THE SHERMAN ACT v. LABOR

CHARLES O. GREGORY*

MR. JUSTICE STONE'S opinion in the *Apex* case⁵ has not been very instructive. He has made it clear that the Sherman Act was designed to prevent restraints on free competition in national markets, and was not devised to set the federal courts up as policing agencies to prevent those interferences with interstate transportation which local authorities should punish. But he does not say precisely what he means by protection of competition in interstate markets from the restraining activities of labor unions. His attempt to interpret and to reconcile earlier labor decisions of the Court under the Sherman Act, to correlate these with the business decisions and thereby to explain the Court's position in the *Apex* case is confusing. But lawyers are anxious to understand the Court's attitude toward labor union activities under the act; and this speculation is an endeavor to determine what that position may be.

We know that a strike which stops production and by this circumstance alone prevents continued shipment of goods into interstate commerce is not, without more, a violation of the act, no matter how illegal the strikers' technique may be.² And this is now true even if the strikers, in addition to stopping production by stopping work, deliberately prevent the employer under strike from shipping finished goods ready for shipment and designed for interstate markets, as long as it appears that they were doing this only to embarrass him and thereby more effectively to coerce him into granting their demands.³ Furthermore, the fact that the unionists

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*Associate Professor of Law, University of Chicago.

² *United Mine Workers v. Coronado Coal Co. (First Coronado case)*, 259 U.S. 344 (1922); *United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co. (Leather Workers' case)*, 265 U.S. 457 (1924).

³ *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). As will subsequently appear, the Second Coronado case might also be cited in support of this proposition. Note 5 infra and accompanying text.
are not even strikers, but are outsiders moving in on a plant which they seize in order to achieve their designs, does not affect the outcome in the instances just related. But if it appears that the unionists in these cases intended by the strike or seizure to keep the producer's non-union-made goods from entering national markets in order to prevent them from competing with the union-made goods of already unionized producers, a restraint on free competition in an interstate market is said to have occurred in violation of the Sherman Act.

This was at one time thought to be true even if the intent was not presently to keep out non-union-made goods by striking to prevent continued production or by seizure or other physical interference to prevent shipment of already existing non-union goods, but rather to insure that the future output of the producer would be only union goods by forcing him to unionize and not by interfering with the transportation or the manufacture for transportation of any sort of goods at all. Under this last conception, the ultimate aim to keep non-union goods from competing with union made goods in national markets was apparently the offense. Now, however, we have recent authority, also dictum but undoubtedly trustworthy, that such an aim as part of an organizational strike or seizure of a plant, no matter how clearly proved the intent may be to obviate non-union competition by unionization, is not an offense under the Sherman Act, but is only a normal union objective which we must accept as an inseparable feature of modern labor unionism itself.

The legal profession has, no doubt, always regarded the Brims case as the most obvious instance of organized labor's violation of the Sherman Act. In that case the union permitted itself to be used by two business combinations as the means of effecting the exclusion from the Chicago market of any wood trim made by out-of-city or -state non-union mills. This, of course, was the creation and maintenance of a monopoly for the benefit of unionized Chicago woodworking mills. But most lawyers have always thought, at least until the Apex decision, that union organizational boycotts which prevented shipments and sales of designated products in interstate commerce were equally offensive under the act. The three

4 Note 1 supra.
5 Coronado Coal Co. v. United Mine Workers (Second Coronado case), 268 U.S. 295 (1925).
6 United Mine Workers v. Coronado Coal Co. (First Coronado case), 259 U.S. 344 (1922).
7 Compare the remarks of Stone, J., in the Apex case, 310 U.S. 469, 503-4 (1940), quoted in the text infra pp. 242-43.
precedents were the Loewe, Duplex, and Bedford cases. In each a union created pressure on the buyers of a commodity in states other than that of production, effectively discouraging purchases and thus destroying the producer's interstate business. That the pressure was created in different ways in each of these cases seems unimportant; in each it was a peaceful secondary pressure based on a refusal to deal except upon stated terms.

On the face of it, and certainly before April, 1940, most lawyers would have supposed that a restraint, the very purpose of which was to destroy a producer's interstate sales, was an offense under the Sherman Act. Certainly they would if they had looked at it from the potential buyer's viewpoint. A contractor in the Bedford case whose employees threatened to strike if he continued to purchase and use out-of-state non-union-cut Bedford stone would certainly have a hard time understanding that he and other contractors similarly situated had not been deprived of access to an unrestricted interstate market. Their lawyers would have a hard time understanding just what Congress had in mind if the Sherman Act was not to prevent the occurrence of this sort of thing; for if the shipment of stone from Indiana to contractors in other states was not interstate commerce, and if conduct expressly designed to destroy orders, sales and shipments constituting such commerce was not a restraint on interstate commerce, then what would be?

There is little doubt that the Supreme Court's reaction in those cases coincided with the feelings of the contractors and their lawyers; it recognized a violation of the act, basing its decisions on the fact that the unions involved had created sanctions attempting to destroy continued commerce in the commodities of specified producers. In those cases the Court did not talk about the amounts of the commodities affected; nor did it talk about restraints on the general market for such commodities, substantial or other. Nothing was said about a general restriction of free competition leading to a market control affecting price or supply. Although any treatment of those cases clearly indicated a control which discriminated between the would-be purchasers and sellers of the commodities, such control did not appear to be for the purposes of rigging the market, as such, in any way, but simply to embarrass the producers into recognizing the union.

A year ago lawyers reading the previous three sentences would have asked: "Why should the Court have mentioned or stressed these factors

in its boycott opinions? Since the Sherman Act specifically applies to all restraints and says nothing about market controls, the control of prices or supplies, or discrimination as between would-be purchasers or sellers, why do you mention such things?" I would not have and did not mention them a year ago in an analysis I then wrote of the Sherman Act and its applications to union boycott activities. But Justice Stone said in the *Apex* case that these factors must be considered in all labor cases arising under the Sherman Act, albeit they were not stressed in the three leading boycott cases. He added, however, that they need not play a prominent part in determining whether or not the act has been violated if the "necessary effect" of the activity in question is a "substantial" restraint on the general market for the commodities affected. Such a "substantial" restraint, he remarked, was observable in each of the three boycott cases under discussion. Unfortunately, a careful reading of the reports indicates that the Court did not treat this as a necessary factor in its decisions of those cases.

Perhaps Justice Stone would have done better in the *Apex* case to have emphasized as the *ratio decidendi* of the three boycott cases the fact that the union activity resulted in discrimination as between would-be purchasers and sellers, thereby having on his side as a matter of record at least part of the *Leather Workers'* case dictum which he featured in his opinion. This item in the dictum undoubtedly had reference to the boycott situations in the *Loewe* and *Duplex* cases, the *Bedford* case not yet having been decided at that time. His reluctance to rely heavily on this

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11 *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 506 (1940). Mr. Justice Stone states: "It will be observed that in each of these cases [Loewe, Duplex, Bedford and Second Coronado] where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it." It might be observed that he also read considerable into these cases which seems absent from them when he said that the activities "were directed at control of the market."

12 Although it is apparent in the Loewe case that the Court could not have found evidence to support the conclusion that the fur hat market had been affected by the boycott, it did appear in the Duplex case that the complainant's factory was one of only four such plants feeding national markets; and in the Bedford case there were allegations indicating that the stone setters' boycott affected more than twenty quarries shipping about ten million dollars worth of cut stone annually into out-of-state markets.

13 265 U.S. 457, 476 (1924). This dictum reads as follows: "It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price, or discriminate as between its would-be purchasers, that the unlawful interference for its manufacture can be said directly to burden interstate commerce."
dictum was natural, however, in view of the result in the *Apex* case which he was attempting to rationalize. For he might have found it rather difficult to explain satisfactorily that whereas the boycotts, by preventing the continued orders and sales (as well as shipments), obviously discriminated as between would-be purchasers and sellers, the refusal of the "strikers" in the *Apex* case to let the producer send out to the trade a million and a half pairs of finished stockings was *not* such a discrimination. And while the subject of inconsistencies is up, it might be well to point out that Justice Stone would have found it quite as difficult to satisfy the profession that, whereas the effect of the three boycotts was substantially to restrain the general market for fur hats, printing presses and cut stone, the effect of the *Apex* "strike" and its incidental activities was *not* substantially to restrain the general market for silk stockings.

II

With the boycott cases before us, it would be a pity not to discuss them in light of the often-cited *Second Coronado* case. The relation is not obvious, because the types of conduct involved seem different, the *Coronado* case being merely a strike for the closed shop and not a blow "directly at" interstate commerce. The effect of keeping Coronado coal from being shipped, however, was probably much the same on the general coal market as the effect of keeping Apex stockings from being shipped was on the general hosiery market. For that matter, these two effects on the coal and stocking markets, respectively, were no doubt much the same as the effects of the hat, press and stone boycotts. At least we have no reason (as a matter of record) to assume the contrary. Yet the Court in the *First Coronado* case suggested, and in the *Second Coronado* case accepted, proof of actual or subjective intent on the part of the strikers to keep Coronado coal out of a national market for the purpose of preventing it (non-union-mined coal) from competing in that market with union-mined (higher-cost) coal of other operators as tantamount to a violation of the Sherman Act.

At the same time it has never stipulated such proof of intent to affect competition in a national market as a prerequisite to recognizing a violation of the act in the boycott cases. Why not? The answer made by those who like the result in the boycott cases is that the union boycotts *obviously* strike at, or deal with, interstate commerce. Unions achieved organiza-

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14 Note 5 supra and accompanying text. The boycott cases referred to are, of course, the Loewe, Duplex and Bedford cases.

15 259 U.S. 344, 408-9 (1922).
tional objectives through destroying interstate commerce in such a way that destruction of the commerce became their primary aim; whereas this is not so in the strike cases. Thus, the explanation goes, there is a vast difference between a mere strike that interferes with interstate commerce by stopping production and a boycott that by secondary pressure prevents would-be purchasers from buying and, hence, would-be sellers from selling in interstate commerce. I absolutely agree; but then I ask if the difference is just as vast when it appears that the strikers not only interfere with commerce by passively stopping production through cessation of work, but also deliberately prevent the shipment of completed goods intended for out-of-state markets, such prevention being purely a coercive pressure on the producer and not designed as a market control or interference with competition of any sort in any way. The answer to this question is, of course, not clear; certainly the producer and his customers in the latter case might have difficulty in appreciating the difference. Of course, it can be said by the still-skeptical supporters of the Court's precedents that in the boycott cases the would-be purchasers are prevented from selling, so that ordering and solicitation of orders has now become futile. The object of their reply is, apparently, that while a strike or seizure, even where it prevents shipment of already produced goods, is a coercion only on one person, the boycott in its ordinary form involves another person and hence interferes with commercial relations, becoming virtually a "restraint of trade." My only answer is that if they think this proves anything, how much good do they think it would have done the customers of Coronado or Apex to submit orders or to press for delivery on placed orders or for the two producers in question to have solicited orders during the periods their businesses were in control of the unions?

The idea I mean to convey in the previous paragraph appears briefly in the following sentences: The conduct of strikers, or of those who seize a plant, for the purpose of preventing its output from entering a national market, as distinguished from the purpose of merely preventing operation

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16 They do not distinguish between the boycott as it actually arose in the Bedford case, and the converse of that situation. Suppose that the employees of the Bedford Cut Stone Co. in Indiana were already unionized, and that the union was interested in organizing the non-union stone setters of certain general contractors in Colorado. If they refused to work at the unionized quarry on stone destined for the non-union general contractor in Colorado, it is said that such a case is no different from the Bedford case as it actually arose. But it is not so easy under such circumstances to see how the purchase by an out-of-state third party has been much more drastically affected than it would have been in a situation like the Apex case where the "strikers" refuse to allow already produced goods to be shipped. Each is an instance of organizational coercion, the only defensible difference being that between forbidding a sale and forbidding the consummation of a sale.
in order to embarrass the owner into compliance with a union demand, may not be an interference with a "market" in any sense of that term. Personally I don't believe it is. But I think it is just as much an interference with a "market" as a boycott is, be it a labor or a consumption boycott. Hence, my conclusion is that neither a strike, with or without deliberate forcible prevention of shipments, nor a boycott, so long as the one or the other is aimed merely at achieving some legitimate union end such as wages and hours or organization, occasions a violation of the Sherman Act in the sense indicated by Mr. Justice Stone.

III

The trump card of the still-skeptical lawyer at this point is probably that the Second Coronado case is bad, anyway—that it never should have been decided and that it introduced an element of confusion into the administration of the Sherman Act by making liability contingent on the proof of actual or subjective intent on the part of the strikers to restrain competition in a national market. But advancement of this argument has adroitly removed the arguer from the former role of supporting the Court's earlier decisions to that of supporting only the boycott decisions. Now, however much one may sympathize with this position, Supreme Court precedents cannot be lightly disregarded merely because they do not fit into a nice scheme. Instead of just calling the case "wrong," one should try to understand its place in a subtly-woven fabric of policy, particularly in view of the Court's complete re-affirmation of the Second Coronado case in the Apex decision itself. This factor is not thrown out by one who really wishes to find out where the Court is heading; for it may be an extremely important clue in the determination of an ultimate judicial position to be assumed by a group of Justices who themselves are not exactly sure of their destination.

Why did the Court take the position it assumed in the Coronado cases? The answer can only be guessed; but inquiry may go far toward narrowing the area of speculation. The Court was dealing with a statute that was vague enough to have justified its discard as unconstitutional for that reason. The Court chose, however, to try to make some sense out of it. Unimpressed by the few state court decisions in 1908 recognizing the legality of labor and other boycotts and having no independent love of such activities, the Court did not hesitate to treat the boycott in the Danbury Hatters' case as an illegal restraint on interstate commerce as soon as it was satisfied that Congress had intended to apply the Sherman Act to labor combinations. The restraint was obvious and boycotts—especial-
ly organizational labor boycotts—were unpopular. Contemporary decisions indicate that the Court did not like the spread of federated union organization—itself a threat to national markets through monopoly of labor and stabilization of production costs at a high level—although apparently little thought was given to the matter, probably because more seemed unnecessary. It now seems clear that the Court furthermore believed to be identical any interference with interstate commerce (1) as an act sufficient to justify the exercise of federal power or assumption of jurisdiction, and (2) as an act unlawful according to the terms of the statute in question. Nothing in the next labor decision—the Duplex case—affected this position; the only new feature of that action was the disposal of Sections 6 and 20 of the Clayton Act.7

Shortly thereafter, however, the Court had to deal with the Coronado case. For the first time it probably perceived a glimmering distinction between such an interference with interstate commerce as warranted the assumption of federal jurisdiction to regulate and such an interference as constituted an illegal restraint under the Sherman Act. Nothing had happened which would lead one to believe that Chief Justice Taft's court was any more favorably disposed toward widespread federated union organization than was Chief Justice Fuller's. Congress had double-crossed the unions in 1914 and the Court had helped to make this apparent in 1921.18

Failure of the great steel strike at the opening of the twenties and public opinion at that time give some indication that the unions were not very strong politically. Yet the Court could not declare a strike, as such, even at a plant engaged in production for national markets, to be a violation of the Sherman Act merely because it kept goods out of interstate commerce through enforced cessation of operations. If it did so in this case, even if it were a strike for the closed union shop, it would have to do it with all strikes having a similar effect on commerce—including those for wages and hours—unless it arbitrarily held that organizational strikes were bad as its reason for doing otherwise. But such frankness was impolitic even as far back as twenty years ago.


18 No attempt is made here to discuss whether or not Congress intended the Sherman Act to apply to situations involving labor. See the early chapters of Berman, Labor and the Sherman Act (1930); Boudin, The Sherman Act and Labor Disputes, 39 Col. L. Rev. 1283 (1939) and 40 Col. L. Rev. 14 (1940); Shulman, Labor and the Anti-trust Laws, 34 Ill. L. Rev. 769 (1940). To quell union demands, Congress passed the Clayton Act in 1914. In Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), the Court held that Sections 6 and 20 of the Clayton Act merely re-enacted the common law as everyone understood it to be.
At the same time the Court realized that if it could find a purpose or aim on the part of the strikers to restrain interstate commerce, particularly of a sort which would not be likely to occur in relatively desirable strikes for wages and hours, no "jurisdictional incident" would be necessary to recognize a violation under the act. As a clue to the finding of such a purpose or aim, the Court suggested proof that the strike was intended to unionize the Coronado mine in order thereby to keep non-union-mined coal from entering a national market and from competing therein with union-mined coal. For it was a matter of common knowledge that the United Mine Workers had to protect organized mines from non-union competition or lose the principal advantages it had gained in unionized mines. And no matter how much it may offend union partisans, this idea of the Court's to protect national markets from the wholesale restraint which universal unionism threatened to impose by eliminating from national trade such an important competitive factor as free non-union enterprise cannot be lightly dismissed. In the early twenties people were by no means convinced as they seem to be today that labor unionism was going to become universally organized in federated systems which could stabilize such an important cost item as wages throughout industry. Nor did they believe that union control over an important competitive factor in national markets was necessarily an inseparable feature of unionism itself as the present Supreme Court apparently thinks it is. If the Court had been taxed with this argument twenty years ago, its reply would have undoubtedly been: "Then so much the worse for labor unionism!" At any rate, I believe the Court knew what it wanted and I shall try to show how it went about achieving its objective.

For a different purpose the Court had already held that the mining was a local affair; and that would relieve the Court from having to hold illegal the prevention of continued interstate commerce incidentally occurring as a consequence of the stoppage of production caused by the mere cessation from work. Therefore, it would not have to hold that the union had violated the act unless the plaintiff could virtually prove a "conspiracy" to restrain competition in a national market. And if this "conspiracy" were proved, no actual physical restraint would be necessary to establish a violation. But this idea of the Court's in the First Coronado case has never become more than mere dictum. The coal company's counsel found evi-

29 Compare note 13 supra.
idence of intent to do something more than ultimately affect the nature of competition in the national market by unionizing the Coronado mines; evidence was presented indicating that the unionists intended by the strike to keep all Coronado coal *presently* out of the market, not merely as a means of embarrassing the mine owner into unionizing, but to keep his output from entering national markets at all, so that it would not compete with union-mined coal until union terms were met.\(^2\) This evidence that the union, by its strike and its destruction of coal cars and tipples, was not just trying to stop operations for organizational purposes, but was also trying to keep coal out of the market, must have made the Court feel that the situation was not much different from the boycott cases—entirely aside from the subjective intent of the unionists to prevent competition by non-union coal with union-mined coal. The difference was essentially a difference between a situation where strikers sit on a supply of already-manufactured goods and say: “You can’t ship these until you organize”; and a situation where an employee in another state says to his employer (a would-be purchaser): “If you buy and propose to use a shipment of goods from producer X, I and my fellow unionists won’t work for you.” The practical result in either case is the same, aside from the proof of subjective intent to affect a general market. The only difficulty in thus comparing the strike and boycott cases is that in the former the practical effect of interference with commerce which inevitably accompanies any effective strike in a plant producing for national markets may easily be mistaken for a deliberate keeping of goods out of interstate commerce by application of the legal rule that one is presumed to intend the consequences of acts deliberately performed.\(^3\) Therefore it would be desirable in all strike or seizure cases, before a violation could be shown (if, indeed, one ever can be shown hereafter), to require either proof of subjective intent that the unionists are holding up operations in order to keep products out of interstate markets, or objective proof that the unionists will not allow completed goods to enter interstate markets. The first alternative requires proof almost impossible to furnish unless counsel is lucky enough to find a traitor among the union leaders; and the second requires proof substantially of the sort offered by plaintiff’s counsel in the *Apex* case and thought insufficient by the Court.

\(^2\) This evidence is related in the report of the Second Coronado case, 268 U.S. 295, 302 (1925), and its effect is summed up and interpreted by the Court on page 310.

\(^3\) The Court made it amply clear in its opinions in the First and Second Coronado cases, and in the Leather Workers’ case, that it did not infer the intent deliberately to keep goods out of interstate commerce by application of this rule.
In criticism of what I have just said, however, it might be argued that I have made it appear that while a strike among production employees cannot occasion a violation of the Sherman Act through interfering with commerce by stopping production, a strike among the shipping employees would inevitably have this effect. But this is not what I have said. Rather, I have meant to indicate that any interference by anyone, employees or outsiders, with either production or shipment, intended to eliminate the plant in question as a unit contributing, in any way, its products to national markets, is different from an interference by the same group with continued production designed merely to force the producer into complying with a union's demands. This is, of course, a thin distinction, and I am not enthusiastic in its support. At the same time I think it quite necessary, for reasons already stated, that it should be made as long as there is any likelihood that the Court will continue to lend full force to the boycott cases after having established its position in the *Apex* case.

IV

From the foregoing it may be supposed that I think the *Apex* case was incorrectly decided. This is *not* my position, because I do not presume to understand the policies being developed by the present Court. But I do believe that the *Apex* case is absolutely inconsistent with the three boycott cases—*Loewe, Duplex* and *Bedford*—and with the *Second Coronado* case—assuming that I am correct in my belief that proof in this last case of subjective intent to restrain competition in a national market became unnecessary when it appeared that the strikers were deliberately trying to keep Coronado coal out of a national market for any purpose. The evidence was clear in the *Apex* case that the strikers refused to allow the shipment of a million and a half pairs of stockings already packed for interstate commerce. If this was not just as much an interference with interstate commerce as anything that happened in the three boycott cases, then practical reason, if any, has forsaken me. In other words, I am convinced that if the *Apex* case had arisen, say, eight or ten years ago, the Supreme Court of that time would certainly have decided it differently. Mr. Justice Hughes dissenting in the *Apex* case points out that the intent in the *Second Coronado* case to control competition in a national market was unnecessary to the decision in view of the new evidence that the strikers were undertaking to keep Coronado coal out of interstate commerce.\(^2^4\)

\(^2^4\) Compare the remarks of the Chief Justice where he says, "... whether the purpose was to maintain unionization in other States, or within the same State, would not seem material." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 524 (1940).
He quoted from that case: "But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."\(^{28}\) Later he remarked: "This Court has never heretofore decided that a direct and intentional obstruction or prevention of shipment of goods in interstate commerce was not a violation of the Sherman Act." And I believe that the Chief Justice's views are a far more accurate indication of what the Court would have decided a few years ago than are, say, Justice Stone's. For the Court was not then obsessed with this notion of protecting "freedom of competition in a national market," and addressed itself to the protection of interstate commerce within the currently accepted meaning of that term. Furthermore, treating the interference in the *Apex* case as a violation of the act would not have had the same results as so treating the interference in the *Leather Workers'* case.\(^{26}\) For the effectiveness of strikes can and should be made to depend only upon the economic embarrassment caused by stoppage of production and not upon the deliberate restraint of possible continued commercial relations with others.

V

By way of approaching a general consideration of what the *Apex* case means and of what the Court's present and future position on labor under the Sherman Act may be, it is necessary to consider some of the cases under discussion from what may be called a "jurisdictional point of view" before we consider the "real" general purpose of Congress in the Sherman Act, according to the social philosophy of the present Court. Since the decision in *NLRB v. Jones & Laughlin Steel Corp.*\(^{27}\) it is "clear" that Congress has power under the commerce clause to legislate with reference to local strikes and other union activities which affect what is called interstate commerce. In other words, Congress has power to regulate the local employment affairs of any industry engaged in producing for national markets, so that labor troubles at such plants will not tend to affect interstate commerce by holding up production and, hence, the fulfillment of commercial relations. Now this is just a new phase of the same old transportational concept of "commerce among the states" which the

\(^{28}\) Ibid., quoting from 268 U.S. 295, 310 (1925).

\(^{26}\) In the *Leather Workers'* case, the Court points out that the strikers "did nothing which in any way interfered with the interstate transportation or sales of the complainants' products." 265 U.S. 457, 471 (1924).

\(^{27}\) 301 U.S. 1 (1937).
Court has always adhered to; and, although the sound is not quite so clear, one with sharp ears can still hear the wheels clicking as they cross interstate boundaries. But it is a phase which had no currency until 1937; and we are therefore entitled to assume that Congress did not have it in mind when the Sherman Act was passed. Hence it seems fair to assume that the Court should not now use the Sherman Act to hold illegal any labor union activities tending to affect interstate commerce in any way, merely because such effect warrants the exercise of federal power if Congress wishes to prevent it. In other words, the profession should use great care not to identify effects on commerce sufficient to justify federal jurisdiction with violations of the Sherman Act. For Congress intended the Sherman Act for one purpose and the Wagner Act for a far different one.

Congress designed the Sherman Act for the purpose of protecting interstate markets from restraints on free competition involving controls of supply and price as well as discrimination as between would-be purchasers and sellers. The Wagner Act was enacted for the purpose of protecting interstate transportation (or commerce) from being held up by local strikes and labor troubles directly traceable to the anti-union policies of producers for national markets. Therefore it would be a perversion of the Sherman Act to use it against a union striking for wages and hours or for the closed shop, merely because the Court has agreed with Congress in connection with the Wagner Act that the interference with continued interstate commerce resulting from cessation of operations is harmful to the national economy and can be corrected by federal legislation. Indeed, the Wagner Act expressly provides that such strikes may still be called; but its general purpose remains: by salutary pressure on recalcitrant employers to correct the conditions leading to a recurrence of such strikes.

This does not mean, however, if a complete picture of Congress' purpose in the Sherman Act can be stated, that any union activity offending this purpose should not therefore be declared unlawful, regardless of the presence or absence of conduct which bears a physical relationship to interstate transportation. By parity of reasoning, unless the union activity in question does offend the agreed purpose of the Sherman Act, it should not be declared illegal under that act no matter how obviously it interferes with interstate transportation or commerce, if the latter word be preferred. For instance, in the Brims case the only union activity was a promise to refuse to work for any building contractor using non-union made wood trim. And in the Second Coronado case the only feature differentiating it

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29 Note 8 supra and accompanying text.
from the *First Coronado* and the *Leather Workers'* cases was proof that the union activity was for the purpose of keeping the coal from competing in a national market with union-mined coal. Thus on such ephemeral items as a promise and an intent is the application of the Sherman Act made to depend and *not* just upon physical interference with the movement of goods. At the same time it should be recognized that occurrences such as those in the *First Coronado* and *Leather Workers'* cases are the kinds of situations the Wagner Act is designed to prevent; yet that act does not set up a sanction against the strike, but against the employers whose anti-union inclinations lead labor to strike.

To return to the three boycott cases, I fear that lawyers who believe that these obvious restraints on interstate commerce are clearly illegal under the Sherman Act, while the obvious restraint on interstate commerce occurring in the *Apex* case is not, have fallen into the very pitfall against which I have just issued a warning. They have, in brief, confused the jurisdictional factor—the interference with commerce which perhaps too vividly portrays the justification for federal intervention—with the *actual* intervention which Congress intended to embark upon in the Sherman Act. This identification is natural and was practiced by the Court in all three of the boycott cases. It is odd, therefore, that it did not perceive the similarity between these cases and the prevention of shipment in the *Apex* case. But perhaps even the Supreme Court was misled by the "vast difference" between the effects of the boycotts on the one hand and of the *Apex* "strike" or seizure on the other. Internal evidence indicating that the Court was not altogether misled is the attempt to pass the three boycott cases off as instances of "substantial restraint" on the "general market" for fur hats, printing presses and cut stone, although there is no evidence of such restraints in the reports of those cases, and it is perfectly clear that the Court in those cases depended upon no such notion in reaching its decisions. Still, if the Court could establish this idea and could thus distinguish the stoppages of commerce in the boycott cases from that in the *Apex* case, it avoided having to decide for the plaintiff in the *Apex* case because of analogous precedents.

But if this is a true picture of the Court's tactics, it has climbed out of one hole only to enter another, unless it throws logic to the winds. First, let me assume that the Court did not arrive at its conclusion in the *Apex* case by rational deduction from precedents. It seems clear that the Court reached its result on extra-judicial considerations of policy not found on any printed page and not existing when the boycott cases were decided.

30. Note 11 supra.
In fact, a majority of the present Court feels far differently about labor unions and their activities than did the incumbents of the Court prior to and including the time of the Bedford decision, saving, of course, Holmes, Brandeis and Stone himself.\textsuperscript{31} Everybody knows this, and it might as well be taken into account as a factor in this argument. Having reached the result in the Apex case, the Court had to agree upon some explanation of this decision which would seem in accordance with established law, including its own precedents. Why, then, did the Court reaffirm the boycott cases so enthusiastically as still current law and at the same time introduce the seeming requirement of "substantial" restraint on the general market for the commodities concerned, if it intends in the future to hold labor boycotts of this general type to be violations of the Sherman Act? For everyone knows that "substantial effect" on the general market does not accompany these boycotts, at least in the mine-run of cases, and counsel for the labor unions are already so arguing in the lower federal courts with tolerable success. Personally, I cannot tell whether by this device the Court wanted to pay lip-service to the boycott cases as precedents and at the same time practically get rid of them; or whether it intends in the future to follow these precedents and to declare all similar boycotts to be violations of the Sherman Act. If the former alternative is true, it is a pity that the Court could not openly have overruled the boycott cases on the ground that they were instances of organizational pressure essentially no different from the prevention of shipment of already produced goods in the Apex case and were, similarly, not attempts or conspiracies to affect in any way the general market in the commodities concerned. Overruling these precedents "in effect" by refusing in the future to recognize "substantial" restraints on the general market in boycott cases would be an artificial recourse. Judge Learned Hand's ironical bow to this notion of "substantial effect" on the general market in a recent labor boycott case, United States v. Gold,\textsuperscript{32} certainly justifies this prediction. And if the Court occasionally does recognize "substantial" restraints, say, in a nation-wide boycott against the General Motors products which, because of the size of the producer, would undoubtedly be reflected in such market conditions as price and supply, the Court would be open to the accusation that it was administering the Sherman Act only for the protection of large producers.

On the other hand, if the Court does follow the three boycott cases to

\textsuperscript{31} Justice Stone concurred specially in the Bedford case in 1927; Justices Holmes and Brandeis dissented.

\textsuperscript{32} 115 F. (2d) 236 (C.C.A. 2d 1940).
the letter and forgets about this "substantial" restraint feature which is not present in those cases, anyway, it will have abandoned logic and will have exposed itself to the accusation of inconsistency until it overrules the *Apex* case and re-defines just what it means when it says that the Sherman Act was intended only to protect *national markets*, as such. Its only "logical" way out of such an inconsistency with the *Apex* result is to declare that there is a difference between strikers sitting on already produced goods to prevent shipment to consignees and strikers who refuse to work for an employer if he purchases and offers to use goods from a specified producer in another state.

VI

Some years ago in his *Bedford* dissent,33 Justice Brandeis expounded an arresting notion concerning the application of the Sherman Act to the tactics of organized labor. This point of view has now become extremely important to understand, not only because Assistant Attorney-General Arnold has gone out of his way to incorporate it as part of his policy toward union activities,34 but also because it has become a dominant consideration in the political and social atmosphere of the times. Brandeis thought it a mistake to declare organizational boycotts to be violations of the Sherman Act merely because they involved restraints upon the interstate commerce of a non-union producer and of his out-of-state customers. I feel certain that his attitude was prompted by the same considerations which have led the present Court in the *Apex* case to decide that the seizure of the Apex plant and the prevention of shipments of hosiery did not constitute a violation of the act. With the support of a few state supreme courts and many economists and lawyers, Brandeis asserted that the labor secondary boycott is just as lawful as the strike, whether it be used as a bargaining or as an organizational device. He pointed out that, like the strike, the boycott was merely an organized refusal to deal with another, except upon stated terms. A consumption boycott, such as that in the *Loewe* case, is a special type of refusal to deal, that is, a refusal to purchase. A labor boycott, such as that in the *Bedford* case, is likewise a special type of refusal to deal, that is, a refusal to work. Such boycotts are, on the whole, much more peaceful than strikes and they are certainly more effective as an organizing device. Indeed, they are frequently the only practicable device for organizing some

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33 274 U.S. 37, 56 (1927).

34 For a brief summary of this policy, see Arnold, The Bottlenecks of Business c. xi, especially at 249-53 (1940).
units of industry in situations where strikes or picket lines would be futile; and they are peculiarly valuable for this very reason in organizing large plants, the output of which is not bought locally. By declaring this organizational device to be unlawful under the Sherman Act, Brandeis feared that the Supreme Court was virtually depriving the unions of the right to press organization into new fields in much the same way as it would have been depriving the unions of the right to strike for hours and wages had it decided differently in the *First Coronado* and *Leather Workers'* cases.

It is noteworthy that Brandeis agreed with the balance of the Court in the *Second Coronado* and the *Brims* cases. Perhaps a safe inference from this fact is that he regarded the Sherman Act as a sanction devised to protect national markets from the imposition of competitive restraints on it *as such* and that he regarded the interferences with interstate commerce caused by the boycotts to be merely "incidental" and "indirect" in precisely the same sense that the majority of the Court so regarded the conceded restraints on interstate commerce occurring in the *First Coronado* and *Leather Workers'* cases. As I said above, the only distinction between the two type situations was that the boycotts were more obviously restraints; but the majority of the Court was misled by this obviousness into confusing the kind of restraint that warranted federal jurisdiction to regulate with the character of restraint the Sherman Act was designed to prevent; whereas Brandeis keenly perceived that this was only a difference of degree and not a real distinction at all. And the *Retail Lumber Dealers'* case, on which Stone depended so much in the *Apex* case, is distinguishable from the boycott cases because there the record showed that the association was attempting to control local markets as the "natural" monopolies of retailers and to exclude the competition of non-members.

A possible weakness with Brandeis' position as I have hypothetically developed it is its exposure to a kind of dialectical transposition. It may be said that in the *Leather Workers'* case the strike did cause an interference with interstate commerce but that, since strikes are an accepted form of union activity, the otherwise illegal restraint must be accepted as an incident of justifiable conduct. This may appropriately be called the argument of "justification." The reason, then, why boycotts causing restraints on interstate commerce are declared illegal under the act is that they are not an accepted form of legitimate union activity and are, therefore, not "justifiable." But this argument may not carry much weight in 1941 because most of our liberal judges probably feel the way Brandeis does about

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35 Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U. S. 600 (1914).
union organizational boycotts and they are likely to assume the position that since each technique—the strike and the boycott—is a “justifiable” organizing device, then each may be used with impunity as far as the Sherman Act is concerned, unless, of course, its use precipitates a “substantial” restraint of the general market—which practically means an almost completely unrestricted scope for union organizational activities against national industries. For it can be proved without much difficulty that a federated union’s interest in organizing a plant by boycotting its products in other states is just as real as the interest of a group of employees, or of the same federated union, for that matter, seeking to organize the same plant by strike or seizure.  

VII

Mr. Arnold’s statement of policy in proceeding against the activities of labor unions is to some extent a shrewd forecast of the direction in which the Court appears to be going. Unlike the Court, he is not bound to follow, to “distinguish” or to overrule any institutional precedents. Nor does the Assistant Attorney-General have to worry about the kinds of cases which private litigants may press under claims for injunctions or triple damages. He may guess which way the wind, political or social, is blowing and chart his course accordingly. It seems more than coincidence or whim that he has adopted the views of Justice Brandeis as part of his policy. Although he has never said as much, it looks as if he had surmised that the administration, and perhaps the present Court, favors the view that the organizational activities of labor unions should be immune from attack unless it appears that such activities are aimed not so much at “legitimate” organizational activities as at control of commodities markets. And if this analysis is correct, it looks as if the purpose and aim of union

36 By now it is acknowledged by progressive courts that a union may follow a non-union-made product into the hands of those who intend to use the commodity as a means of furthering their own enterprises. This proposition has reference not only to the “community of interest” existing among different branches of a federated union to further the making and using of certain products with the assistance of union labor, but also has reference to the “unity of interest” existing between a non-union producer and one who uses or sells the non-union products in furtherance of the latter’s own enterprise and to give him an advantage over his competitors who purchase only union-made products. This “unity of interest,” most graphically set forth in recent years by the New York Court of Appeals in Goldfinger v. Feintuch, 276 N.Y. 281, 12 N.E. (2d) 910 (1937), is such as to render the enterpriser dealing in the non-union product—at least for most practical purposes—just as “unfair” to organized labor as is the non-union producer himself. For a further discussion of this point, see 8 Univ. Chi. L. Rev. 356 (1941), noting People v. Muller, 174 Misc. 872, 27 N.Y.S. (2d) 1003 (S. Ct. 1940).
activities affecting interstate commerce may be the Court's focal point of inquiry in its future administration of the Sherman Act in the labor field. This does not imply, of course, that the Court may not ever treat labor boycotts affecting interstate commerce as violations of the Sherman Act. It merely signifies that the Court may not treat some labor union boycotts as violations, namely, those concerned only with organization such as the Loewe, Duplex and Bedford cases. It means by implication that the Court will treat as violations of the Sherman Act other labor union boycotts having immediate effects on the market identical to the ones just mentioned, and in addition, those designed to keep certain types of commodities permanently out of the market (not because they are non-union-made but because they are innovations tending to upset vested union interests). Since the aim of such boycotts is destruction of the market for products beneficial to consumers, it will not be difficult to establish their illegality under Justice Stone's "protection of the market" criterion.

But Mr. Arnold's program is more extensive than protection of the market as such. He believes that by indictment he may prevent specific union practices which he thinks harmful to national economy. However, it is difficult to see how some of these practices—like jurisdictional disputes, whether between two craft unions or between rival federated unions—can be said to affect national markets any more seriously than the usual self-help coercive organizational tactics. Perhaps Mr. Arnold expects the Court to draw the distinction between "justifiable" and "unjustifiable" union practices adverted to above. Under this approach, conceding that all such practices do interfere with and restrain interstate commerce, he might assume that the Court would declare unlawful those union activities which even Justice Brandeis would hesitate to defend. Such an assumption perhaps suggests the amusing spectacle of trying to explain the "justification" for the lawless invasion of the Apex plant and destruction of its property. But the drawback to such expectations is the present Court's avowed policy to use the Sherman Act only for the protection of national markets, as such, whatever that might mean. To use it as Mr. Arnold has hypothetically been made to suggest in this article would be to abandon the "protection of market" criterion and to assume the function of policing interstate commerce, a task which the Court in the Apex case most emphatically said it would not undertake in the name of the Sherman Act.

37 See particularly United States v. Hutcheson, 32 F. Supp. 600 (Mo. 1940), probable juris-diction noted, 310 U.S. 609 (1940); argued before the Supreme Court on December 10, 1940. 9 U.S.L. Week 3154 (1940).
It is high time for us to determine, if possible, just what is the Court's present policy toward the activities of labor unions under the Sherman Act in the light of the *Apex* case. Justice Stone, in describing the scope of the act, says: "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." He repeatedly stresses the purpose to maintain freedom of competition, remarking, variously, that "some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies" under the act and that the restraints prohibited were "only those which are so substantial as to affect market prices . . . . or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." In addition he makes it clear that the Supreme Court has never applied the act "as a means of policing interstate transportation" and goes on in the same sentence to state the issue of the *Apex* case to be "whether a conspiracy of strikers in a labor dispute to stop the operation of the employers' factory in order to enforce their demands against the employer" is the sort of thing at which the act is aimed "even though . . . . the only effect on trade or commerce was to prevent substantial shipments interstate by the employer"—a most dubious characterization of the evidence.

The present Court's concern for freedom of competition in national markets is patent; but it is no more obvious than its lack of concern for obstructions or interferences to interstate transportation in contradistinction to marketing. The vice of fictional terms like "freedom of competition" and "market" is that they have no precise meaning and may assume different significances in different contexts. But whatever it means by "freedom of competition" in "national markets," it is perfectly clear that in the *Apex* case the Court for the first time has taken the position that the wholesale restriction of competition in national markets involved in activities of a federated labor union has the unqualified approval of the Government. This means that from now on the unions, by establishing the universal closed shop in national industries, may use their collective-bargaining power to impose a fixed-wage system throughout each industry,
thereby eliminating one of the most important competitive factors in modern industrial and commercial life.\(^4\) The economic results of such a position may possibly be to discourage competition among existing units of production, freezing costs at a relatively high level and cutting down the amount of goods produced because of the high labor costs. Another possible consequence is the relative unlikelihood of new enterprise as a means of affording some sort of competition in national markets. The previous statement is concededly hypothetical; yet that part of it dealing with the union desire to stabilize wage conditions throughout national industries is certainly true. This desire, as every student of labor problems is aware, has become a necessity, since labor unionism as a device for securing advantages to its members cannot stand non-union or free competition and continue to exist. And it is equally clear that, broadly speaking, unionized producers cannot stand the competition of non-union producers and continue to remain solvent, unless they break with the unions. Now from this we may infer that federated unionism and its drive to eliminate the competition of non-union products from national markets has a great deal to do with control of prices; and if output declines with rising costs, supply in national markets is likely to suffer. Yet the Supreme Court, while expounding the Sherman Act as the bulwark of free competition in national markets, frankly concedes that the unions may carry out their anti-competition economic program to the full. The legal profession is, therefore, naturally puzzled over the meaning of Justice Stone's language concerning market protection in the *Apex* case.

How the Court happened to arrive at a position so far removed from that set forth by Chief Justice Taft in the *First Coronado* case is hard to say. The passage of years, with general changes of economic and social thought, together with the greatly increased political power of organized labor and with genuinely different judicial conceptions of the originally intended application of the Sherman Act to labor unions, have no doubt had something to do with it. But the Court's formal method of embracing this position leads one to suspect that Section 6 of the Clayton Act is not as dead as it was thought to have been after the *Duplex* case. Justice Stone acknowledged this new position in the *Apex* case with the following sentences (shortly after having quoted Section 6 of the Clayton Act): "Since, in order to render a labor combination effective it must eliminate

\(^4\) This is not meant to imply, of course, that the Supreme Court would formerly have regarded such a union agreement as unlawful under the Sherman Act unless, perhaps, the circumstances were similar to those which the Court in the Coronado case said would lead to a violation of the act.
the competition from non-union made goods, . . . . 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. 242 It seems likely that the Court defines labor unions as organizations, the normal objectives of which are to do whatever is necessary for their economic survival, and then reasons that Congress, having accepted labor unions in Section 6 of the Clayton Act, has also accepted the inseparable attributes of the unions as part of them. Chief Justice Taft's court certainly did not do so; but in his time it is clear that the federal courts did not look upon unions as organizations whose legitimate function was to restrain competition in any way.

Justice Stone did drop a footnote 43 indicating that Congress in the Wagner Act had apparently approved the universal closed union shop throughout national industries and hence had by implication approved the elimination of non-union competition which is one of the primary objectives of universal organization. And it is hard to deny the force of this implication if, indeed, it be clear that Congress had envisaged universal closed shop organizations under the act. Certainly Congress must have realized that the then existing national federated unions would press for recognition under the act and would try to use it for extending organization. But it is clear in the Wagner Act that Congress also intended to leave all questions of organization ultimately up to the employees in particular bargaining units of industry. In view of the allowances made in the act for independent plant unionism or for rejecting unionism altogether it is, therefore, far from certain that Congress either wanted or even contemplated the possibility of the universal closed shop, much less the incidental elimination of all non-union competition in national markets. Anyhow, there seems to be sufficient doubt about this to make assumption by the Court of this view by implication a questionable step. In any event, the availability to unions of parliamentary organizational methods under the Wagner Act, which might with effective administration result in a certain amount of healthful independent plant unionism, or even non-unionism, should perhaps have kept the Court from so openly encouraging the established federated unions to achieve closed national union commodities markets by coercive self-help methods.

242 310 U.S. 469, 503-4 (1940), citing, inter alia, American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921), and Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933).

43 310 U.S. 469, 504 n. 24 (1940).
This leads us naturally to a final reconsideration of the secondary boycott technique—unionism's most effective peaceful organizing device. In the light of preceding discussion, serious doubts concerning the legality under the Sherman Act of boycotts interfering with interstate sales and shipments of goods as a means of creating organizational pressure seem unlikely. Attacking purely organizational boycotts under the Sherman Act seems futile if success depends upon protecting free competition in national markets in accordance with the present Court's ideas of such market protection. Nevertheless, the Court may yet be able to steer a course between the wholesale union restraint of a competitive commodities market by universal federated unionism and particular restraints affecting specific producers and their customers.

The federated unions, of course, can hardly be expected to admit this. Both the American Federation of Labor and the Congress of Industrial Organizations have condemned Mr. Arnold's policy, although he has not prosecuted even union boycotts which disrupt interstate commerce and free access to markets as long as their ultimate objective is organization. This position of the federated unions seems unreasonable, for they could hardly expect Mr. Arnold to adopt a more extreme position than even Justice Brandeis has taken. But they have interpreted Mr. Arnold's recognition of Justice Brandeis' view as proof that the mere physical "restraining effect" of boycotts is not unlawful under the Sherman Act. They have openly accused Mr. Arnold of using the Sherman Act to prevent organized labor's use of coercive tactics to achieve ends which he believes to be "bad," such as preventing the sale and use of new materials and equipment or compelling employers to hire unnecessary men or achieving the advantages sought in jurisdictional disputes. Since in his prosecutions of these cases he relies on much the same types of restraints on commerce as occur in the situations he refuses to indict, they point out that by such refusal he tacitly concedes that no offense exists in any of these situations under the act. What he is doing, they claim, is perverting the Sherman Act to stop what he believes to be socially bad conduct, a purpose for which the act was never designed. Their reasoning is simple: if a restraint on commerce is unlawful under the Sherman Act, it is unlawful

44 Such a charge was heard by the writer while listening to the argument of Mr. Charles H. Tuttle, counsel for the carpenters' union, in an anti-trust suit brought against an AFL union for refusing to handle a product produced by a CIO union. United States v. United Brotherhood of Carpenters and Joiners of America, argued before Judge Woodward in the Federal District Court for the Northern District of Illinois, in November, 1940.
aside from the objective sought by the restraint; and if the restraint having certain effects on commerce is not unlawful in view of one set of objectives, then it is not unlawful in view of any objective. To decide otherwise, they conclude, is to make the Sherman Act a mere policing measure.

This apparent confusion on the part of union lawyers between effects such as give the Federal Government jurisdiction to act and the character of effects such as render the restraints illegal under the Sherman Act is, perhaps, excusable; for the chances are that the bulk of the bar has identified the two in interpreting the statute and finds it far from easy to answer the conundrum: when is a restraint not a restraint. And if the Court ever decides that labor boycotts used as they were in the Loewe, Duplex, and Bedford cases are illegal restraints under the Sherman Act, the union lawyers are with some justice going to wonder just what it is that differentiates such restraints from that in the Apex case.

Even if the Court does not overrule the Apex case, it may still narrow its construction of market protection as the criterion for applying the Sherman Act to labor. Thin as it may be, there is a distinction between prevention of commerce by seizure or strike at the producer's plant, such as the refusal to allow shipment of the Apex stockings, and prevention of commerce by boycott pressure brought directly either on the producer's customers as coercion on the producer or brought directly on the producer as coercion on the producer's customers. In each situation producers and customers are affected in their commercial relations. But in the former this effect appears to be exercised only on transportation, and in the latter it is obviously exercised on sales as such, transactions more patently typical of commercial relations and the market than is mere transportation. The Court may say that while it would not use the act to "police" interferences with transportation, it will use it to protect "market" transactions from attempts to control supply and to restrain "free competition." And those who acknowledge trade unionism as a legitimate enterprise for gain but who still want to see curbed its practices which disrupt the free buying and selling in an unrestricted interstate market, should be satisfied.45

45 Justice Black's opinion in the recent Lake Valley case (Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 61 S. Ct. 122 (1940)) has been regarded by some as a hopeful indication that the Supreme Court still intends to use the Sherman Act as a means of controlling the activities of labor in appropriate circumstances. It was made clear in that case that the Court was only denying injunctive relief in accordance with the plain wording of the Norris-LaGuardia Act and its broad definition of "labor dispute," and was not passing on the merits of the suit as a violation of the Sherman Act.