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Antitrust and Labor

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THE thirteen-page treatment of the subject of "organized labor" in the *Report of the Attorney General's National Committee to Study the Antitrust Laws* shows that the committee approached the subject gingerly, and that the counsel of moderation prevailed. The views of those who would change the national policy favoring (or at least tolerating) the existing institutions of trade unionism and collective bargaining by subjecting unions to "monopoly" standards are not discussed in the *Report*.[1] The result is a limited and generalized approach, which holds that some kinds of union practices "aimed directly at commercial market restraints" run counter to our national antitrust policy and should be prohibited by some law. With but two dissenting voices the committee says:

> " . . . This Committee believes that union actions aimed at directly fixing the kind or amount of products which may be used, produced or sold, their market price, the geographical area in which they may be used, produced or sold, or the number of firms which may engage in their production or distribution are contrary to antitrust policy. To the best of our knowledge, no national union flatly claims the right to engage in such activities. We believe that where the concession demanded from an employer as prerequisite to ordering the cessation of coercive action against him is participation in such a scheme for market control, this union conduct should be prohibited by some statute."[2]

Most observers will agree with this expression of policy, though many, with the dissenters, will be apprehensive of a statutory formulation of

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[1] These views are well illustrated by the Gwinn-Fisher Bill, H.R. 8449, 82d Cong., 2d sess. (1952). For discussions of these proposals, see Iserman, "The Labor Monopoly Problem: Gwinn-Fisher Bill Would Effect Reforms," 38 A.B.A.J. 743 (1952); and Kamin, "The Fiction of 'Labor Monopoly': A Reply to Mr. Iserman," id. at 748.

The Gwinn-Fisher bill would not only cover direct commercial restraints of the kind envisaged by the antitrust committee's proposal, but, in addition, would attempt to eliminate what Mr. Iserman refers to as "centralized control of bargaining." This would be accomplished by making illegal multiple employer bargaining or concerted action, and concerted action among unions, in relation to wages and other terms of employment, except in the case of small, local labor market bargaining units numbering not more than 5,000 employees.

[2] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, March 31, 1955, p. 294 (hereinafter referred to as REPORT, followed by the page number).

this proposition in such general terms that "potential abuse" will be invited.[3]

The committee's failure to discuss the basic economic issues raised by the existence of union power doubtless reflects its judgment of the scope of its assignment. "At the outset," the *Report* begins, "we emphasize that appraisal of the Nation's labor-management relations policy goes beyond this antitrust study."[4] Thus the committee assumed, on the one hand, that the national labor policy is to encourage collective bargaining on terms and conditions of employment,[5] and, on the other hand, that the national antitrust policy is the "promotion of competition in open markets."[6] The committee evidently believed that it was not called upon to evaluate the one policy as against the other, but was to view each policy as of equal standing in the national hierarchy of values. Thus, it accepted as its responsibility only an inquiry into "those union activities, not directed at such established [i.e., recognized] union ends, but instead at direct restraints on commercial competition."[7] Constituted as the committee was, I think this was a wise decision. At the same time it must be recognized that the proponents and opponents of an antitrust curb on union power as such may fairly claim that this issue was not considered on the merits.

Even within the comparatively narrow jurisdictional limits set by the committee, it has not undertaken to make a first-hand examination of the relevant facts. One gathers that primary reliance has been placed upon "reported cases," relatively few in number, to show the existence of the practices which the committee condemns.[8] This is consistent with the general thesis of the committee, underlying its entire report, that its "aim is not to add to the storehouse of statistical data or to survey the economic effects of antitrust applications to specific industries" but, rather, "to weave as coherent a pattern as possible in the light of the differences and seeming inconsistencies of the legislative and judicial strands that make up our antitrust fabric" in the hope

[3] Thus, in a dissent filed by Walter Adams, and concurred in by Raymond Dickey, the point is made that "to the extent that the limits of challenged union conduct are defined in terms of 'object' (i.e., intent), the proposal is subject to potential abuse." REPORT 305.

[4] REPORT 293.

[5] Ibid.

[6] REPORT 1.

[7] REPORT 294.

[8] "Reported cases indicate, however, that some unions have engaged in some practices aimed directly at commercial market restraints by fixing the kind or amount of products which may be sold in any area or their market price." REPORT 304.

that "clarification" will yield better guides to those concerned.[9] With respect to trade union practices, this "clarification" consists in showing that existing law deals to some extent with the subject, but, as the committee thinks, incompletely. The logic appears to be that existing law shows that the practices in question are not justifiable, and that the problem is simply to close gaps and round out enforcement. This is a plausible methodology, but it involves the risk of criticism that the exact dimensions of the problems under consideration have not been taken.[10]

The committee's approach makes its analysis of existing federal law very important. This consists of examination of "antitrust coverage" and of the "relevant provisions of the Labor-Management Relations Act of 1947." The committee has furnished us with a succinct and useful analysis of the pertinent statutes and decisions.

The Survey of Antitrust Coverage

The survey of antitrust coverage reviews, in about eight printed pages, the history and present status of trade unions under the Sherman Act. The *Report* begins with a summary of the 1908 decision of the Court in the *Danbury Hatters*[11] case, and treats next the judicial delimitation of sections 6 and 20 of the Clayton Act in the *Duplex*[12] and *Bedford Cut Stone*[13] cases. Proceeding chronologically, it finds that a key distinction emerged in the *Coronado*[14] and *Apex*[15] cases be-

[9] REPORT 4.

[10] Thus, the dissenting statement of Walter Adams states: "In dissenting, I am not unmindful of the concern over allegedly widespread labor abuses. I believe, however, that corrective legislation—if, when and by whomsoever proposed—should be based on a careful and comprehensive investigation of all the facts within the context of market reality." REPORT 305-306.

[11] Loewe v. Lawlor, 208 U.S. 274, 28 S.Ct. 301 (1908).

[12] Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S.Ct. 172 (1921). For comments on this case, see 21 COL. L. REV. 258 (1921); 34 HARV. L. REV. 880 at 885 (1921); 1 WIS. L. REV. 186 (1921); Mason, "The Labor Clauses of the Clayton Act," 18 AM. POL. SCI. REV. 489 (1924); and Powell, "The Supreme Court's Control Over the Issuance of Injunctions in Labor Disputes," 13 PROC. AM. POL. SCI. ASSN. 37 at 49-54 (1928).

[13] Bedford Cut Stone Co. v. Journeymen Stone Cutter's Assn., 274 U.S. 37, 47 S.Ct. 522 (1927).

[14] United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 42 S.Ct. 570 (1922); 268 U.S. 295, 45 S.Ct. 551 (1925).

[15] Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982 (1940). For comments on this case, see Brown, "The Apex Case and Its Effect Upon Labor Activities and the Anti-Trust Laws," 21 BOST. UNIV. L. REV. 48 (1941); Gregory, "The Sherman Act v. Labor," 8 UNIV. CHI. L. REV. 222 (1941); Cavers, "Labor v. Sherman Act," 8 UNIV. CHI. L. REV. 246 (1941); Landis, "The Apex Case," 26 CORN. L. Q. 191 (1941); Steffen, "Labor Activities in Restraint of Trade: The Apex Case," 50 YALE L. J. 787 (1941); and notes in 54 HARV. L. REV. 146 (1940), and 39 MICH. L. REV. 462 (1941).

tween union activities aimed at "furthering rightful union objectives" and activities aimed at suppressing commercial competition. Finally, it considers the limiting impact of *United States v. Hutcheson*[16] and the broadening impact of *Allen-Bradley*.[17] These and related cases are, of course, familiar to students of labor law. The committee essays to interpret, not to appraise, these decisions. In this group of cases the *Coronado-Apex, Hutcheson,* and *Allen-Bradley* trilogy are obviously the most important.

In *Coronado* and *Apex* the Court had to consider primary union concerted action, unlawful by standards of tort law,[18] directed for recognition or organizational purposes against a mine operator and a hosiery manufacturer, respectively. The violent conduct involved clearly was not immunized by section 20 of the Clayton Act. However, this fact alone did not, by inverse reasoning, require the conclusion that the Sherman Act could be applied. The Court held, in line with established doctrine, that the act was not designed to provide an additional federal remedy against violence affecting interstate commerce but, rather, to deal with conduct specifically aimed at market restrictions.[19] The Court ruled that this intent could not be predicated alone on the reduction through strike action of the supply of a product entering interstate commerce, but had to involve the specific purpose "to restrain or control the supply entering and moving in in-

[16] 312 U.S. 219, 61 S.Ct. 463 (1941). For discussions of this case see Cavers, "And What of the Apex Case Now?" 8 UNIV. CHI. L. REV. 516 (1941); Gregory, "The New Sherman-Clayton-Norris-LaGuardia Act," 8 UNIV. CHI. L. REV. 503 (1941); Carey, "The Apex and Hutcheson Cases," 25 MINN. L. REV. 915 (1941); Tunks, "A New Federal Charter for Trade Unionism," 41 COL. L. REV. 969 (1941); Teller, "Federal Intervention in Labor Disputes and Collective Bargaining—the Hutcheson Case," 40 MICH. L. REV. 24 (1941); Steffen, "Labor Activities in Restraint of Trade; The Hutcheson Case," 36 ILL. L. REV. 1 (1941); Nathanson and Wirtz, "The Hutcheson Case: Another View," 36 ILL. L. REV. 41 (1941); and notes in 41 COL. L. REV. 532 (1941), 29 GEO. L. J. 770 (1941), 9 GEO. WASH. L. REV. 724 (1941), and 89 UNIV. PA. L. REV. 827 (1941).

[17] Allen Bradley Co. v. Local Union No. 3, Intl. Brotherhood of Electrical Workers, 325 U.S. 797, 65 S.Ct. 1533 (1945). See Dodds, "The Supreme Court and Organized Labor, 1941-1945," 58 HARV. L. REV. 1018 (1945), and notes in 45 COL. L. REV. 272 (1945), 58 HARV. L. REV. 273 (1944), and 43 MICH L. REV. 818 (1945).

[18] In Coronado, the Union used tactics of physical violence, and in Apex the Union used the "sit-down" strike.

[19] In Apex, Justice Stone said, for the Court: "These cases [referring to the Coronado cases, among others] show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers.'" Apex Hosiery Co. v. Leader, 310 U.S. 469 at 512, 60 S.Ct. 982 (1940).

terstate commerce, or the price of it in interstate markets."[20] This formulation of the rule led to a retrial in *Coronado,* in which the required motivation was held to have been established. In *Apex* no such showing was made, so the action against the union was dismissed. "From this decision," according to the committee's analysis, "there emerges a distinction, deemed essential by this committee, between union activities aiming, on the one hand, at furthering rightful union objectives and, on the other hand, at directly 'suppressing [commercial] competition or fixing prices' of commercial products."[21] The committee evidently considers that this distinction may have continuing vitality despite *United States v. Hutcheson,* and, on this basis, it concludes, as its first proposition by way of summarizing existing law, that "where the union engages in fraud or violence and intends or achieves some direct commercial restraint," it "may be" vulnerable to Sherman Act proceedings.[22]

The committee has, I think, treated a little too cavalierly the *Coronado-Apex* cases. These cases did, indeed, narrow the scope of the Sherman Act in relation to trade union activities by emphasizing that liability had to be founded upon some direct and intentional connection between the union's activities and market restraint or control.[23] Yet the evidence which the Court ultimately found sufficient, in the second *Coronado* opinion, to establish liability was nothing more nor less than a concern of the embattled United Mine Workers that nonunion coal from the Bache-Denman mines upon entering the interstate market might seriously endanger wage scales prevailing in unionized mines.[24] It is significant, however, that the union's conduct was

[20] Ibid.

[21] REPORT 296.

[22] REPORT 299.

[23] This kind of intent was not required in the early interstate secondary boycott cases, such as Loewe v. Lawlor, 208 U.S. 274, 28 S.Ct. 301 (1908).

[24] Note the following, for example, from the second opinion:

"Part of the new evidence was an extract from the convention proceedings of District No. 21 at Fort Smith, Arkansas, in February, 1914, in which the delegates discussed the difficulties presented in their maintenance of the union scale in Arkansas, Oklahoma and Texas because of the keen competition from the non-union fields of Southern Colorado and the non-union fields of the South in Alabama and Tennessee. Stewart, the president, called attention to a new field in Oklahoma which he said would be a great competitor of union coal fields, and that District No. 21 would be forced to call a strike to bring into line certain operators in that section, and in the event that they did so the District would fight such a conflict to the bitter end regardless of cost. They also discussed a proposal to reduce the scale at the union mines at McCurtain, Oklahoma, which Stewart advocated, in order that the McCurtain operators might be put on a proper competitive basis in interstate markets with other operators. Several of the delegates at this convention took part in the riot of April 6th and the battle of July 17th following." 268 U.S. 295 at 306-307, 45 S.Ct. 551 (1925).

in the setting of a decision by the Coronado Company to abandon the union shop and the union wage scale. Basically, the union sought to compel the company to rescind this decision. Concern with the protection of employment standards in organized areas is surely present in many, if not most, union recognition campaigns. While Justice Stone reiterated with apparent approval in the *Apex* opinion the antitrust-labor formula stated in *Coronado,* there is reason to doubt, from other observations in his opinion, that the Court in 1940 would have held this element alone sufficient to establish Sherman Act liability.[25] Moreover, I doubt that this organizational motivation for concerted action is intended by the committee to be included as one of the "specific union activities which have as their direct object direct control of the market . . . ,"[26] and which should therefore be prohibited by law, for any such proposal would be inconsistent with the national "labor-management relations policy," which the committee accepts. I think we must credit the committee simply with approval of the general formulation of antitrust doctrine in *Coronado* and *Apex,* and not read its analysis and recommendation as an underwriting of the specific decision in *Coronado.*

A fairly persuasive argument can be made, as a matter of fact, that the Court in the later *Hutcheson* and *Allen-Bradley* cases actually moved away from the *Coronado-Apex* formula to a position which excludes union activities from antitrust coverage except where they are part of a concert with employers to accomplish objectives outlawed by the Sherman Act. In *Hutcheson* the Court used the now famous "inter-

[25] The following interesting paragraph appears in Justice Stone's opinion in Apex Hosiery Co. v. Leader, 310 U.S. 469 at 503-504, 60 S.Ct. 982 (1940):

"Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demand, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. *Appalachian Coals* v. *United States, supra,* 360. Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See *Levering & Garrigues Co.* v. *Morrin, supra;* cf. *American Foundries* case, *supra,* 209; *National Association of Window Glass Mfrs.* v. *United States,* 263 U.S. 403."

It may be questioned whether the United Mine Workers, in Coronado, was really seeking anything more than the "'elimination of price competition based on labor standards."

[26] REPORT 304.

lacing statutes" rationale to immunize peaceful jurisdictional strike and boycott conduct from liability under the Sherman Act. It reasoned that since such conduct is not enjoinable under section 4 of the Norris-LaGuardia Act, and since a primary purpose of the Norris Act was to repudiate the narrow construction which had been placed on section 20 of the Clayton Act, Congress must have intended that the general immunity granted by section 20 to kinds of conduct made nonenjoinable should be extended to conduct protected against injunction by the Norris Act.[27] The most interesting point about this analysis, for present purposes, lies in the fact that it was really unnecessary, for, as Justice Stone pointed out in his concurring opinion, union nonliability was clear under previous decisions of the Court, especially *Apex*. It seems reasonable, therefore, to conclude that Justice Frankfurter and his associates joining in the majority opinion, who did not even discuss the *Coronado* and *Apex* cases, deliberately chose an approach to union Sherman Act coverage different from and narrower than that laid down previously. The shift seems to have been away from a doctrine which required an examination of specific union objectives or intentions and toward a rule which inquires simply whether the union is engaging in peaceful concerted action in connection with a labor dispute. It is clear, at least, that the *Hutcheson* doctrine would reject antitrust coverage of union strike action for *Coronado*-type objectives in the absence of violence.

The question, then, is whether Sherman Act liability would conceivably be permitted to turn simply on the question whether union conduct in connection with a labor dispute is violent (hence enjoinable despite Norris Act limitations) or non-violent (hence nonenjoinable). The committee evidently believes that this may be so, despite the point emphasized in *Apex* and other cases that the Sherman Act was not designed simply to police violence. The 1945 decision in the *Allen-Bradley* case is the most recent general treatment of the question, and the language used in the opinion is therefore significant.

[27] The opinion, by Justice Frankfurter, states:

"The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction §20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Act is to be determined only by reading the Sherman Law and §20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." 312 U.S. 219 at 231, 61 S.Ct. 463 (1941).

The holding was that a union which had entered into formal agreements with manufacturers which were designed to protect an area price structure by excluding non-area products from the area market and to give the area union a monopoly on area work was equally guilty under the Sherman Act with the manufacturers, even though the union acted in pursuit of "their own interests as wage earners."[28] The Court reviewed the history of labor under the act (without, however, mentioning the *Coronado* cases). *Apex,* it said, left labor unions still subject to the act to " 'some extent not defined.' " The *Hutcheson* doctrine was restated approvingly, with the observation that the union action which lay in the background in *Allen-Bradley* (threats of peaceful strikes and boycotts) would not have been a violation of the Sherman Act had there been no "union-contractor-manufacturer combination," even though the union, acting alone, might, as the "natural consequence" of its activities, have produced an exclusion of outside products from the market. The Court concluded, "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."[29] The general tenor of the opinion justifies the view that the Court regarded traditional types of union concerted action as excluded from Sherman Act coverage where used in connection with a "labor dispute," except only where they are used specifically to aid a business combination. The Court could have stated expressly, either in *Hutcheson* or in *Allen-Bradley,* that the general exclusion of union action from the Sherman Act would be deemed forfeited if a union resorted to non-peaceful concerted action, but it did not do so.

The committee's next proposition is that commercial restraints by unions may be vulnerable to antitrust proceedings "where the union activity is not in the course of a labor dispute as defined in the Norris-LaGuardia Act." This suggests that even peaceful types of union concerted action may be subject to the Sherman Act in some circumstances. The *Report* cites the *Hawaiian Tuna Packers*[30] and *Columbia River Packers Association*[31] cases as the primary basis for this con-

[28] The opinion, by Justice Black, states: "Our problem in this case is therefore a very narrow one—do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which that Act prohibits?" 325 U.S. 797 at 801, 65 S.Ct. 1533 (1945).

[29] 325 U.S. 797 at 810, 65 S.Ct., 1533 (1945).

[30] Hawaiian Tuna Packers, Ltd. v. International Longshoremen and Warehousemen's Union, (D.C. Hawaii 1947) 72 F. Supp. 562.

[31] Columbia River Packer's Assn. v. Hinton, 315 U.S. 143, 62 S.Ct. 520 (1942).

clusion. In each of these cases there were involved, within the "union," individuals (fishermen) whom the Court considered to be independent entrepreneurs, not employees, and the Court viewed the cases as attempts to achieve price-fixing, not wage-fixing. This is not the occasion for a critical examination of the Court's independent enterpriser analysis, although this point is not free of difficulty as some of the cases (non-antitrust) involving services rather than products suggest.[32] One may agree with the committee, at least, that the *Hutcheson* doctrine does not seem to apply where there is no incident of an employment relationship at stake in the concerted action.

The committee suggests further that cases such as *Giboney v. Empire Storage Co.*[33] tend to show by analogy that "a dispute involving the object of direct market control may not constitute a 'labor dispute' within Norris-LaGuardia. . . ."[34] In the *Giboney* case the courts of Missouri held that picketing as part of a course of action designed to force an ice supplier to stop sales to non-union peddlers was enjoinable because the union sought thereby to force the supplier to violate the state's antitrust laws. The only question presented to the Supreme Court was whether this injunction was forbidden under the picketing-free speech principle declared in the *Thornhill*[35] case. Clearly, the Court, in holding that the civil rights of the union were not violated by the injunction, did not purport to say that similar union conduct involving interstate commerce would be violative of the Sherman Act or would be subject to injunction despite the Norris Act. The committee's point, however, may be simply that the Court, by indicating its willingness to permit a state to give effect to its antitrust policies in cases involving union activity, thereby suggested that it may be ready to narrow further the "labor dispute" definition of the Norris Act. This interpretation of the case is a bit fanciful.

The final proposition of the committee is that a union engaged in commercial restraints may be vulnerable to antitrust proceedings where it "combines with some nonlabor group to effect some direct commercial restraint."[36] This conclusion is clearly warranted by *Allen-Bradley*. Also warranted is the view that section 6 of the Norris

[32] See, e.g.: NLRB v. Hearst Publications, Inc., 322 U.S. 111, 64 S.Ct. 851 (1944); Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552 (1941); United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463 (1947).

[33] 336 U.S. 490, 69 S.Ct. 684 (1949).

[34] REPORT 298.

[35] Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940).

[36] REPORT 300.

Act, as construed in *United Brotherhood of Carpenters and Joiners of America v. United States*,[37] places serious obstacles in the path of the government or a private party in attempting to enforce against unions even those limited types of Sherman Act liability which still exist. The problem is to connect the union with the conduct of individual members or officers. It is noteworthy that the burden of proof here is much heavier than would be the case under ordinary agency principles or, indeed, under Taft-Hartley.[38] This fact underlines further the point that existing possibilities of antitrust coverage of trade union conduct are limited.

The Survey of Relevant Provisions of Taft-Hartley

In its brief survey of Taft-Hartley in relation to the problem of market restraints, the committee mentions only the so-called "boycott" provisions of the act and points out that these reach union activities aimed at suppressing commercial competition in some circumstances, but not in others. Such activities are covered where they involve the elements of liability prescribed by section 8(b)(4) of Title I. There must be a strike or an inducement of employees to strike or to refuse, in the course of their employment, to handle goods or perform services, where an object is some one of those proscribed. The broadest of the proscribed objects is stated in clause (A), and includes, in substance, forcing one employer to cease doing business with another person. "Commercial restraints," as defined by the committee, are not specificially a proscribed object, but it is clear that if a union, in order to effect a commercial restraint, engages, for example, in secondary strike action, it violates the act. Primary concerted action, secondary action by persons otherwise than in the course of their employment, and sec-

[37] 330 U.S. 395, 67 S.Ct. 775 (1947).

[38] Thus, §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 in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 47 Stat. L. 71 (1932), 29 U.S.C. (1952) §106.

On the other hand, §2 of Title I of the Labor-Management Relations Act of 1947, in expressing what amounts to standard agency doctrine, states:

"When used in this Act—

"(13) In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 67 Stat. L. 139, 29 U.S.C. (1952) §152 (13).

ondary action not undertaken by the use of strike threats (for example, direct appeals to consumers or suppliers) are not covered by this provision even though intended to achieve commercial restraints. It is therefore true, as the committee states, that commercial restraints are covered under some circumstances but not others.

The committee does not mention section 8(b)(6) of Title I. This so-called "anti-featherbedding provision" makes it an unfair labor practice for a union "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction for services which are not performed or not to be performed." Perhaps the committee's recommendations do not encompass union "featherbedding" demands. The proposal is to reach "only specific union activities which have as their direct object control of the market, such as fixing the kind or amount of products which may be used . . . ," and a demand for the employment of standby or unnecessary labor, as a response to technological change, could be considered as an indirect, rather than a direct, attempt to limit the kind of products which may be used. If so, the point is interesting in the light of the fact that the Thurman Arnold antitrust-labor policy as promulgated in 1939 contemplated that this type of union restraint should be subject to antitrust proceedings.[39] Possibly the committee considers the Taft-Hartley attack upon this problem to be adequate, or at least as expressing the extent of national policy, despite the limited interpretation of section 8(b)(6) which the Supreme Court has approved.[40]

In general it is the conclusion of the committee that the Taft-Hartley Act provides incomplete protection against union action which seeks commercial restraints. Moreover, the committee makes the point that, unlike the Sherman Act, proceedings under the Taft-Hartley Act may not be initiated by the government in the absence of formal complaints, and this is considered to be a weakness. There is no question as to the accuracy of the committee's judgment concerning the adequacy of Taft-Hartley from the point of view of the objectives which

[39] Among the types of "unreasonable restraint" which were thought to be "unquestionable violations of the Sherman Act" (as of 1939) were "unreasonable restraints designed to compel the hiring of useless and unnecessary labor." See Mr. Arnold's letter to the Central Labor Union, AFL, of Indianapolis, 5 LAB. REL. REP. 316-317 (1939), reprinted in SMITH'S CASES AND MATERIALS ON LABOR LAW, 2d ed., 408 (1953).

[40] In American Newspaper Publishers Assn. v. NLRB, 345 U.S. 100, 73 S.Ct. 552 (1953), and NLRB v. Gamble Enterprises, Inc., 345 U.S. 117, 73 S.Ct. 560 (1953), the Court agreed with the NLRB that §8(b)(6) should not be construed to reach demands by a union that the employer hire unwanted labor. Thus, unless the demand is that the employer pay for services not offered, the section will not apply.

the committee considers desirable. As the committee points out, the framers evidently believed that the new unfair labor practice provisions written into the law would reach broadly the types of undesirable union conduct which constituted the most serious problems. They wrote this law at a time when the extent of antitrust coverage of union activities was uncertain. Evidently, they elected not to focus specifically on the subject of commercial restraints.

The Committee's Conclusions and Recommendations

The committee recommends "appropriate legislation" to prohibit union efforts "at outright market control," to the extent that "such commercial restraints" are not effectively curbed either by the antitrust laws or by the Labor-Management Relations Act.[41] "Regarding such legislation," the committee makes three points: (a) the legislation "should cover only specific union activities" having as their "direct" object commercial restraints of the kinds mentioned; (b) the government should be empowered to proceed against such restraints "on its own initiative"; and (c) the legislation "should not contain provisions for private injunction." Thus, the committee takes no position on the question whether the proposed legislation should be incorporated in the antitrust laws, the Taft-Hartley Act, or a separate statute. Certain of the suggested remedial characteristics of the new law would depart from the pattern of either existing law.

The *Report* states, as its first recommendation, that the legislation "should cover only specific union activities which have as their direct object direct control of the market, such as fixing the kind or amount of products which may be used, produced or sold, their market price, the geographical area in which they may be sold, or the number of firms which may engage in their production or distribution."[42] The Adams dissent objects that "to the extent that the limits of challenged union conduct are defined in terms of 'object' (i.e., intent), the proposal is subject to potential abuse," and that "unlike the Taft-Hartley Act, it does not pinpoint specific malpractices in terms of a clearly delineated course of conduct."[43] Mr. Adams may be correct in his apprehensions. On the other hand, the committee may have in mind that the legislation should specify concretely the "specific union activities" which would be illegal. This point is left unclear by the *Report*, although it

[41] REPORT 304.
[42] Ibid.
[43] REPORT 305.

may be supposed that some considerable difficulty would be encountered in framing statutory language which would be more "specific."

Certainly it is apparent that a statutory formula in the language used in the recommendation would present some interesting litigious possibilities. Under the proposal union action, to be covered by the prohibition, would have to have as its "direct" object "direct" control of the market. By way of example, the use of the word "direct" as a dual modifier (or qualifier) could produce an interesting question whether the *Coronado* type of union conduct (tortious strike action intended either to force unionization, or to keep non-union products out of an interstate market in order to protect union wage scales) would be considered as having as a direct (or only an indirect) object direct (or only indirect) control of market price. Similarly, the question could arise whether the refusal of union workers to use certain labor-saving machinery (for example, the refusal of painters to use spray guns or rollers) would be considered as having as its direct object direct control of the "kind" of products produced or sold, or, on the other hand, as directly intended simply to preserve work for union members. Again, the question might be whether union-imposed production standards (daily or hourly work limitations, for example, in the case of craftsmen) could be considered a form of "direct control" of the "amount of products which may be used," and, if so, whether a "direct object" of the union action. Too broad and loose an application of the suggested standard could result in the attempted prohibition of some kinds of union action which stem from considerations of self-interest and which, though possibly prejudicial to the interests of others, are nevertheless within the general privilege now accorded to labor.

I do not suggest that these illustrative questions should be decided one way or the other. I do believe, however, that in the area of labor relations law it is especially important for the legislator to think out clearly the policy which he proposes to write into law, and put the policy into language which will not require very much "filling in" by the judiciary. If the statutory language must, perforce, be cast in general terms out of sheer necessity or desperation, then I suggest that the legislative history should show as completely as possible, perhaps by enumeration of concrete illustrative examples,[44] the kinds of cases

[44] See, for example, the detailed pre-enactment consideration of the contemplated impact of certain amendments of the Fair Labor Standards Act in Conference Report, H. Rep. 1453 on H.R. 5856, 81st Cong., 1st sess., pp. 14 and 15 (1949).

intended to be covered and excluded from coverage. Otherwise, the courts will have the difficult task of reconciling competing and at times conflicting general statutory policies. The history of our labor law shows that this kind of abdication of legislative responsibility is both unfair and unwise.

The committee has performed a useful function in its limited treatment of the "antitrust" aspects of trade unionism, even though its principal proposal needs further elucidation and examination. The committee has demonstrated that there are areas of uncertainty in our national policy which should be clarified, and its work should stimulate the further detailed consideration which the development of a sound policy will require.