HISTORICAL PERSPECTIVE:
SELECTED SUBJECTS IN
LABOR LAW

An Honors Thesis (ID 499)
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INTRODUCTION

Since the beginnings of the labor movement in the United States there has been a call for labor laws. Sometimes the cry was from the employer, who sought regulatory or punitive laws. Other times the unions themselves appealed for legal relief from oppressive employers. Congress and the Supreme Court were not deaf to either group and many labor laws have been enacted and interpreted.

The applicability of anti-trust legislation, contractual union security provisions and decertification procedures are of vital concern to the labor movement and management alike. This paper will trace the legal histories of these three areas and attempt to foresee what changes may be expected in the immediate future.

The major battle for any labor union is gaining the right to represent the workers. The first hurdle for labor unions in this country was receiving the legal right to bargain for the workers. The anti-trust laws blocked this attempt for some time. When union organization efforts were effectively removed from the jurisdiction of the trust-busters, they soon found themselves holding certification elections under the direction of the National Labor Relations Board (NLRB). Even a successful certification election does not guarantee the union any lasting security, however. To try to achieve a more secure position unions began bargaining for security clauses. These clauses have
become more important in recent bargaining talks. Often, union security provisions are the most valuable and hotly contested issues in contractural talks. Unions may feel more secure with such a provision in the contract, but, they may still lose their rights to bargain. The decertification election is a growing phenomenon. As management becomes more resourceful and determined, the incidence of union-busting increases.

ANTI-TRUST

The basic philosophy of the labor movement and collective bargaining is in direct conflict with the purpose of the anti-trust laws. The anti-trust laws seek to provide for free competition and eliminate the restraint of trade. The labor movement seeks to limit competition to areas other than the terms and conditions of employment for the laboring classes. Because these two ideals often come into conflict, it becomes the duty of the Supreme Court to balance the rights and allowable policies for each area.¹

The Sherman Act of 1890 is the major piece of anti-trust legislation. Section 1 makes the restraint of trade illegal and allows for fines and/or imprisonment for those convicted. Section 2 provides that:

Every person who shall monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor

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and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.  

Section 7 allows triple damages to be awarded to the injured party.

The Supreme Court first applied the Sherman Act to unions in the Danbury Hatters case of 1908 (Loewe v. Lawler, 208 U.S. 274). In 1902, the United Hatters of North America, attempting to organize the firm of Loewe & Company, called a strike. The organizational strike was a failure. The workers who went on strike represented a small percentage of the work force and were easily replaced by the company.

Confronted with failure, the union turned to indirect means of applying pressure. A nationwide boycott of Loewe hats was called. This action proved to be very successful. In one year the company claimed a loss of $85,000.  

The company, in 1903, filed suit under the Sherman Act naming the United Hatters and its members as defendants. In 1908, the Supreme Court ruled in favor of Loewe & Company stating that the boycott was a violation of the Sherman Act since the effect of the action was to restrain trade.  

Once the Sherman Act was held to be applicable to unions, anti-trust prosecutions of labor unions increased. The Sherman Act became another tool with which to fight unionization.
In 1914, labor thought they would finally receive some relief from the Sherman Act. Section 6 of the Clayton Act was sometimes referred to as labor's Magna Charta. Labor leaders of the time felt that Congress had finally put an end to their anti-trust woes in this section. Their elation proved to be premature, however.

The Supreme Court did not interpret section 6 in the same manner that unionists did. They did not interpret it as immunity from anti-trust legislation, in fact, they saw it as Congressional approval of their earlier decisions. Both the Court and President Wilson saw the measure as affirming the right of labor unions to organize and lawfully fulfill their legitimate objectives. Since these objectives were not clearly defined, the courts were left to decide which activities of the unions were legal and which were not.

The Court's interpretation of the Clayton Act not only didn't exempt unions from anti-trust legislation, it facilitated injunctive relief for the employer. Before the Clayton Act, only the government could obtain an injunction. The Clayton Act made it possible for private parties to obtain injunctions. In 1930, Edward Berman wrote that the Clayton Act "more than doubled the chances that labor activities would be hampered by the Sherman Act." 

The **Bedford Stone** case (Bedford Stone Co. v. Journeyman Stone Cutters Assoc., 274 U.S. 37 (1927)) is a landmark
decision. An employers association had formed which handled about 70% of all stone cut in the nation. They recognized and bargained with the Journeyman Stone Cutters Association until 1921.

In 1921, the employers association discontinued the bargaining relationship with the Stone Cutters and set up company unions. The loss of such a large share of the stone market would certainly mean dissolution to the Stone Cutters. In an attempt to re-organize, they added a clause to their constitution which would stop union employees from handling or installing non-union stone.

The Court found the Stone Cutters guilty of violating the Sherman Act. They concluded that the secondary boycott constituted restraint of trade.\(^6\)

Congress did not intend the Clayton Act to exempt labor unions from anti-trust legislation but, they did intend to ease the legal straitjackets which had been placed on unions. In the Norris-LaGuardia Act of 1932, Congress clearly defined the term labor dispute and limited the courts' power to issue injunctions.

Norris-LaGuardia defines and specifies that the following acts are not to be considered unlawful combinations:

(1) ceasing or refusing to perform any work or to remain in any relation of employment, (2) becoming or remaining a member of any labor organization, (3) giving publicity to any labor dispute by any method not involving fraud or violence, and (4) assembling peaceably to act
in promotion of their interests in a labor dispute.\textsuperscript{7} Congress thus spelled out its disapproval of the \textit{Danbury Hatters} and \textit{Bedford Stone} decisions. But, labor had felt false hope before and unionists were unsure of the Court's interpretation of the Norris-LaGuardia Act. The current rule-of-thumb is that unions acting alone in their own self interest, are usually not subject to anti-trust legislation. But, if unions act in conjunction with a non-labor group, they may be in violation of the Sherman Act.

In 1940 the Apex Hosiery Company experienced a long and violent strike. The Court described the activities as the "lawless invasion of the petitioner's plant and destruction of its property by force and violence of the most brutal and wanton character."\textsuperscript{8} The company chose to sue under the Sherman Act. The fact that the strike was unlawful was undeniable, but, was it a violation of the anti-trust laws?

The Court dismissed the suit on the grounds that the union's intent to restrain trade did not violate the Sherman Act. Violence alone does not bring a strike under the jurisdiction of anti-trust legislation. The Court did not exempt labor unions from the application of the Sherman Act, but, declared that "restraints not within the (Sherman) Act when achieved by peaceful means are not brought within its sweep merely because, without other differences, they are attended by violence."\textsuperscript{9}
The Allen Bradley decision (Allen Bradley Co. v. IBEW local 3, 325 U.S. 797) did apply the Sherman Act to labor unions. In 1945, IBEW local 3 acted in conjunction with the Allen Bradley Co. to monopolize the sale and installation of their equipment in New York.

The Court held that, because they did not act alone in their own interest, the union had violated the Sherman Act. They stated:

We may assume that such an agreement would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other businessmen from the area, and to charge the public prices above a competitive level. It is true that a victory of the union in its disputes, even had the union acted alone, might have added to the costs of the goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. But when the unions participated with a combination of businessmen who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

In certain cases the union may violate the Sherman Act even when acting alone in its own self interest. Such a case was decided in 1976. Plumbers Local 100 secured a commitment from Connell Construction Company, a general contractor, that Connell would not sub-contract work to non-union plumbers. The Plumbers did not represent the Connell employees, nor were they attempting to organize them.
The Court held that the contract constituted a "direct restraint of the business market (with) substantial anti-competitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions."  

Although the union was acting alone on its own behalf, it was determined to be guilty of violating the Sherman Act. The Court did stress that there would have been no violation had there been a collective bargaining relationship with Connell.  

It is difficult to determine the effect of Connell on future decisions. It may "foreshadow a stiffer standard for determining what constitutes wages and working conditions." If a more restrictive standard is adopted labor unions will once again become vulnerable to the Sherman Act and injunctions issued thereunder. However, if the Court follows its usual practice of not over-extrapolating its decisions, Connell will have little impact on future decisions. This is more likely to be the case. Connell merely establishes and defines the areas where a union may enforce agreements to a direct employer/employee relationship.

Application of the anti-trust laws has finally reached an equitable level. Congress did not intend the Sherman Act to stifle the organizational efforts of labor unions, but to halt the harmful, anti-competitive practices of business. Nor did Congress intend any group to be exempt from the Sherman Act if they were capable of monopolizing an area of trade. Thus, unions should not be immune from prosecution merely because they are labor unions. When
they violate the law and act with an employer to monopolize trade they are guilty under the Sherman Act and should be held responsible for their actions.

UNION SECURITY

Virtual exemption from the anti-trust laws offers unions some security. However, the issue of contractual union security provisions is far from settled. Union security has always been a controversial issue and remains so today. As unions face uncertain economic conditions union security becomes one of the most important bargaining issues more often.

Four basic forms of union security are used today: maintenance of membership, union shop, agency shop, and closed shop.

Maintenance of membership requires members of the union to remain as members for the duration of the collective bargaining agreement. An escape clause is usually present which allows employees to discontinue membership. This option is not available to new employees.\textsuperscript{14} There are many variations of this form of union security. Some contracts allow newly hired employees to escape within a 15 day period. Others require an application for union membership before hiring and allow for cancellation within a specified time period.\textsuperscript{15}
The maintenance of membership form of union security was widely used by the National War Labor Board (NWLB) during WWII. Unions demanded some form of security in exchange for no strike clauses in contracts. Unions which had previously negotiated closed or union shop agreements were allowed to continue these practices. President Roosevelt, however, had declared that the U.S. Government would not order closed shop agreements. The NWLB was forced to find a compromise.

The chemical, meatpacking and paper and pulp industries supplied the compromise. Agreements in these industries in the 30's contained maintenance of membership clauses. In 1941, the National Defense Mediation Board implemented the maintenance of membership device to help settle labor disputes. The NWLB adopted it as a method of appeasement where no agreement on closed or union shop existed before the War. Maintenance of membership is rarely used today.

The union shop requires membership in the union after a specified grace period. After the grace period the union will ask that the employee be discharged if they have not joined the union.

The agency shop is very similar to the union shop. The main difference is that in an agency shop arrangement the employee does not have to join the union, merely tender uniform dues and initiation fees.
Taft-Hartley modified the union shop arrangement somewhat. "Section 8(a)(3) states that the only condition whereby a worker may lose his job for non-membership in a union is for non-payment of dues." Unions are still free to negotiate union shop agreements but they are not legally able to ask for his discharge unless the employee is unwilling to tender his dues and fees. Unions are free to use internal discipline or to discharge a worker from union membership, but they may not endanger his employment relationship. Fines and other discipline must be levied against a worker as a union member, not as an employee or they interfere with the employment relationship and are illegal.

The Supreme Court, in 1963, ruled that for the purposes of the Taft-Hartley Act, the union shop and the agency shop were the same. In General Motors (NLRB v. GMC 373 U.S. 734) the court stated that "the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." This doctrine equalizes the union and agency shops since both may require only financial contributions, not actual membership.

The fourth form of union security is the closed shop. The most effective form of security, the closed shop requires membership in the union before consideration for employment. Thus, all employees must be union members. The only regulation of the closed shop prior to the Taft-Hartley Act was:
Hartley was that the union was required to represent a majority of workers in the bargaining unit.

Taft-Hartley outlawed the closed shop in section 8 (a)(3). This section makes it an unfair labor practice for an employer to hire employees based on union membership status. Section 8 (b)(2) further makes such action on the part of the union an unfair labor practice as long as the member has tendered periodic dues and initiation fees. 22

Despite the illegality of the closed shop, employers and unions continue to band together to adopt agreements which achieve the same effect. Contract provisions have been negotiated which provide for preference to applicants who have worked under the parties to the agreement. Such arrangements call for preference to union members where closed shop clauses existed previously. 23

In 1950, the National Labor Relations Board (NLRB) ruled that a hiring hall arrangement was legal, provided it was operated in a non-discriminatory manner. In the National Union of Marine Cooks and Stewards case (90 NLRB 167) the union asked that a hiring hall arrangement be established. The union declared that the hall would not discriminate on the basis of union membership. They did ask that preference be given to the currently employed and those with seniority. Retention of membership was not to be a factor. 24 The NLRB declared that a non-discriminatory hiring hall did not violate Taft-Hartley.
Agreements which, for all intents and purposes, offer closed shop security to unions may continue to exist. "The NLRB deals with this illegal form of union security only when formal charges are filed dealing with the issues. The Board does not have the authority to seek out violators of the law."\textsuperscript{25}

One exception to the doctrine of illegality of closed shop agreements is the construction industry. In 1959, in the Landrum-Griffin Act, Congress specifically exempted construction from prosecution. Landrum-Griffin allows pre-hire agreements and compulsory membership after 7 days employment. The reasoning behind such exemption is the nature of the industry. The construction industry is marked by short and intermittent employment. This structure makes provisions for the full 30 day grace period impractical.

Taft-Hartley also allows another exception in the area of union security. Section 14(b) allows union shop agreements (and by judicial interpretation, agency shop) except where prohibited by the state. This section allows the states to enact what is known as right-to-work legislation. Without 14(b) state laws outlawing union security clauses would be illegal due to federal supremacy.\textsuperscript{26}

Twenty states currently have right-to-work (RTW) laws which prohibit or limit union security. Those states are: Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North
Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.

Organized labor opposes RTW legislation because it threatens their continued existence. They have fought state legislation which would limit security arrangements. Their main battle, however, has been on the Federal level, where they are steadfast in their attempts to repeal section 14(b).

The unions major arguments are that allowing states to enact legislation leads to inconsistency and uncertainty. A second argument is more troublesome for the lawmakers. Unionists charge that 14(b) is in contravention to the stated public policy which supports collective bargaining. Congress and the Supreme Court have chosen to simply ignore this apparent contradiction.

If unions successfully repeal 14(b) all state actions concerning RTW would become null and void. The ability to legislate in this area stems exclusively from Taft-Hartley, not constitutional provision.

Supporters of RTW legislation place the foundations of the laws in the constitution. They claim that the RTW laws protect the right of association and its corollary right not to associate. It is their position that even the limited security offered by the Supreme Court's past decisions (only financial security is possible) is repugnant. Financial contributions are considered as a part of the freedom of speech under certain circumstances. Proponents feel they should also be considered free association by the same logic.
Currently a greater emphasis is being placed on union security. The auto industry is a prime example of this shift in emphasis.

The United Auto Workers and major auto manufacturers have agreed to open contract negotiations early this year in an attempt to reduce or eliminate the threat of a strike. The early negotiations and settlement are beneficial to both sides. The UAW will probably lose bargaining power and rank and file support as the recession deepens. The manufacturers hope to gain concessions which will help reduce the price of cars and bolster sagging sales.

"Labor unions have already begun making substantial concessions in an attempt to safeguard jobs." Chrysler workers agreed to cuts and changes in work rules which amounted to more than $1 billion. The Ford agreement allows workers with 15 or more years of seniority to receive one-half of their pay if they are laid off.

Similar concessions have occurred in many industries. In the airline industry "labor has made job security, not pay, its primary concern." For instance, Braniff employees took a "10% pay cut, and pilots have agreed to fly 10 extra hours per month, five of them without pay." The Rubber Workers have signed contracts which call for reductions amounting to $54.9 million over 3 years. Even the Teamsters, long noted as one of the most militant unions, have made concessions to major trucking companies. These concessions and concessions in other industries are attempts to save or preserve jobs.
The U.S. system of government is based on majority rule. Likewise, unions are, by definition, representative bodies and may not bargain for a group until the majority has voted in favor of such an arrangement. Furthermore, unions are charged with a duty of fair representation (DFR). DFR requires all employees in the bargaining unit, regardless of union membership, to be represented equally. Because unions are bound by DFR and thus subject to the problem of free riders (workers who receive benefits but do not support the union financially), it only seems fair that some sort of renumeration be made to the union. Union security provisions provide some protection to unions from these free riders.

Individualism is also a highly regarded value in the U.S. The RTW laws seem to protect the individuals, who, despite majority wishes, do not want any connection with unions. This also should be protected if we are to call ourselves a free nation.

As is often the case, the problem of balancing these two rights is very delicate. While it is the national policy to allow unions to exist, it is not policy to insure their continued acceptance, as will become clear in the next section. However, financial stability is not the same as security in this instance. Because the union must have the support of the majority of the bargaining unit employees to be recognized, they are consistent with the idea of democracy. The individual still has the right
to associate (or not associate) with the union because he is free to change employers. He may also simply refuse to join the union. The individual also has the right to deny the union the use of their funds for political activities. In *Machinists v. Street* (367 U.S. 740 (1961)), the Supreme Court ruled that an individual may demand a refund of his money if it is used for a political contribution which the member opposes. 31

RTW laws shift the balance which is achieved by Taft-Hartley and Supreme Court decisions dealing with union security. RTW subordinates group rights and emphasizes individual rights, rather than balancing them. Therefore, 14(b) should be repealed.

DECERTIFICATION/UNION BUSTING

Even if the union can successfully negotiate a union security clause they have only achieved temporary acceptance. Taft-Hartley allows for deauthorization and decertification elections which negate the effects of the union influence. In conjunction with these methods, employers are becoming more skilled in the area of union busting and union avoidance.

Deauthorization elections allow unions to repeal the union security clause of their contracts. A petition signed by a minimum of 30% of the bargaining unit is required to initiate action. A majority must be gained
in the election for the clause to be repealed. If the majority is achieved the union security clause is invalid. The rest of the contract is left intact.

A growing phenomenon in labor relations is the decertification election. In 1967, 624 decertification petitions were filed, 234 of which resulted in elections. In 1977, 1,867 petitions were filed and 849 elections were held. The rate at which unions are being decertified has increased continually in the last decade. In 1968, unions lost 65% of the decertification elections held. In 1977, 76% of the elections resulted in defeat for the union.

The major reason for these dramatic increases is the increasing willingness for management to learn and exercise their rights. In the past, managers were afraid to discuss the workings of the decertification process. Today, seminars are held which instruct managers in the legal details of decertification and the technical aspects of informing employees and conducting elections.

A decertification election has the effect of removing the union's right to bargain for the employees. The election is held under the same rules as a certification election.

A petition, which must show that 30% of the bargaining unit is interested in holding an election, "may be filed by unit employees or by an organization other than the currently recognized or certified organization representing employees." Employers may not file the petition. A petition may not be filed within one year of a certification
election or another decertification election. 38

A referendum or election will be held if the petition is found to be valid and if no unfair labor practice charges are filed. If a majority of bargaining unit members vote to decertify the union, all bargaining rights are revoked. The effect is the same in case of a tie. 39 Both parties may file objections to the election if they do so within 5 days. 40

A member of a union who files a decertification petition "may be expelled from membership, but is not subject to a fine."41 The NLRB has allowed such discipline due to the special nature of the decertification situation. Since the employee is filing for decertification, he will probably not be significantly effected by expulsion from the union. However, fines are a punitive measure and are thus not allowed. 42

An employer may provide an employee with some assistance, but he is strictly regulated. An employer may lawfully:

1) answer employee inquiries on how to decertify unions by directing the questioning employee to the Board; 2) respond to employee questions by informing the inquiring employee about the decertification process in an atmosphere free of coercion or other unfair labor practices; or 3) furnish an employee or an attorney representing a group of employees a list of employee names and addresses.

An employer may not:

1) obtain Board forms for employees interested in decertification; 2) provide services such as typing, phrasing of the petition, and use of
company letterhead for employees in their
decertification effort; or 3) initiate a
discussion on how or whether to decertify a
union or allow a supervisor or any individual
identified with management to do so.

Union busting and union avoidance seminars are being
held around the country. As management becomes more aware
of their rights and proficient in exercising their rights,
more decertification elections can be expected.

Decertification elections are a necessary balance for
dissatisfied union members. It is vital that the threat
of expulsion as the bargaining representative exists in
order to force unions to remain responsive to their members.
If such a threat were removed, unions would be permanent
fixtures with no need to deal with their members.

Increased awareness on the part of management also acts
as a check on union actions. As managers become more
familiar with the law, they are more likely to exercise their
rights and keep the union in line.

CONCLUSIONS

Labor law is a continual attempt to balance the rights
of labor and management. Anti-trust legislation seems to
have achieved a balance which is fair to all concerned.
Laws concerning union security are fragmented and inconsistent.
Such a system cannot achieve a balance. Preference for one
right over another is inevitable. The laws governing
decertification are only now being tested. It is presently
unclear how rights will be balanced in this area.

The future of the labor movement is far from rosey. There will probably not be any major changes in the anti-trust laws concerning unions. Union security will, more than likely, see many innovative ideas. Laws may even be changed in this area, but not in the very near future. Decertification laws may undergo some slight modifications, but they should remain intact. The incidence of decertification petitions and elections are expected to continue to climb. A deeper recession will only exacerbate the union's problems, both security and decertification wins will decrease with poor economic conditions.
FOOTNOTES


3. Taylor, p. 49.

4. ibid.

5. Taylor p. 54.


8. Taylor, p. 110.


10. Feldacker, p. 204.

11. Taylor, p. 120.


18. Feldacker, p. 236.


24. ibid.
25. ibid.
28. ibid.
29. ibid.
32. Taylor, p. 360.
35. ibid.
38. Taylor, p. 300.
40. ibid.
41. Taylor, p. 301.
42. ibid.
43. Krupman, p. 235.
44. Krupman, pp. 236-251.
SELECTED READINGS


