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## Introduction

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# Duquesne Law Review

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## SYMPOSIUM: THE APPLICATION OF ANTITRUST LAWS TO LABOR-RELATED ACTIVITIES

### Introduction

*Daniel I. Booker\**

The problem considered in this symposium is as old, nearly, as the antitrust laws and as current as pending decisions of the Supreme Court.<sup>1</sup> The problem is how and whether to apply our laws regulating competition, the antitrust laws, to the joint conduct of workers or of employers with respect to workers. Much of this

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1. The Supreme Court first applied the Sherman Act to labor activities in 1908. *Loewe v. Lawlor*, 208 U.S. 274 (1908) (the "Danbury Hatters" case). At the time of this writing (October 1982), the Supreme Court has one labor/antitrust case pending before it. *Cal. State Council of Carpenters v. Ass'n Gen. Contractors of Cal.*, 648 F.2d 527 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 998 (1982). It has just denied certiorari in two other such cases. *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. and Constr. Trades Council*, 609 F.2d 1368 (3d Cir. 1979), *on remand*, 670 F.2d 421 (3d Cir.), *cert. denied*, 103 S. Ct. 229-30 (1982); *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 132-33 (1982). One such case is pending in the Court on petition for writ of certiorari. *James Snyder Co. v. Associated General Contractors*, 677 F.2d 1111 (6th Cir. 1981), *petition for cert. filed*, 51 U.S.L.W. 3175-76 (U.S. Sept. 21, 1982) (No. 82-148). A comprehensive table of cases and bibliography of articles relating to labor/antitrust issues was prepared and distributed to participants in the seminar on which this symposium is based. Copies are on file with the Allegheny County Bar Association, Pittsburgh, Pennsylvania.

conduct is addressed in our labor laws.

The fundamental source of the problem is not hard to find for anyone trained in economics. Our labor laws promote and encourage what our antitrust laws forbid: cartels, or agreements to fix prices and control production levels.

Agreements to fix prices for an economically significant factor of production are the essence of unionism. Collective bargaining, by which workers and employers through multi-employer or parallel bargaining can equalize wage rates throughout an industry, is the cornerstone of this country's labor policy. The labor laws permit workers to join together to fix wage rates, and permit employers to join together to bargain with workers over wage rates.

This is contrary to the fundamental premises on which antitrust lawyers work. For example, the antitrust laws would forbid mine operators from fixing the price to steel companies of iron ore, and would forbid steel companies from joining together to agree what they will pay to mine operators for iron ore. Although few would dispute that labor is as significant a factor in the production of steel as is iron ore or that steel prices are affected by labor costs as well as iron ore costs, our national policy is to tolerate, indeed to encourage, agreements concerning labor that we would not tolerate regarding any other factor of production.

This underlying conflict between labor and antitrust policy is not always recognized. I am confident Mr. Winpisinger, the president of the International Association of Machinists and Aerospace Workers (IAM), saw no irony in his filing of an antitrust complaint charging OPEC nations with fixing the price of oil and causing an increase in gasoline prices.<sup>2</sup> I am sure he felt a great injustice had been done when, on grounds relating to foreign policy, the dismissal of his complaint was affirmed by the Ninth Circuit. Doubtless he would see only justice were a court similarly to throw out, on grounds relating to national labor policy, a complaint by consumers that the IAM had raised the price of air fares by increasing the labor cost of the airlines.

Recognizing the fundamental source of the difficulty in reconciling labor and antitrust policy is only the first step in understanding the problem, however. This is because, speaking as an antitrust lawyer, labor law is an extraordinarily complicated field.

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2. *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1036 (1982).

Those whose daily practice is labor law doubtless feel that the same is true about antitrust. Also, there is an endless variety of situations in which labor and antitrust issues can arise.

The following papers identify some of the general rules that Congress and the courts have developed and imposed upon this complicated area. They also discuss a good number of the specific and recurring situations in which a concrete resolution of the conflict between labor and antitrust law and policy has been and is necessary.

The Supreme Court and Congress have undertaken many times in this century to resolve this conflict. None of the papers here repeat the entire history — that history is set out ably in a number of places by the Supreme Court and by commentators.<sup>3</sup>

It will suffice to say that Congress has several times “corrected” Supreme Court decisions that seemed to tip the balance of anti-trust law and labor policy in favor of antitrust.<sup>4</sup> My own view is that currently the balance once again is tipped decidedly in favor of antitrust concerns. It seems to me the Supreme court has concluded that, in the gray areas where labor law does not clearly approve an activity or practice, less weight is and will be given to concerns about inhibiting collective bargaining or other favored labor activities, than to concerns about limiting competition among employers or increasing prices to consumers.

If the labor/antitrust problem has been with us for ninety years, it is fair to ask why we are having a symposium about it now. The simple answer is that more is happening today in this field than ever before. A large part of the reason for this is that the Supreme Court’s decision in 1975 in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*<sup>5</sup> has been perceived as expanding the area in which antitrust laws may apply to labor-related activities.

It is very difficult to measure precisely the increased litigation activity in labor/antitrust. There may be anecdotal evidence in the fact that most labor lawyers never worried until recently about the problem, and that more than a few practitioners now find labor/

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3. *Connell Constr. Co. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975); *United States v. Hutcheson*, 312 U.S. 219 (1941); Meltzer, *Labor Unions, Collective Bargaining, and The Antitrust Laws*, 6 J.L. & ECON. 152, 154-58 (1963); see also P. AREEDA & D. TURNER, *ANTITRUST LAW* 188-222 (1978).

4. See Booker & Leech, *A Sketch of Antitrust Laws Applied in Labor Contexts*, Allegheny County Bar Ass’n Seminar on the Application of the Antitrust Laws to Labor-Related Activities (June 22, 1982) (to be published in *ABA ANTITRUST LAW DEVELOPMENTS (SECOND)* (1983)).

5. 421 U.S. 616 (1975).

antitrust counseling questions arising regularly.<sup>6</sup>

One more concrete indication we have is reported cases, which LEXIS permits one quickly to search. Doing so indicates that discussion of labor/antitrust exemption issues has increased markedly. For example, in the ten years before the Supreme Court's 1965 decisions in *Local 189, Amalgamated Meat Cutters v. Jewel Tea* and *United Mine Workers v. Pennington*,<sup>7</sup> two important labor/antitrust cases, there were twenty-one federal court opinions that concerned these types of issues. In the following ten years (until the Supreme Court decision in *Connell*), there were sixty-seven such opinions. In just the seven years since *Connell*, 127 opinions have addressed labor/antitrust issues.

Labor/antitrust opinions thus have increased in frequency since the decade 1965-75 at a rate of 270%, while the number of opinions in all federal cases (according to LEXIS) has increased since that decade by only 140%. Several federal courts of appeals have within the year issued labor/antitrust opinions.<sup>8</sup> The Supreme Court has considered labor/antitrust cases several times recently<sup>9</sup> and currently has before it a labor/antitrust case — *California State Council of Carpenters v. Associated General Contractors of California*.<sup>10</sup>

By way of a further and final introduction to the subject of this symposium, let me mention a few thoughts to keep in mind and a few questions to which you might expect answers in the following papers. First, if conduct is specifically addressed by the labor laws and is legal under the labor laws, there will be no antitrust exposure for engaging in that conduct. This is acutely important, because it would be a mistake to assume that every action of a union or of employers dealing with a union raises antitrust issues. There is a great portion of what unions and employers regularly do that is not affected by antitrust.

Of course, what unions and employers do is not always legal under the labor laws. Any antitrust prosecutor will tell you that most government sanctioned cartels eventually, in some way and

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6. See, e.g., *Legal Times*, July 5, 1982, at 1, col. 1.

7. 381 U.S. 676 (1965); 381 U.S. 657 (1965).

8. See *supra* note 1; *National Elec. Contractors Ass'n v. National Contractors Ass'n*, 678 F.2d 492 (4th Cir. 1982); *Swanson-Dean Corp. v. Seattle Dist. Council of Carpenters*, 646 F.2d 376 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2903 (1982).

9. See *supra* note 1; *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704 (1981).

10. 648 F.2d 527 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 998 (1982).

to some degree, exceed the scope of their government sanction. Thus, we need to reach my other thoughts.

Second, if conduct is specifically addressed by labor law, involves an employer in some way and is illegal, or if conduct is not specifically addressed by the labor laws, it is likely to be subject to antitrust scrutiny. Just what type of antitrust scrutiny, and the conclusion a court will reach as to antitrust illegality, will depend on the facts of the particular case. It would be a mistake to assume that because the labor exemption from antitrust liability does not apply, the conduct is illegal under the antitrust laws. Rather, there is at least a two step inquiry. Does the labor exemption apply? And if not, was the conduct illegal under the antitrust laws?

Third, it is my impression that labor lawyers and antitrust lawyers have not sought to understand each other's fields. I doubt that any antitrust compliance program of a major corporation in this country (each one designed by antitrust lawyers) seriously addresses the need for labor relations executives (and labor lawyers) to be familiar with antitrust danger points in labor relations. On the other side, I doubt that many labor lawyers fully appreciate the full consequences of the policies upon which antitrust law is based.

Fourth, it occurs to me that the lower courts are uncomfortable with the present balance in favor of antitrust and that, in consequence, some unusual things are happening to antitrust law. Just one example is the suggestion of the Third Circuit in the *Consolidated Express, Inc. v. New York Shipping Association*<sup>11</sup> case which held that a rule of per se antitrust illegality would apply to a boycott of non-International Longshoremen's Association employers. The "suggestion" to which I allude was that treble damages might not be available to the boycotted employers. The Third Circuit felt compelled to conclude, in a holding unprecedented to my knowledge, that the trebling of damages, which by the statutory terms seems to be mandatory and which in common understanding is mandatory once an antitrust violation is established by an injured party, may in fact not be available if the antitrust illegality of the union's conduct was unforeseeable.

So much for my thoughts. I raise them tentatively and with some expectation of contradiction by other following papers. How-

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11. 602 F.2d 494 (3d Cir. 1979), *vacated*, 448 U.S. 902, *on remand*, 641 F.2d 90 (3d Cir. 1980), *mandamus and prohibition denied sub nom.* In re Int'l Longshoremen's Ass'n, 451 U.S. 905 (1981).

ever, I hope they provide you with reference points as you read the other papers.

As a concluding note, the symposium outline may impose more structure on this field than in fact there is. We hope, however, that this structure will give you some bearings in understanding the problem and a common sense start in finding the answer to a client's questions or an opponent's argument.