commerce Act 49 U.S.C. §5(11) (1952) (carriers participating in an approved transaction); Civil Aeronautics Act, 49 U.S.C. §494 (1952) (exemption for acts ordered by CAB).

5/ United States v. Line Materials Co., 333 U.S. 287, 310 (1948).

Labor unions have always been held within the general purview of the Sherman Act. 6/ However, under the rationale of the Norris-La Guardia Act, 7/ any trade union activity within §20 of the Clayton Act 8/ is immunized from the operation of the Sherman Act when the union is acting alone and in its own self interest. 9/ But since trade unions do not enjoy an all inclusive exemption from the Act, 10/ any combination with a non-labor group renders the immunity dubious. 11/ Thus a union, although employing means authorized by §20 of the Clayton Act, has no exemption when it combines with businessmen who have the power and intent to eliminate all competition among themselves and prevent competition from others, 12/ or when it combines with non-labor groups to fix prices and thus effect an unlawful restraint in commerce. 13/

6/ United Brotherhood of Carpenters v. United States, 330 U.S. 395, 414 (1947) (dissenting opinion); see e.g., Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); Loewe v. Lawlor, 208 U.S. 274 (1908).

7/ 29 U.S.C. §101 - 15 (1952).

8/ 29 U.S.C. § 52 (1952).

9/ United States v. Hutcheson, 312 U.S. 219 (1941).

10/ Las Vegas Merchant Plumbers Association v. United States, 210 F. 2d 732, 751 (9th Cir.), cert. denied, 348 U.S. 817 (1954) (dictum).

11/ United States v. Hutcheson, 312 U.S. 219, 232 (1941) (dictum); see United States v. Brims, 272 U.S. 149 (1926).

12/ Allen Bradley Co. v. Local 3, Int'l. Brotherhood of Elec. Workers, 325 U.S. 797 (1945).

13/ Gulf Coast Shrimpers and Oystermans Ass'n. v. United States, 236 F. 2d 658 (5th Cir. 1956), cert. denied, 25 U.S.L. Week 3168 (U.S. Dec. 3, 1956) (No. 480).

More explicitly, labor's immunity is dependent on a factual determination of whether the union is acting in its own self interest or conspiratorially with non-labor groups that are intent on violating the antitrust laws. 14/ Therefore, if a union combines with business contractors to suppress competition it is not immune from the provisions of the Sherman Act. 15/ Similarly, where an association of businessmen makes an agreement aimed at substantially restricting competition and controlling prices and markets, the inclusion of labor provisions in the agreement does not immunize it from the Act, 16/ for benefits to unions cannot be used "as a cat's paw to pull the employers' chestnuts from the antitrust fires." 17/

Thus it is our duty to carry out this Congressional design by instituting cases which demonstrate conduct detrimental to our antitrust policy while at the same time not being protected, by the mantle of privilege granted to unions to achieve traditional goals. In this selective process we must be ever vigilant that neither policy is frustrated.

14/ Anderson-Friberg, Inc. v. Justin R. Cleary & Sons, Inc., 98 F. Supp. 75, 82 (S.D. N.Y. 1951) (dictum).

15/ United States v. Employing Plasterers Ass'n., 347 U.S. 186 (1954).

16/ United States v. Women's Sportswear Manufacturers Ass'n., 336 U.S. 460 (1949).

17/ Id. at 464.

I believe the following cases will amply demonstrate the painful selective process we undergo in our careful pricking out of the law. For this analysis, a convenient starting point is Apex Hosiery Co. v. Leader. 18/ There the Court found it unnecessary to rely on Norris-LaGuardia to hold that an organizational strike, though affecting interstate hosiery shipments, did not run afoul of the Sherman Act. That Act, the Court noted, aimed at "restraints upon commercial competition in the marketing of goods or services." 19/ In Apex, however, it was "plain that the * * * [union] did not have as its purpose restraints upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands" for organization. 20/ From this decision emerges a distinction--potentially crucial to construction of Norris-LaGuardia "labor disputes"- between union activities aiming, on the one hand, at furthering recognized union objectives and, on the other, at directly "suppressing [commercial] competition or fixing prices" of commercial products. 21/

The Supreme Court first construed the antitrust impact of Norris-LaGuardia in United States v. Hutcheson. 22/ There involved was a

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18/ 310 U.S. 469 (1940).

19/ Id. at 495.

20/ Id. at 501.

21/ 312 U.S. 219 (1941).

22/ Ibid.

strike by one union against an employer who had assigned work to a competing union's members. Removing such conduct from the Sherman Act, the Court held that Congress, by the passage of the Norris-LaGuardia Act, had in effect overruled the Duplex construction of Section 20 of the Clayton Act. As a result, the Court concluded that all union self-help conduct specified in the concluding clause of Section 20, as well as Section 4 of Norris-LaGuardia, was now immunized from Sherman Act sanctions.

Hutcheson's rationale, however, was, in its own language, limited to "where a union acts in its own self-interest and does not combine with nonlabor groups," 23/ while Hutcheson treated union pressure which fell short of coercing employer participation, Allen-Bradley Company v. Local No. 3, 24/ decided some five years later, involved a consummated union-employer scheme. There, Local No. 3, comprised of electrical workers in the New York area, agreed with "contractors * * * to purchase equipment from none but local manufacturers who also had closed-shop agreements with Local No. 3" and with manufacturers "to confine their New York City sales to contractors employing the Local's members." 25/ These contracts, the Court found, were "but one element in a far larger program in which contractors and manufacturers united * * * to monopolize

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23/ Id. 232.

24/ 325 U.S. 797 (1945).

25/ Id. at 799.

all the business in New York City." 26/ This fact of Union-employer combination was held to distinguish Allen-Bradley from Hutcheson and, in turn, to subject Local No. 3 to the Sherman Act. 27/

Not yet settled is whether Allen-Bradley permits antitrust prohibition of an agreement between one union and one employer requiring conduct whose object is some direct market restraint. The majority there assumed, without deciding, that "such an agreement standing alone would not have violated the Sherman Act." 28/ However, as the separate opinion emphasized, employer inspired agreements were not solely involved; instead some respondents were "individually coerced by the union's power to agree to its terms. It is, therefore, 'inaccurate,' that opinion went on, "to say that the employers used the union to aid and abet them to restrain interstate commerce." 29/ Accordingly, it may be that the employer connivance which Allen-Bradley requires might be inferred largely from a labor-management contract agreed to at union insistence. 30/

26/ Id. at 809.

27/ Similarly note Brotherhood of Carpenters v. United States, 330 U.S. 395, 399-400 (1947); see also Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n. of Philadelphia, 155 F. 2d 799 (3d Cir. 1946); but see Albrecht v. Kinsella, 119 F. 2d 1003 (7th Cir. 1941).

28/ 325 U.S. 797, 809 (1945).

29/ Id. at 814.

30/ In Loews Inc. v. Basson, 46 F. Supp. 66 (S.D. N.Y. 1942), a union comprising projectionists, deliverers and cutters sought to compel a movie producer-distributor to license only exhibitors who employed union projectionists. The producer-distributor objected, but the court held nonetheless its entry into the proposed contract would constitute

Even in the absence of such connivance, where the activity involved both aims, in the language of the Apex decision, at "suppressing [commercial] competition or fixing prices" 31/ and is not sanctioned by the Labor-Management Relations Act, antitrust proceedings may not be foreclosed. In Hawaiian Tuna Packers v. International Longshoremen and Warehousemen's Union, 32/ for example, fish canners sought treble damages from Local 150, made up of some crew members and boat owners who apparently were also crewmen. The complaint alleged that Local 150 demanded that the plaintiff canner contract to buy a season's catch at fixed rates per pound. Upon plaintiff's refusal, the union cut off its fish supply and, as part of its plan to coerce plaintiff to fix prices, agreed with fishermen in competing waters to boycott plaintiff. Upholding the complaint against the defendant's motion to dismiss, the court held that a demand to fix prices made by a combination of crewmen and owner crewmen brought the case within Allen-Bradley. 33/

Beyond connivance, however, the court held that the facts alleged failed to state a case involving or growing out of, as the Norris-LaGuardia

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30/ (Cont'd.)

an illegal "combination between a union and a nonlabor group" (Id. at 72); cf. Anderson-Friberg Inc. v. Justin R. Clary & Son, 98 F. Supp. 75, 82 S.D. N.Y., 1951); but see Meier and Pohlmann Furniture Co. v. Gibbons, 113 F. Supp. 409 (E.D. Mo., 1953) and New Broadcasting Co. v. Kehoe, 94 F. Supp. 113 (S.D. N.Y.).

31/ 310 U.S. 469, 501 (1939).

32/ 72 F. Supp. 562 (D. Hawaii, 1947).

33/ Id. at 566.

Act requires, a "labor dispute." That Act, the Court reasoned, "was not intended to have application over the disputes over the sale of commodities * * * [or] to include controversies upon which the employer-employee relationship has no bearing." 34/

Supporting the suggestion that a dispute involving the object of direct market control may not constitute a "labor dispute" within Norris-LaGuardia are analogous decisions upholding state action restricting labor activities not sanctioned by Taft-Hartley. 35/ Giboney v. Empire Storage Co., 36/ for example, involved picketing by union peddlers of an ice supply plant to bar ice sales to non-union peddlers. If Empire had agreed to stop selling ice to non-union deliverers, the Supreme Court concluded that such conduct would have violated the state antitrust statutes. Accordingly, since no question of conflict with the Federal labor relations scheme was even raised, 37/ the Court upheld application

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34/ Id. at 566; similarly, note Columbia River Packers Ass'n. v. Hinton, 315 U.S. 143 (1942).

35/ See, for example Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Whitaker v. State of North Carolina, 335 U.S. 525 (1949); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949).

36/ 336 U.S. 490 (1949).

37/ It was not necessary for the Court to consider there whether the union activity involved ran afoul of the Taft-Hartley subsection 8(b)(4)(a). Its legality under that provision, however, seems open to question. Initially, it seems clear that "an object" of the picketing was, as that section required, to foreclose Empire from "doing business with any other person." The primary issue would be whether the union activity constituted, within the meaning of that provision, encouraging "the employees of any employer to engage in * * * concerted refusal in the course of their employment to * * * handle * * * any material * * * or to perform any services." Cf. National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665, 670 (1951).

of the state policy whose "purpose * * * is to secure competition and preclude combinations which tend to defeat it." 38/

Summing up, then, analysis of these "three 'interlacing statutes'" 39/ suggests that commercial restraints by unions may be subject to antitrust, first, when the Union engages in fraud or violence, and in the language of the Apex case, is intent on "suppressing [commercial] competition or fixing prices" of commercial products, 40/ second, when the Union activity is not in the course of a "labor dispute" within the meaning of Norris-LaGuardia. Bearing on definition of this term, moreover, the Hawaiian Tuna Packers and Columbia River Packers cases suggest that courts may infer Congressional intent to cover those labor activities not sanctioned by Taft-Hartley which aim at direct commercial restraint. Finally, as Allen-Bradley indicates, antitrust may come into play where a union combines with some nonlabor group to effect some commercial restraint.

Current Problems

A problem of considerable interest has confronted us in unions which are composed of a mixed membership to wit, both employers and employees. The immunities of the Clayton and Norris-LaGuardia Acts, however, extend not to "Unions" but to "Employees" in a dispute

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38/ Giboney v. Empire Storage Co., 336 U.S. 490, 495 (1949).

39/ Allen-Bradley Co. v. Local No. 3, 325 U.S. 797, 806 (1945).

40/ Cf. Apex Hosiery Co. v. Leader, 310 U.S. 469, 501-504 (1940); 29 U.S.C. 6104 (1) (1952); Coronado Coal Co. v. United Mine Workers of America, 268 U.S. 295 (1925).

concerning terms or conditions of employment. 41/ It is therefore, our belief that the immunity given labor organizations does not extend to concerted activity in restraint of trade between employers or entrepreneurs and a union, even though the employers belong to the Union.

As an example of our enforcement policy, the relief we would seek in such a situation would not be a general injunction against the union but rather to require it to exclude from its members any person who functions as an entrepreneur rather than an employee. Cases of this type are important in order to confine the immunity given by Congress in the Clayton and Norris-LaGuardia Acts to the class of persons Congress intended to benefit: to wit, employees. If our government allows entrepreneurs and employers to enjoy the immunities granted by Congress only to working men, a large segment of our business society would soon resort to the guild method of organization prevalent in Elizabethan England. This is one of the very consequences which the Sherman Act was designed to prevent.

Another problem of considerable interest is whether in a civil antitrust action, charging Union participation in an antitrust conspiracy, proof that the Union is responsible for the unlawful acts of its agents and members must meet (1) the strict standard of Section 6

41/ See e.g., 38 Stat. 738, 29 U.S.C. §52 (1952); 47 Stat. 70, 29 U.S.C. §104 (1952).

of the Norris-LaGuardia Act 42/ or (2) the less vigorous standard of Section 301 of the Taft-Hartley Act. 43/

Section 6 of the Norris-LaGuardia Act provides:

> No officer or member of any, association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation of, such acts, or of ratification of such acts after actual knowledge thereof. (Emphasis supplied)

On the other hand, the relevant portions of the Taft-Hartley Act (29 U.S.C., 185(b) and (e)) provide:

> (b) Any labor organization which represents employees in any industry affecting Commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents.
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> * * * *
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> (e) For the purposes of this section [185], in determining whether any person is acting as an "agent" of another person so as to make such other persons responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.
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> [Emphasis supplied]

42/ 29 U.S.C. § 106 (1952).

43/ 29 U.S.C. § 185 (1952).

It could be argued there is some authority which would construe section 185 of the Taft-Hartley Act as a supersedure of section 106 of the Norris-LaGuardia Act. 44/ The late Senator Taft commenting on this subject remarked: 45/

> This [section 301] restores the law of agency as it has been developed at common law.
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> It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of United States against United Brotherhood of Carpenters placed upon section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual investigation, participation or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming such responsibility. The conferees agreed

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44/ See United Construction Workers v. Haislip Baking Co., 223 F. 2d 812, 878 (4th Cir. 1955).

45/ Senator Taft's remarks to the Senate, 93 Cong. Record 7001, Legislative History of Labor Management Relations Act, Volume 2, p. 1622.

that the ordinary law of agency should apply to Employee and Union representatives. . . . Similarly union business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair-labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct."

There is, however, a very strong contra argument to the foregoing analysis, which seems to be the better reasoned.

The rigorous standard of the Norris-LaGuardia Act was employed to prove Union responsibility for the unlawful acts of its agents, members and officers in United Brotherhood of Carpenters and Joiners v. United States, 46/ where the Supreme Court set aside the conviction of a Union for participation in an antitrust conspiracy under Section 1 of the Sherman Act. Although the Supreme Court approved the ruling of the lower courts that the employer-Union conspiracy in that case was condemned by the Allen-Bradley Rule, 47/ the court held that the jury which convicted the Union had not been correctly instructed as to the quantum of proof necessary to establish Union liability for acts of its agents and members.

In the problem under consideration, as was done in the Carpenters case, it could be argued the test of Union responsibility would turn

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46/ 330 U.S. 395 (1947).

47/ Allen-Bradley Co. v. Local No. 3, 325 U.S. 797 (1945).

upon the question, whether the challenged practices grew out of "labor disputes" as defined in Section 13 of the Norris-LaGuardia Act. In the Carpenters case, it was expressly "conceded that this agreement grew out of such a labor dispute and that all parties defendant participated or were interested in that dispute." 48/ In view of that concession, an instruction under Section 6 was necessary, and the failure to give it was reversible error.

It is thus contended that outside the sphere of a "labor dispute" Section 6's strict requirements of proof have no application. The language of Section 6 embodies this limitation, for it says that "no officer or member of any association or organization and no association or organization participating or interested in a labor dispute" shall be held liable for unlawrul acts of members, etc. The Carpenters case itself notes, 49/ that the "purpose and effect" of Section 6 is "to relieve an organization, whether of labor or capital and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization "without the clear proof" required by Section 6 [Emphasis supplied]. Indeed, the very objectives of the Norris-LaGuardia provisions to enable freely elected labor representatives to engage in collective bargaining and other concerted activities

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48/ Id. at 401.

49/ 330 U.S. 395 at 403.

for "mutual aid and protection," free from employer interference have no application when there is no "labor disputes" as that term is defined in Section 13.

Following this line, the question then becomes whether, and under what circumstances, Union pressures continue to be a "labor dispute" when the Union combines with non-labor groups. Two questions must be distinguished: (1) whether the Union activities (in combination with non-labor groups) violate the Sherman Act, and (2) whether such acts, though condemned by the Sherman Act, occur in "labor disputes." Since Union activities may grow out of a "labor dispute" 50/ and yet violate the Sherman Act, the two classes plainly are not coterminous. Allen-Bradley and the Carpenters cases demonstrate that concerted Union pressures may violate the Sherman Act (because of employer connivance) and yet have some measure of protection 51/ as "labor dispute" because they are designed to promote proper Union objectives (such as higher wages and better working conditions). The question then will always be whether or not on the facts of the case, the Union not only transgressed the Sherman Act but whether, by acting outside the ambit of a "labor dispute," it has also forfeited the protection of Norris-LaGuardia.

As a final remark I should like to make mention of the fact that we in the Antitrust Division are keenly concerned with the employment,

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50/ See United Brotherhood of Carpenters and Joiners v. United States, 330 U.S. 395 (1947).

51/ E.g., Modification of the Allen-Bradley decree to permit the Union, acting alone to use concerted pressure.

by Unions, of unlawful means to stifle competition. 52/ Whenever such activities are unearthed we direct our immediate attention to the anti-competitive effects since, such unlawful measures are certainly not within the ambit of Congressional protection. These problems and countless others are constantly under our study in our ceaseless effort to enforce our antitrust laws fairly, justly and in accordance with the will of the Congress.

52/ See e.g., United States v. Chicago Boiler Manufacturers Ass'n., et al., Criminal No. 57 C R 412, (N.D. Ill., June 25, 1957).