RESTRAINT OF TRADE—EMPLOYEES OR ENTERPRISERS?

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THROUGHOUT the history of the use of federal injunctions in labor disputes, one doctrinal weapon stands out from the entire arsenal used by the courts to promote the ends of "judge-made law" over the policy of Congress, as expressed in the Clayton Act:¹ the denial of the employee-employer relationship. By means of judicial manipulation of the underlying jurisdictional facts of case after case, the major premise expressed by Congress—that the Sherman Act² does not apply to labor, and that certain recognized activities of organized labor groups were simply not enjoined in federal courts—remained for the most part a dead letter. With the passage of the Norris-La Guardia Act, however, the tide was finally turned, and the term "labor dispute" was extended to include any controversy "regardless of whether or not the disputants stand in the proximate relation of employer and employee."³ Then with the accession of the new Court in the late thirties, such "hospitable scope" was given to the congressional purpose as to "draw the sting of criminality"⁴ from any and all activities of labor unions peaceably acting in self-interest, whether or not such activity resulted in monopoly in the product market or a setback to the aims of the competitive economy.

In the face of this hospitable and all-inclusive attitude on the part of the present Court, it is indeed surprising to find the old battle-ax of the employee-employer relationship once again brought into play. At the same time that a clean bill of health was granted to the hod carriers,⁵ the carpenters,⁶ and their ilk, a decision of the Court which for the most part has remained unnoticed placed a significant limitation on the scope of the acts exempting labor by adding a new restriction to the definition of the

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¹ 38 Stat. 730 (1914), 15 U.S.C.A. § 17 (1941).

² 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1941).

³ 47 Stat. 70 (1932), 29 U.S.C.A. § 101 (1947). See note 71 *infra*.

⁴ *United States v. Hutcheson*, 312 U.S. 219 (1941).

⁵ *United States v. International Hod Carriers & Common Laborers' District Council*, 313 U.S. 539 (1941).

⁶ *United States v. United Brotherhood of Carpenters and Joiners*, 313 U.S. 539 (1941).

employment relationship. The fact that in this instance it was done by a Court which is sympathetic to the objectives of organized labor and zealous in giving effect to legislative intent makes the decision all the more noteworthy.

THE MATRIX OF THE CONTROVERSY

On February 2, 1942, a unanimous Court, speaking through Justice Black, in a suit by a West Coast cannery against a CIO Fishermen's Union, declared the union, which was the collective bargaining agent for the fishermen from whom the company obtained its fish, a combination in restraint of trade and awarded the company treble damages under the Sherman Act. Reason: The disputants did not stand in the proximate relation of employer and employee.⁷ Three years later, on the authority of this decision, the Circuit Court of Appeals for the Second Circuit in its mandate to the lower court in a similar suit, denied the claim of the Dramatists' Guild (of the Authors' League of America) to exemption from Sherman Act liability under Section 20 of the Clayton Act, holding that "... the exemption will not apply unless an employer-employee relationship is the matrix of the controversy."⁸

Neither decision is noteworthy from the standpoint of the doctrine it expounds; neither has aroused much comment. The opinions are significant not so much for what they say as for what they fail to say. It is not the ratio decidendi of the court but its inarticulate middle premise which has in each case led to the watering down of the employment relationship and the resulting restriction on the coverage of the exempting acts.⁹

In neither opinion does the court tell us in any concrete, factual terms just what characterizes this all-important employment relationship. In

⁷ *Columbia River Packers Ass'n, Inc. v. Hinton*, 315 U.S. 143 (1942).

⁸ *Ring v. Spina*, 148 F. 2d 647, 651 (C.C.A. 2d, 1945).

⁹ It must be pointed out in limine that the nature of the employment relationship is only one facet of the problem of identifying the "labor dispute" within the statutory meaning of the term. Perhaps equally important is the nature of the demands made—do they amount to bona fide collective bargaining? In the cases concerning dramatists and fishermen, notes 7 and 8 supra, the courts held the nature of the relationship to be the crucial factor; if the employee relationship can be demonstrated, then the nature of the demands will concededly amount to collective bargaining. On the other hand, in *American Medical Association v. United States*, 317 U.S. 519 (1943), the court found it unnecessary to determine whether the employee-employer relationship lay at the matrix of the controversy because of the very nature of the controversy itself. The American Medical Association physicians were not interested in seeking employment with Group Health; they were not interested in the terms of conditions of Group Health doctors' employment, except to make sure that there was no Group Health to employ them; and above all, by their own emphatic assertion, they were not interested in collective bargaining. "... The petitioners represented physicians who desired that they and all others should practice independently on a fee for service basis, where whatever arrangement for payment each had was a matter that lay between him and his patient in each individual case of service of treatment." *Ibid.*, at 536.

the former, we are simply presented with a conclusion that "the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours or other terms and condition of employment of these *employees*."¹⁰ As to the status of the playwrights, the court would have us believe that "the minimum price and royalties provided by the Basic Agreement, unlike minimum wages in a collective bargaining agreement, are not remuneration for continued services, but are the terms at which a finished product or certain rights therein may be sold."¹¹

But how may the two genres be distinguished? One learns in an early lesson in economics that the most lowly employee is truly a seller—his wages are in fact nothing but the price received for the sale of his services. When the playwright "sells" his manuscript, he is being paid for much more than the commodity value of the paper on which it is written. What his sale price represents is actually the market value of his services as an artist—the labor that has gone into the thing to make it command so dear a price. Which is the "wage" and which is the "sale"? How are we to know "the employee-employer relationship" when we see it?

THE INFINITE AND SUBTLE VARIATIONS

Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy.¹²

The question is by no means a new one. "Few problems in the law have yielded greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employee-employer relationship and what is clearly one of independent entrepreneurial dealing."¹³ In viewing the auto assembly line mechanic and Henry Ford, no one would doubt for a moment that there is an employment relationship. But while it may be said that the mass production type of industrial structure has become the predominant pattern in this country in terms of the number of people so employed and in terms of popular normative thinking, still it is grossly inaccurate to regard this particular form as typical in any generic sense. Such generalization excludes from consideration the great variety of structure and practice which characterizes our present economy, especially among the smaller business and industrial units. "An industry, like an individual, is a part of all that it has met; it has a character, a structure, a system of habits of its own. Its pattern is out of ac-

¹⁰ *Columbia River Packers' Ass'n, Inc. v. Hinton*, 315 U.S. 143, 147 (1942) (italics added). Note the Court's characterization of these fishermen as "employees" in the same sentence which excludes them from the scope of the employee-employer relationship.

¹¹ *Ring v. Spina*, 148 F. 2d 647, 652 (C.C.A. 2d, 1945).

¹² *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 126 (1944).

¹³ *Ibid.*, at 121.

cord with a normative design; its activities conform very imperfectly with a chartered course of industrial events.”¹⁴ To talk about “the” employment relationship is to assume a standardization which simply does not exist.

A glance into the reported cases in which the problem of employee-or-entrepreneur has been presented bears eloquent testimony to the multifarious guises into which this relationship has been cast—and to the utter chaos which has resulted from the judicial attempt to find a single legal norm in terms of which they could all be analyzed. The term “employee” has been extended by the courts to cover a great variety of trade and employment patterns. Holders of such borderline jobs as those of the taxi driver,¹⁵ the individual tailor, needleworker, or homemaker,¹⁶ the window cleaner,¹⁷ the newsboy,¹⁸ the “coal hustler,”¹⁹ the “gypsy chaser,”²⁰ the red-cap porter,²¹ the backwoods lumberman,²² the free-lance artist and writer,²³ the insurance canvasser,²⁴ the vendor or jobber of various wares, including milk, baked goods, laundry and soda pop²⁵—all of whom are in some respects analogous to the small businessman or entrepreneur—have at one time or another been allowed the rights, privileges, duties, and ex-

¹⁴ Hamilton and others, *Price and Price Policies* 4 (1938).

¹⁵ *Taxi-Cab Drivers Local Union No. 899 v. Yellow Cab Operating Co.*, 123 F. 2d 262 (C.C.A. 10th, 1941).

¹⁶ *Walling v. Twyeffort*, 65 F. Supp. 920 (N.Y., 1946) (tailors); *Walling v. American Needlecrafts*, 139 F. 2d 60 (C.C.A. 6th, 1943) (needleworkers); *United States v. Vogue*, 145 F. 2d 609 (C.C.A. 4th, 1944) (seamstresses); *Fleming v. Demeritt Co.*, 56 F. Supp. 376 (Vt., 1944) (homeworkers).

¹⁷ *Brayer v. Charton*, 37 N.Y.S. 2d 326 (1942); *Suchodolski v. American Federation of Labor, International Building Service Employees Union*, 127 N.J. Eq. 511 (1940).

¹⁸ *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *In the Matter of Seattle Post-Intelligencer Department of Hearst Publications*, 9 N.L.R.B. 1262, 1270-75 (1938); *In the Matter of the Post Standard Co.*, 34 N.L.R.B. 226 (1941).

¹⁹ *Grace v. Magruder*, 148 F. 2d 679 (App. D.C., 1945).

²⁰ *United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablen and Helpers of America*, 315 U.S. 521 (1942).

²¹ *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942); *Southern Ry. v. Black*, 127 F. 2d 280 (C.C.A. 4th, 1942).

²² *In the Matter of the Connor Lumber and Land Co. and International Woodworkers of America, Local No. 125*, 11 N.L.R.B. 776, 786-87 (1939).

²³ *In the Matter of KMOX Broadcasting Station and the St. Louis Local, American Federation of Radio Artists*, 10 N.L.R.B. 479 (1938) (radio artists); *In the Matter of Twentieth Century-Fox Film Corp. and Screen Publicists Guild*, 32 N.L.R.B. 717 (1941) (motion picture publicity writers).

²⁴ *La Lone v. United States*, 57 F. Supp. 947 (Wash., 1944).

²⁵ *Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940) (milk); *Bernstein v. Madison Baking Co.*, 186 N.Y. Misc. 474, 38 N.Y.S. 2d 811 (1942) (baked goods); *People v. Gassman*, 295 N.Y. 254, 66 N.E. 2d 705 (1946) (laundry); *Singer v. Kirsch Beverages, Inc.*, 271 App. Div. 801, 65 N.Y.S. 2d 400 (1946) (soda pop).

emptions of employees where it was found that within the specific industrial context the conditions under which they worked more closely resembled those of the employee status.²⁶ By what token then are such similarly ambivalent artisans as the fishermen and the playwright excluded from the scope of the employment relation?

Justice Black, in the previous term, had stated that a case involving a CIO union of milk vendors in Chicago who purchased their milk from the dairies and resold to the consumer was a bona fide labor dispute.²⁷ The relation between the dairies and the union members, just as between the canners and the fishermen, was, on paper at least, that of buyer and seller. The president of the company himself was in a quandary as to how to label them: "... They own their own trucks and pay their own expenses and they buy milk at a certain price at our dairy. In one way they are employees and in another way we do not pay wages."²⁸ Yet the Court was willing to pierce the contractual veil to find that in substance their situation was like that of employees. The fact that the collective agreement in this case, as in the *Hinton* case, was couched in terms of "sale" rather than in the language of "wages" was not reconciled in the latter opinion except by invoking the touchstone: that in the former "the employee-employer relationship was at the matrix of the controversy" and in the latter it was not—which merely begs the question.

Turning to the opinion of the district court for some light as to what characterizes the relationship, we find another suggestion: The defendants are not "employees" but rather they are "producers, just as cattlemen, grainmen, poultry raisers, or orchardists are producers."²⁹ True enough, this serves to distinguish the *Milk Drivers'* case, for peddlers are distributors and not producers or suppliers. It is also a convenient point of comparison for the dramatists, for their play is the product of their own ingenuity and workmanship alone, just as the fisherman's catch is the original product of his exclusive labor. But will this distinction, any more than the preceding one of sale or wage, serve to encompass all the various employment patterns "that blanket the nation's economy"?

²⁶ The cases set forth above were decided under a variety of social legislation, certainly not entirely under the anti-trust laws. They are not cited as controlling authority for the principal cases; they are used as persuasive of the great variety of callings which, when realistically examined within their respective industrial contexts, have been held by courts to be within the scope of the so-called employee-employer relationship. See also materials collected in 322 U.S. 111, at 127 n. 26 (1944).

²⁷ *Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940).

²⁸ *Ibid.*, at 98 n. 11.

²⁹ *Columbia River Packers' Ass'n, Inc. v. Hinton*, 34 F. Supp. 970, 974 (Ore., 1939).

The cases of the coal miner³⁰ and the lumberman³¹ come to mind. They, like the fisherman or the farmer, are producers, engaged in the taking and distribution of an important natural resource, "the common bounty of all men."³² In a recent case in the Federal District Court for Kentucky a mine operator sought to evade his responsibilities as an employer by means of contractual arrangements whereby each of his subordinates was to operate a portion of the mine independently, employing his own help, furnishing his own equipment, and being paid not by the hour on a salary basis, but by means of the "sale" of his coal to the owner at a fixed rate per ton. But here again, the court, looking beyond the form of the relationship, held: "Although the defendants in this case undertook to avoid the impact of the Fair Labor Standards Act by adopting the scheme of letting their employees become what under some circumstances might be regarded as an independent contractor relationship, the economic realities of the situation require the conclusion that not only the subordinate personnel but also the alleged independent contractors themselves are employees. . . ."³³

Nor can we say, as some suggest, that the element of risk-bearing is the determining factor; or, as others would put it, that the determining factor is ownership of the means of production. Window cleaners certainly bear the risks of their enterprise, and piece workers in an assortment of trades own their own equipment and assume the losses of damage and spoilage to their product. An enlightening opinion handed down in 1944 by the present Secretary of Labor, sitting in his capacity as District Judge for the Eastern District of Washington, shows the ineffectiveness of these criteria as guideposts for identifying the presumed employee-employer relationship. The case involved the status of an insurance salesman under the Old Age and Survivor's Insurance Act. He had been originally employed by the Barrett Insurance Co., had gone into business for himself, and failing in that, had returned to Barrett under an arrangement whereby he could become a partner upon his successful solicitation of a certain amount of new business. The Social Security Board, relying on the factors of risk-bearing and ownership of means of performance, had denied the claim of his representative on the grounds that he was not an employee of Barrett

³⁰ *Walling v. Woodbine Coal Co.*, 64 F. Supp. 82 (Ky., 1945). See also *NLRB v. Blount*, 131 F. 2d 585 (C.C.A. 8th, 1942), where the owner of a Barite mine who permitted persons to mine the ore in return for a royalty was held to be an employer and the miners his employees.

³¹ In the Matter of the Connor Lumber and Land Co. and International Woodworkers of America, Local No. 125, 11 N.L.R.B. 776 (1939).

³² *Columbia River Packers' Ass'n, Inc. v. Hinton*, 34 F. Supp. 970, 976 (Ore., 1939).

³³ *Walling v. Woodbine Coal Co.*, 64 F. Supp. 82, 85 (Ky., 1945).

Co. Judge Schwellenbach in his reversal, admonishing the referee for his excessive reliance on traditional doctrine and his failure to give heed to the particular trade practices of the insurance business, summed up as follows:

"I can readily understand how anyone inexperienced in business practices would construe this to mean that at all times La Lone maintained a proprietary interest in his business and was working for himself. Actually all he had was the right to recapture these accounts . . . [and quoting from Judge Parker]³⁴ what is needed is not the bookish approach of the scientist but the common sense approach of a court accustomed to deal with all sorts of human relationships."³⁵

The prize example of "the bookish approach of the scientist" is the common-law independent contractor test, which has been the most popular criterion of all with those who postulate "the" employment relationship. This, of all the aforementioned alternatives, is the criterion which most likely underlay the decision excluding the fishermen from the employee status.³⁶ It is claimed that since Congress has failed explicitly to define the term "employee," or the "employee-employer relationship," the old common-law use of the term was intended: that whether or not a given individual is an employee or an independent contractor depends upon whether or not the purported employer exercises control over the means of performance as well as the end result to be achieved. While this is more frequently than not espoused as the governing rule of statutory construction, it never has been satisfactorily explained why a criterion borrowed from the law of agency and designed to determine tort liability should be relevant or reliable as a yardstick for measuring eligibility for the "employee team" in the "industrial combat."³⁷ Not only have its theoretical merits been challenged, both as a measure of tort liability³⁸ and, a fortiori,

³⁴ Parker, *Recurrence to Fundamentals*, 30 A.B.A.J. 620, 623 (1944).

³⁵ *La Lone v. United States*, 57 F. Supp. 947 (Wash., 1944).

³⁶ Compare the language used by the lower court to characterize the relationship: "Said fishermen are directly employed by no one but are producers and independent contractors . . . who own or lease the boats they operate, own the nets and other gear, but each of these operates his business according to his own desires, uncontrolled by the plaintiff." District Court Finding of Fact VII, Record on Appeal, *Columbia River Packers' Ass'n, Inc. v. Hinton*, p. 60.

³⁷ ". . . Both the common law of a State and a statute of the United States [the Clayton Act] declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest." Brandeis, J.; dissenting in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921).

³⁸ Steffen, *Independent Contractor and the Good Life*, 2 Univ. Chi. L. Rev. 501 (1935); Douglas, *Vicarious Liability and Assumption of Risk*, 38 Yale L.J. 584, 720 (1929); *Judicial Restrictions on Peaceful Picketing by "Non-Labor" Groups*, 51 Yale L.J. 1039 (1942).

as a measure of the broader employment relationship,³⁹ but pragmatically it can be shown that, like the other criteria which have been advanced, it fails to comprehend the distinctive employment patterns in many industries.⁴⁰

In the final analysis, there is no universal formula by which the employee may be distinguished from the entrepreneur. The criteria of the "sale" as opposed to the "wage," the producer as opposed to the distributor, the casual as opposed to the regular course of dealing, risk-bearing and ownership, or even the hallowed control test of the common law, all enter into the determination, but in the last analysis it is the industry, not the norm, which must be decisive. As this brief survey has indicated, for every norm suggested as characterizing the quintessence of the employment relationship, there are always some industrial situations—situations which by judicial admission embody the employment relationship—which simply do not fit into the neat abstraction.

It is in the nature of the human material with which we are dealing that it defies stereotype and cannot be pigeonholed into the preconceived category. Moreover, there is nothing inherent in the nature of the judicial process which requires such conceptual treatment. Judge Learned Hand many years ago pointed the way for resolving issues of this sort with the suggestion that "this is one of those classes of cases where it is safer to prick out the contour of the rule empirically by successive instances than to attempt definitive generalization."⁴¹ And in April 1944, three years after the *Hinton* case was handed down, the Supreme Court declared that "economic relationships cannot be fitted neatly into the containers designated 'employer' and 'employee' which an earlier law had shaped for different purposes."⁴²

THE CONTOUR OF THE RULE

That term [employee] . . . must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. Where all the conditions of the relation require protection, protection ought to be given.⁴³

NLRB v. Hearst Publications, Inc. was a case arising under the Wagner Act⁴⁴ which presented the same basic issue as that under consideration in the *Hinton* case and in *Ring v. Spina*: Were the "newsboys" whom Local

³⁹ Stevens, *The Test of the Employment Relation*, 38 Mich. L. Rev. 188 (1939).

⁴⁰ See discussion of the *Hearst* and *Gassman* cases below, p. 645 et seq.

⁴¹ *In re All Star Feature Corp.*, 231 Fed. 251, 252 (D.C. N.Y., 1916).

⁴² *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 128 (1944).

⁴³ *Ibid.*, at 129.

⁴⁴ National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C.A. § 151 (1947).

75 sought to represent employees with the right to self-organization under the statute, or were they independent businessmen as was claimed by the publishers? The circuit court below found as a matter of law that the employee relationship did not exist and the case went up to the Supreme Court on that issue. In an 8-1 opinion, the Court, speaking through Justice Rutledge, made an unequivocal departure from the doctrinal treatment of prior cases and upheld the NLRB's finding that the "newsboys" came under the coverage of the National Labor Relations Act.

To begin with, the Court disposed of the circuit court's denial of the employee-employer relationship because the newsboys' control over the physical means of performance and their assumption of certain risks of the enterprise predestined them for the "independent contractor container." "The mischief at which the Act is aimed," it said, "and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.'"⁴⁵ But it did not stop at merely rejecting the traditional categories. It went on to enunciate a new approach to statutory interpretation on questions of this sort—an approach which required consideration of 1) the basic economic facts of the relationship within its particular industrial background, in the light of 2) the ends sought to be accomplished by the legislature. In the first respect, it analyzed the practices of the trade and the pattern of the news-hawking business and found that both the price at which the newsboys buy their papers and the price at which they sell to the public are fixed by the publishers; that the spots at which they operate are likewise assigned to them by the publishers; that the allocation of spots is often used as a disciplinary measure; and that as a matter of economic fact the newsboy's bargaining power as an individual was practically nonexistent. As to the second factor, the condition which the legislature sought to remedy was found to be "inequality of bargaining power in controversies over wages, hours, and working conditions" which, the Court said, may as well characterize independent contractors as employees. Viewing the two factors in juxtaposition, it concluded:

"... The particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate, and the remedies it affords are appropriate for preventing them or curing their harmful effects. . . . In short, when the particular situation of employment combines these characteristics so that the economic facts of the relationship make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by

⁴⁵ NLRB v. Hearst Publications, Inc., 322 U.S. 111, 126 (1944).

the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protection."⁴⁶

Since Justice Rutledge's opinion was handed down, this "mischief-remedy test,"⁴⁷ which it suggests, has been widely followed by the lower courts not only in NLRB cases, but for purposes of determining status under other forms of social legislation as well.⁴⁸ Recently the Supreme Court itself extended it to apply to cases involving coverage of the Fair Labor Standards Act⁴⁹ and the Federal Social Security Act,⁵⁰ and even relied on it to some extent in a District of Columbia Workmen's Compensation Appeal.⁵¹

Hence it does not appear too daring to suggest that the *Hearst* case method be adopted for purposes of determining the scope of the employment relationship under the labor exemption to the anti-trust laws and under the anti-injunction laws, especially in view of the similarity in underlying policy between the latter and the Wagner Act, out of which the *Hearst* case arose. As a matter of fact, the New York Court of Appeals has already applied the mischief-remedy approach to a case under the New York State anti-trust laws in which the problem was strikingly parallel to that of the *Hinton* and *Spina* cases.⁵²

⁴⁶ *Ibid.*, at 127.

⁴⁷ The "mischief-remedy test" was the label given to the doctrine of the *Hearst* case by an author who derived the term from what he regarded as the chief determinants of the doctrine: "the mischief at which the act is aimed" and "the remedies it affords." *Labor Law: Scope of the Term "Employee,"* 32 Calif. L. Rev. 289 (1944). The term will be used herein as a shorthand reference to the *Hearst* doctrine.

⁴⁸ "In many cases, most of which have been decided since *National Labor Relations Board v. Hearst Publications, Inc.*, courts have held that the traditional common law tests or concepts of an employer-employee relationship . . . are not controlling in dealing with social legislation, and that under such legislation the area between employee and entrepreneurial enterprise is to be surveyed and determined in practical industrial and economic perspective and with regard for the special remedial purpose of the legislation." *Walling v. McKay*, 70 F. Supp. 160, 170 (Neb., 1946).

⁴⁹ "The Fair Labor Standards Act is a part of the social legislation of the 1930's of the same general character as the National Labor Relations Act . . . and the Social Security Act. . . . Decisions that define the coverage of the employer-employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act." *Rutherford Food Corporation v. McComb*, 67 S. Ct. 1473 (1947).

⁵⁰ "Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case." *United States v. Silk*, 67 S. Ct. 1463, 1468 (1947).

⁵¹ *Cardillo v. Liberty Mut. Ins. Co.*, 67 S. Ct. 801 (1947).

⁵² In *People v. Gassman*, 295 N.Y. 254, 66 N.E. 2d 705 (1946), the group under indictment for restraining trade was a union of laundry jobbers who had most of the attributes of common-law independent contractors. Their job was to pick up and mark the laundry, keep the accounts, and collect the money; their compensation was measured, not by a fixed salary, but by

It is submitted that were the *Hinton* and *Spina* cases to be reconsidered in the light of the *Hearst* case, an entirely different result would be reached. For purposes of testing this hypothesis, the abuses which Congress sought to remedy in the interlacing statutes involved in *Columbia River Packers v. Hinton* and in *Ring v. Spina* will be first considered. A clinical study of the economic position of the individuals claiming the protection of the statutes in these cases—the fishermen and the dramatists—follows. Finally an evaluation is attempted as to whether, as a matter of economic fact, these groups are subject to “the mischief at which the act is aimed” and in need of the remedies it provides.

THE MISCHIEF AT WHICH THE ACT IS AIMED

The Sherman Act,⁵³ like so many doctrines of its kind, has undergone considerable evolution in the course of its operation over the last half-century.⁵⁴ In its inception, it constituted little more than a restatement of the common law of monopolies and restraints of trade.⁵⁵ In recent years, partly due to legislative amendments,⁵⁶ partly to a more vigorous enforcement policy on the part of the administration,⁵⁷ and partly to changes on the Supreme Court bench, it has taken a new lease on life as an ag-

the amount collected from the customer less the wholesale price of the laundry; they operated their businesses on their own time and as they saw fit. Yet the court, on closer examination of the industrial framework in which they operated, found that the function they were performing was practically identical to that formerly carried on by company-employed truck drivers who had been discharged years ago for tax and social security reasons. Viewing this industrial picture in terms of the exempting acts, after the methods of the *Hearst* case, the New York Court of Appeals concluded:

“True they have some of the marks or qualities of independent contractors, such as a measure of independence and some small investment of capital. But in common speech and common sense, they are still ‘workingmen’ just as are window cleaners or furnacemen who go from house to house and are not employees of anyone. *We find no controlling definitions of ‘labor union’ or ‘workingmen’ but we are dealing not with niceties of language but with a broad policy, strongly expressed of exempting workers from the antimonopoly statutes.*” *Ibid.*, at 260 (italics added).

The case may not be distinguished on grounds of the statutes involved, for the New York Antitrust Act and the New York labor exemption are modeled almost word for word after the federal laws. For example, compare the following with the provision of the Clayton Act set forth in note 71 *infra*:

“The labor of human beings shall not be deemed or held to be a commodity or article of commerce as such terms are used in this section, and nothing herein contained shall be deemed to prohibit or restrict the right of workingmen to combine in unions, organizations and associations not organized for the purpose of profit.” N.Y. General Business Law (McKinney, 1941) c. 19, § 340 (3).

⁵³ 26 Stat. 209 (1890), as amended, 15 U.S.C.A. § 1 (1941).

⁵⁴ Hamilton and Till, *Antitrust in Action* (U.S. Temporary National Economic Committee, Monograph 16, 1940); Handler, *Construction and Enforcement of the Antitrust Laws* (U.S. Temporary National Economic Committee, Monograph 38, 1941).

⁵⁵ Hamilton, *Common Right, Due Process, and Antitrust*, 7 *Law & Contemp. Prob.* 24 (1940).

⁵⁶ Clayton Act, 38 Stat. 730 (1914), 15 U.S.C.A. § 12 (1941); Robinson-Patman Act, 38 Stat. 730 (1914), 15 U.S.C.A. § 13 (1941).

⁵⁷ Arnold, *Antitrust Law Enforcement, Past and Future*, 7 *Law & Contemp. Prob.* 5 (1940).

gressive economic instrument to control the tendency toward concentration of economic power⁵⁸ and to secure competitive operation of our private enterprise system.⁵⁹

Today it is generally considered unlikely that the original Sherman Act was ever intended to apply to labor groups.⁶⁰ "It was enacted in an era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market . . . the monopolistic tendency of which had become a matter of public concern."⁶¹ In the middle or transition period, under the rule of reason, certain forms of concerted action by labor groups were held to be unreasonable restraints,⁶² but eventually the famous Brandeis dissent in the *Bedford Stone* case⁶³ was written into the law of the majority.⁶⁴ More recently, under the "new Sherman Act,"⁶⁵ while there had been concerted efforts to subject "big labor" to the anti-trust laws⁶⁶ when the issue reached the Supreme Court in the *Apex* case it was held that, the labor exemption aside, the affirmative provisions of the Sherman Act were aimed not at concerted actions on the part of labor which may hinder the competitive position of the employer, but only at such restraints as tend to affect the product market and deprive the consumer of the advantages of competition. The Court took the opportunity to reaffirm that the objective of the Sherman Act was ". . . the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the

⁵⁸ Economic Concentration and World War II, S. Doc. 206, 79th Cong. 2d Sess. (1946).

⁵⁹ Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 Univ. Chi. L. Rev. 567 (1947).

⁶⁰ Berman, *Labor and the Sherman Act* 3-51 (1930).

⁶¹ *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492 (1940).

⁶² *United States v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994 (D.C. La., 1893), 57 Fed. 85 (C.C.A. 5th, 1893); *Loewe v. Lawlor*, 208 U.S. 274 (1908).

⁶³ "The Sherman Law was held in *United States v. United States Steel Corp.*, 251 U.S. 417, to permit capitalists to combine in a single corporation 50 per cent of the steel industry of the United States dominating the trade through its vast resources. The Sherman Law was held in *United States v. United Shoe Machinery Co.*, 247 U.S. 32, to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country. . . . It would, indeed, be strange if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so." *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of North America*, 274 U.S. 37, 65 (1927).

⁶⁴ *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938); see note 71 *infra*.

⁶⁵ Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 Univ. Chi. L. Rev. 567 (1947).

⁶⁶ For an analysis and critique of this policy, see Shulman, *Labor and the Anti-Trust Laws*, 34 Ill. L. Rev. 769 (1940).

market to the detriment of purchasers or consumers of goods and services. . . ."⁶⁷

On the other hand, we find the exempting Acts⁶⁸ encouraging the combination of labor units.⁶⁹ We may regard that purpose in the broader sense as complementary to and consistent with the basic values of the anti-trust laws in that both are seeking to equalize the relative bargaining positions of the component elements of our democratic-capitalist economy so as to preserve the competitive conditions upon which its successful functioning depends. Or, we may view it within the more specific frame of reference of the economic theorist, as antithetical to the purposes of the Sherman Act in that it introduces a substantial restriction upon the operation of the free market.⁷⁰ But whichever the rationale, the congressional intent—as twice restated to correct the erosion of judicial legislation to the contrary—⁷¹ remains⁷² that labor groups, acting inde-

⁶⁷ *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940).

⁶⁸ Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C.A. § 17 (1941); Norris-La Guardia Act § 1, 47 Stat. 70, 29 U.S.C.A. § 101 (1947).

⁶⁹ The legislative history of the exempting acts has been the subject of much research and comment and will not be elaborated herein; see Berman, *Labor and the Sherman Act* (1930); Boudin, *Organized Labor and the Clayton Act*, 29 Va. L. Rev. 272, 395 (1942); Pierce, *Labor and the Antitrust Laws*, 18 So. Calif. L. Rev. 171 (1945).

⁷⁰ *The Basis of the Labor Exemption from the Antitrust Laws*, 54 Yale L.J. 853 (1945).

⁷¹ “. . . The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help. . . .” Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C.A. § 17 (1941). Section 20, 38 Stat. 738 (1914), 29 U.S.C.A. § 52 (1927) denies the courts power to issue injunctions in labor disputes except in special circumstances and provides that “No such . . . injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work. . . . or from . . . persuading others by peaceful means to do so. . . .”

In a succession of cases—*Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921); down through *Bedford Cut Stone Company v. Journeymen Stone Cutters' Ass'n of North America*, 274 U.S. 37 (1927)—the Supreme Court managed to denature the effect of the above provisions by the dual weapon of limiting the legitimate objectives of union action and by restricting the scope of the employment relationship for purposes of denying the existence of a labor dispute. See Frankfurter and Greene, *The Labor Injunction* (1930).

In response to popular indignation with this “judge-made law,” Congress passed the Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. § 101 (1947). The policy expressed in Sections 6 and 20 of the Clayton Act was reasserted, and an attempt was made to eliminate the loopholes by means of which the courts had escaped enforcing its provisions. One of the chief measures adopted to counteract the effects of judicial erosion was the broadening of the scope of the term “labor dispute.” Under Section 13 (c), 47 Stat. 73 (1932), 29 U.S.C.A. § 113 (c) (1947), “the term ‘labor dispute’ includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*” Italics added.

⁷² Labor Management Relations Act, 29 U.S.C.A. § 160 (j) (1947), while subjecting certain labor abuses to injunction, does nothing to alter the immunity from the antitrust laws which labor unions enjoy.

pendently and in their own self-interest, shall not be subject to the anti-trust laws.⁷³ Just as the Wagner Act⁷⁴ is aimed at employer interference with labor's exercise of its right to self-organization, so the exempting Acts were directed at judicial interference with this same right. In both cases labor derives the right to organize and combine from its inferior bargaining position, and in both cases the right is protected in order to equalize the power of the two combatants in the industrial conflict.⁷⁵

Our problem now is to determine under which of these major congressional policies the subject individuals fall—that enjoining the combination of capital and business units or that encouraging the combination of labor groups with inferior bargaining power? We have seen that there is no rule of thumb that can be applied. So let us continue in our application of the mischief-remedy approach and proceed to an examination of the economic milieus of the fishermen and the dramatists, letting the facts speak for themselves.

THE UNDERLYING ECONOMIC FACTS: TWO CLINICAL STUDIES

In the long run, the workman may be as necessary to his master as his master is to him, but the necessity is not so immediate. . . . Masters are always and everywhere in a sort of tacit, but constant uniform combination not to raise the wages of labour above their actual rate.⁷⁶

A. THE COLUMBIA RIVER SALMON FISHERMEN

The fishing industry on the West Coast presents in microcosm an illustration of the heterogeneity of trade and employment practices which

⁷³ *United States v. Hutcheson*, 312 U.S. 219 (1941).

⁷⁴ National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C.A. § 151 (1947).

⁷⁵ Even as conservative a judge as Chief Justice Taft openly recognized this as the policy behind the Clayton Act: "Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. . . . They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent on his daily wage for the maintenance of himself and his family. If the employer refused to pay him the wages he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921).

For a statement of the motivating policy behind the Norris-La Guardia Act, see Report of the Senate Committee headed by Senator Norris: "It is obvious that existing conditions under which large employers of labor possess unprecedented power to dictate contracts and conditions of employment have been developed through governmental grants of authority to form corporations and organizations of corporations whereby thousands of owners of capital are able to combine hundreds of millions of dollars of capital and thus control and sometimes substantially to monopolize opportunities for employment. Such a power unrestrained by the organization of labor would permit employers arbitrarily to fix wages and conditions of employment under which millions of men and women would find their only opportunity to earn a living. A single laborer standing alone and confronted with such far-reaching and overwhelming concentration of employer power and compelled to labor for the support of himself and his family, is absolutely helpless to negotiate or exert any influence over the fixing of his wages or conditions of his labor." S. Rep. 163, 72d Cong. 1st Sess., at 9 (1932).

⁷⁶ 1 Smith, *Wealth of Nations* 58 (Everyman's ed., 1910).

characterize the American industrial scene in general. Around each species, and in each locality, there has grown up a distinctive group of practices and customs of trade and of production. In the case of salmon fishing on the inland rivers, the fishing is done primarily with gill nets drifting with the current or tide as the salmon head upstream to spawn.⁷⁷ The spawning begins in June in the headwaters and continues until November, when the rivers begin to freeze over in parts. Due to the similarity in habits of salmon and shad and the similar techniques required in their capture, the fishermen on the Oregon rivers usually start the season in April, when the shad appear on the rivers, and continue through the end of the shad season in June into the salmon catch. The fishing in both instances is usually done overnight in small boats. Very little gear is required. It is done comparatively close to the canneries so that long hauls are not necessary. In some cases a helper is employed who is paid only for the particular catches in which he is engaged. In many instances only one man will gather the fish from the net as it is pulled over the stern of the boat. Small boats are used, and the repairs to and purchase of the nets may amount to more than the repair and upkeep of the boats. Into this general pattern fall the members of the Pacific Coast Fishermens' Union involved in the *Hinton* case.

It is enlightening to contrast with inland-river fishing the deep-sea salmon fishing such as that which supplies the Seattle market.⁷⁸ There the trollers go out for several weeks at a time on large vessels, each of which has an owner, a captain, and crew.⁷⁹ Whereas the entire product of the deep-sea troller is purchased by many small peddlers, jobbers, or fresh-fish dealers of one sort or another for consumption by the housewife the same day, the situation in river fishing is entirely different. As appeared in the record of the *Hinton* case, almost the entire catch of the inland-river fishermen is taken by the packers for canning purposes. The fishermen

⁷⁷ Report of the Federal Trade Commission on Distribution Methods and Costs, Part IX, Cost of Production and Distribution of Fish on the Pacific Coast 53-57 (1946).

⁷⁸ *Ibid.*, at 57.

⁷⁹ The deep-sea fishermen have their own organizations such as the Fishermen's Cooperative Ass'n, Inc. of Seattle, which makes no claim to labor-union status and the members of which freely acknowledge that they are in business for themselves and are employees of no one. Before the war the association operated an exchange through which all fish was marketed. In 1941 the Department of Justice secured an indictment against the Seattle Fish Exchange for restraints which had grown up in the sale of halibut. In 1942 a consent decree was entered, and shortly thereafter the OPA sounded the final death knell of this organization. *Ibid.*, at 35. It must also be noted at this point that on May 8th, 1947, the anti-trust division secured a conviction of Local 36 of the CIO Fishermen and Allied Workers Union for restraints in the sale of fresh fish at the Los Angeles market. N.Y. Times p. 12, col. 3 (May 9, 1947). The distinction must be made between the situations presented by the above two cases involving the sale by deep-sea fishermen to the fresh-fish dealers, jobbers, and peddlers, and that of the gill-net river fishermen who sell to the canners and packers.

generally own the nets and some own the boats. Those who do not own their own boats may do one of two things: they may hire themselves out as helpers on a "lay" basis to a boat-owning colleague, in which case the general custom is that their compensation is measured by one-third the amount of the net catch.

But for those who do not have their own vessels and are unwilling or unable to obtain work on a lay basis, the companies themselves maintain a fleet of fishing boats which are available to fishermen. In the *Hinton* case, the district court found that at least five of the defendants "are using powered boats heretofore belonging to the plaintiff, sold to them by the plaintiff under the agreement that said fishermen will sell and deliver their fish caught in said areas to the plaintiff until their purchase price is paid."⁸⁰ Under this sort of arrangement, not only is the individual fisherman obligated to turn over his catch regularly to the canner until the price is paid but the canner retains a chattel mortgage on the boat itself, so that in case of default by the fishermen foreclosure and repossession by the canner is a certain consequence. Under these circumstances, the bargaining power of the "share-fishing" fishermen as to the "price" which his catch is worth is practically nil unless he combines with others for concerted action.

Of the three types of status among union members—the fisherman who works out of his own boat, the man who works as another's helper on a lay basis, and the one who works out of a company-owned boat on a share-fishing basis—while the third is the clearest case, all three appear upon analysis of the basic industrial conditions to be subject to the evils of inferior bargaining power which the exempting Acts were designed to cure. The bargaining position of all the river fishermen is similar in two respects: the nature of their product and the nature of their market.

Salmon is a highly perishable product. Unless it is sold on the day it is landed it spoils before it can be processed. If the unorganized fishermen were left to discuss terms and conditions of sale while the salmon were lying on the wharves, they would be powerless to hold out and would be compelled to accept anything the canners offered.⁸¹ This is so not only because of the threat of spoilage and consequent inability to get any price at all, but also by virtue of a statutory penalty imposed under the Oregon conservation laws for the wasting of food fish.⁸² Bargaining power has been

⁸⁰ U.S.D.C. for District of Oregon, Findings of Fact in *Columbia River Packers' Ass'n, Inc. v. Hinton*, Finding XIV, Record on Appeal, at 65 (March Term, 1939).

⁸¹ Report of the Federal Trade Commission on Distribution Methods and Costs, Part IX, Cost of Production and Distribution of Fish on the Pacific Coast 55 (1946).

⁸² 5 Ore. Comp. Laws Ann. (1940) § 82-336.

defined as the power to withhold from making a transaction.⁸³ It is clear that the nature of their product being as it is, the fishermen are powerless in this regard unless some sort of contractual arrangement is made in advance of the landing of the salmon.⁸⁴ In order to evaluate the effect of bargaining power in a given market, it is necessary to ascertain the relative numbers of buyers and sellers in the field. In the Seattle market for the sale of salmon caught in the open sea there are fewer sellers, inasmuch as only the captain of the ship offers the fish for sale. There are any number of buyers, since the distribution of fresh fish is not controlled by a few large concerns but is done through many smaller dealers and jobbers and peddlers. Under such conditions, real competition prevails and it cannot be said that the bargaining power of either group is seriously deficient, although the commodity here is just as perishable as in river fishing. Although the salmon must be sold within forty-eight hours, the individual buyer has as little power to refuse to buy as the fisherman has to withhold from making the sale, since if a buyer waits too long or holds out for too low a price the catch will go to his competitor.

In the river market, however, an entirely different condition is found. There, hundreds of small fishermen are engaged in supplying only a handful of large packing concerns.⁸⁵ The plaintiff in the *Hinton* case, the Columbia River Packers' Association, accounts for more than sixty per cent of all the processed fish produced in Oregon alone, as well as a very substantial amount of the canned fish produced in Washington and Alaska.⁸⁶ It has two plants in Alaska, a "floating cannery" (the steamship "Menon"), and two plants in Washington, in addition to the two large canneries in Oregon which are supplied by the defendant fishermen. If any single fisherman withholds his custom, the packers are not affected one iota. If any group of fishermen refuse to sell at a given price, the packers will probably even then be able to fill their needs elsewhere. On the other hand, the gill-netter is totally dependent on the packers for his compensa-

⁸³ Dunlop & Higgings, "Bargaining Power" and Market Structures, 50 J. Pol. Econ. 1 (1942).

⁸⁴ Perishability of his product has long been considered one of the distinguishing characteristics of the laborer as opposed to the entrepreneur. "The seller of labor is worse off in several respects than the seller of almost any physical product. His commodity is in the highest degree perishable. That which is sold today disappears absolutely. If he refuses an offer, the next comer will probably accept it, and he is likely to be left destitute. . . . Under such conditions, the result of free competition is to throw the advantages of the bargain into the hands of the stronger buyer." Final Report of the United States Industrial Commission of 1898, at 801 (1902).

⁸⁵ Report of the Federal Trade Commission on Distribution Methods and Costs, Part IX, Cost of Production and Distribution of Fish on the Pacific Coast 34 (1946).

⁸⁶ U.S.D.C. for District of Oregon, Findings of Fact in Columbia River Packers' Ass'n, Inc. v. Hinton, Finding XXI, Record on Appeal, at 75 (March Term, 1939).

tion since there is no one else to buy his catch. Separated as he is from the large city markets for fresh fish, without adequate transportation, he has no alternative but to sell quickly for what he can get.

It would hardly appear that combination under such circumstances was the evil at which the Sherman Act was aimed. Nor is its effect such as to place it within the scope of unreasonable restraint as defined by the *Apex* case. The district court in its findings of fact pointed out that "prior to the organization of the PCFU . . . silver-side salmon on occasions were sold to the packers as low as one cent per pound, and, concurrent therewith, the retail price of the same product sold to the public in the same area for between 15 and 20 cents per pound" and that "there is no evidence offered in this case tending to show that the wholesale or retail prices paid by consumers have been enhanced by the activities of these defendants."⁸⁷ As a result of the fishermen's organization, the product market has not been appreciably affected, and the only group to be deprived of the advantages of competition were the canners, whose profit per can was perforce reduced.

On the other hand, our analysis of the nature of his product and of his market would seem to indicate that the Columbia River fisherman is quite definitely subject to the evils assailed by the exempting Acts. He catches fish exclusively by his own labor to supply a handful of large canneries. He has no effective alternative market and consequently no effective bargaining power, and is left in a position of complete dependence on the canners for his livelihood. In this light his combination "to fix the price of a finished product" becomes instead the familiar union organization for purposes of collective bargaining over terms of compensation and conditions under which services are regularly rendered to the canners.

The lower court admitted in its findings that "it would seem that it is necessary for those engaged in fishing to arrange, by lawful contractual relationship, agreements for the sale of the products prior to taking of the fish. . . ."⁸⁸ It also would have permitted the organization of the fishermen along certain lines and to a limited degree and with limited purpose and effect. It gave its blessing to the operation of the defendant as a co-operative marketing association such as that intended by the Federal Agricultural Marketing Act⁸⁹—the kind of organization which was in ef-

⁸⁷ *Ibid.*, Finding XXXVIII, at 88.

⁸⁸ *Ibid.*, Finding XXXVIII, at 89.

⁸⁹ "Persons engaged in the fishing industry . . . may act together in associations . . . in collectively catching . . . processing, handling, and marketing. . . ." 15 U.S.C.A. § 521 (1927).

fect in the Seattle area before the war.⁹⁰ But as we have pointed out, there are fishermen and fishermen; and what is a fitting mode of organization for one group with one cluster of trade and craft practices is not appropriate or adequate for another group with an entirely different industrial pattern. And if the greatly inferior bargaining power of the gill-net salmon fisherman and his complete dependence on the packers in the river areas requires him to assume the economic position of the laborer, then in order for his self-organization to be effective, it must be in the form suited to laborers—a labor union rather than a cooperative marketing association.

The Pacific Coast Fishermen's Union was chartered in 1932 by the International Fishermen and Allied Workers of America of the CIO. By 1939 it had organized the great mass of the fishermen on the Columbia, Smith, and Umpqua rivers and was recognized by the majority of the packers as collective bargaining representative for the fishermen. The packers themselves are combined into an organization known as the Commercial Fisheries Association, which acts as their bargaining agency in dealing with the union. The union's primary function is to contract with the packers, in advance of the landing of fish, as to the basic terms and conditions under which the fishermen will work and the compensation they will receive for their labors. The constitution and by-laws of the PCFU require that "members shall not deliver catches outside of union agreements."⁹¹ And the union requires as a basic condition of every contract with a canner that "the union members shall not be required to work with and/or alongside non-union employees."⁹² It is clear that these two clauses taken together amount to a union shop, and this is undisputed by either party. Without some such condition in the contract, the effectiveness of the union as collective bargaining agent would be seriously jeopardized due to the irregular nature of the supply of fish and the tendency in days of overabundance to sell and buy outside of union agreements to the frustration of union action. But the union keeps its charter open and will admit to membership any bona fide fisherman who agrees to abide by its charter and withdraw from rival organizations.⁹³ It must also be point-

⁹⁰ Even though the Seattle Fish Exchange was organized as a cooperative instead of a union, and even though it was sanctioned by the above statute, it still came under the indictment of the antitrust division when its concerted action became really effective; see note 79 *supra*. For a discussion of the status of cooperatives in general under the antitrust laws, see *The Federal Antitrust Laws: Recent Application to Cooperative Organizations*, 29 *Corn. L.Q.* 251 (1944).

⁹¹ U.S.D.C. for District of Oregon, *Findings of Fact in Columbia River Packers' Ass'n, Inc. v. Hinton*, Finding XXXI, Record on Appeal (March Term, 1939).

⁹² *Ibid.*, Finding XVIII.

⁹³ *Ibid.*, Finding XLVII.

ed out that there were no independent or unaffiliated fishermen who complained of being deprived of their calling since the union has succeeded in gaining the support of 100 per cent of the men in the river areas

The particular dispute which brought this case before the court arose at the start of the 1939 season. The Columbia River Packers' Association refused to agree to the union-shop provision and withdrew from the Commercial Fisheries Association when the latter signed a collective bargaining agreement which embodied the disputed union-shop clauses. Thereupon the union fishermen withheld their services and the packers brought this suit for treble damages under the Sherman Act. Thus the large corporation which processes more than 60 per cent of all the fish produced in Oregon, being confronted with the defensive economic action of the organized fishermen, invoked the aid of the courts to break the resulting improved bargaining power of the fishermen so as to be free to use its own uncontrolled economic force against them. The decree in favor of the corporation had the effect of enjoining the very persons sought to be protected by the exempting Acts from engaging in an activity which we have seen was specifically immunized from Sherman Act liability by the Clayton and Norris-LaGuardia Acts.⁹⁴

B. THE DRAMATISTS' GUILD

Most of the theater-going public think of the playwright as an artist, an intellect, a talent, a genius, or a "soul." Few people stop to realize that he too is "economic man," and rarely do they consider the effect of his market place upon the author and his output. The staging of a play for a Broadway run is, nevertheless, a business enterprise and, for the most part, the business has remained in the hands of a numerically small, but professionally and economically powerful, group upon whom the undertaking of a theatrical production depends. The producer or manager is responsible for the financing, provides the direction, undertakes the risks, and enjoys what profits are to be made by the enterprise. He chooses the play as well as those who will act in it. While the actors are generally paid on a salary basis, the author's compensation usually takes the form of a certain sum in advance and a percentage of the gross box-office receipts in the form of royalties. But despite the differences in the wording of their respective contracts, what the producer is bargaining for in both cases is the services or workmanship of a given individual. And in both cases the relationship between the parties is a continuing one.

While the position of the actor is clear on its face, that of the dramatist is confused by the language which is generally used to describe it. We talk

⁹⁴ For pertinent sections of the two Acts, see note 71 *supra*.

of an author selling his manuscript—not his services—to a producer. And yet what more does that manuscript represent but the labor of the author? The term “sale” is also confusing in that it connotes a finality which is not inherent in the transaction between playwright and manager. In the everyday bargain and sale over the counter, the seller takes his cash and the customer his chattel, and neither has any further business with the other so far as that particular deal is concerned. But the relationship between the producer and the playwright does not end with the sale of the script. The author must be on hand at rehearsals for any changes which the actual staging of the play necessitates. He works with the producer, director, or manager in revising the play during the rehearsal period, and it is seldom that the play which greets the audience on opening night is the same in all respects as the script which was bartered and sold a few months before.

Not infrequently the normal expectancy of a Broadway play that has met with moderate success includes a road tour, a foreign production, a motion picture adaptation, a novelization, and a condensation for radio or television use. Each of these possibilities, which are inherent in every script that is licensed, represents rights and duties for each of the parties, some of which are contemplated at the time of signing the contract, and some not anticipated. Prior to the organization of the Dramatists' Guild, it was common practice in the theatrical market place for the author to surrender his script and all the rights that it represented for a lump sum in total compensation. Royalties, when paid, averaged around 5 per cent, and the manager who first produced the play took to handling and leasing all subsidiary rights. Managers had unrestricted control over the manuscript with the absolute right to make any changes which they deemed necessary whether or not the author gave his consent. Even after the contract was signed, the playwright had no means of enforcing whatever rights it gave him.⁹⁵ Royalties often were not paid when they fell due, and as the author could not afford the luxury of litigation, they continued to remain unpaid for months at a time.⁹⁶ As Arthur Garfield Hays put it, in those days “the individual dramatist bent a deferential head to the

⁹⁵ *The Dramatists' Guild: What It Does, How It Happened, and Why* 12 (Pamphlet published by the Dramatists' Guild, 1947).

⁹⁶ Formerly the general practice was for the producer to incorporate each theatrical production separately. This often resulted in a situation such that, although back royalties were owing on one play, the producer could withdraw all his funds from that production, and commence a new one without the new enterprise being liable for the obligations of the old one.

Today, while the limited partnership is the most common form of organization in the theater, if a corporation wants to produce a play, the largest stockholder or the person otherwise in control must undertake with the corporation to assume personal liability for its debts. See 1946 Minimum Basic Agreement, Art. 1, § 1.

Shubert fifteen million dollar colossus and gave away his shirt, if he had one, in order to get a production.”⁹⁷

During this period, both the managers and the actors were organized, the former into the Managers’ Protective Association,⁹⁸ the latter into Actor’s Equity, an affiliate of the AFL. The only semblance of collective action on the part of the authors was the weak and ineffective Dramatists’ Guild of the Author’s League of America, which amounted to little more than a literary club for its fewer than two hundred members. Commenting on this inadequate state of affairs, George Middleton wrote to the *New York World* in 1923: “Until an economic situation arises which forces us authors into a close organization, we are only a lot of languid lilies with good intentions; until we have as strong an organization watching only our interest, as have the actors and managers, we can merely smile sadly when we are about to be sat on.”⁹⁹

The repercussions in New York of the rise of the motion picture industry on the West Coast proved to be the economic situation which finally brought matters to a head. Soon after the practice developed of adapting Broadway successes for projection on the screen, difficulties arose concerning the disposition of the not insignificant resale and royalty proceeds from Hollywood. It was held by the courts that any film made from a play competed with it and that the manager who had contracted for the play, even though he had not provided for the film rights, was therefore entitled to protection.¹⁰⁰ This was the origin of what eventually became the established practice whereby the managers were regarded as entitled to a half share in all subsidiary rights. This development in itself caused no great consternation among the dramatists. The movie revenues at the outset came as something of a windfall, and the dramatist’s elation at this unexpected additional return was not too greatly mitigated by having to sacrifice half of the interest which was rightfully his.

⁹⁷ Hays, City Lawyer 132 (1942).

⁹⁸ This organization has since given way to the League of New York Theaters, which now represents both managers and theater owners for purposes of collective bargaining. It was with the managers’ committee of this organization that the 1946 Minimum Basic Agreement was negotiated.

⁹⁹ *New York World* (Mar. 27, 1923).

¹⁰⁰ See *Harper Bros. v. Klaw*, 232 Fed. 609 (D.C. N.Y., 1916) and *Manners v. Morosco*, 252 U.S. 317 (1920), in which cases it was held that even though the license of a play for dramatic production does not convey the motion picture rights, there is an implied negative covenant by the author not to use his reserved rights under the copyright to the detriment of the licensee. In order to obtain a waiver of this objection from the manager, the author had to forfeit half of his moving picture rights. The movie companies, being unwilling to risk an infringement suit, tended to withhold purchase of the rights unless title were cleared up beforehand. Hence the manager could hold up any sale unless he were given his desired share in the proceeds.

The straw which finally broke the camel's back, however, came in 1925. Fox Films signed up six managers under a form contract providing for the sale, by certain key managers of all the motion picture rights in the plays which they produced, to Fox alone. A secret clause in each of these contracts provided for a weekly salary to be paid by the Hollywood studio to these affiliated managers in addition to the 50 per cent which they ordinarily received. This meant, in effect, that the manager would be getting more than his 50 per cent and the author would have to sell his play for anything Fox offered and then receive only half of that. The salary paid to the manager would undoubtedly reduce the amount which the studio would pay for the play. "To get his play produced, the author would have to take it or leave it. As Fox had already tied up six managers, he boasted that he would practically 'control all of the stage output of those producers.'"¹⁰¹ An even greater danger presented by this development was that as the idea spread to other studios, in the rush to buy up film rights of the remaining producers, a situation would ultimately result in which only those plays with film possibilities would receive such backing, and the development of the legitimate theater would be under the control and domination of Hollywood. The playwrights rightly feared that the production of plays would be undertaken only when they measured up—or down—to the standards of Hollywood.

Such a prospect proved to be too much for even the hitherto conservative rank and file of the playwriting profession. Within a year the old Dramatists' Guild was transformed from a polite learned society into an active collective bargaining agency for the authors—the form in which it exists today. Within a year its ranks of some two hundred members had swelled to nearly a thousand and included not only the most vulnerable, but also the most venerable, members of the profession. All agreed to withhold their plays from the Broadway stage until the managers accepted the Guild's Minimum Basic Agreement (MBA). After considerable negotiation, this model contract was drawn up and accepted by the Association. In essence it amounted to a collective bargaining agreement specifying minimum compensation and basic terms and conditions under which a manager could acquire the production rights in an author's play. Among the items which it covered were minimum down payments and royalties; minimum share for the author in film rights and the various subsidiary rights, all rights not then in existence being reserved for the author;¹⁰² a stipulation that no changes were to be made in the script

¹⁰¹ Middleton, *These Things Are Mine* 314 (1947).

¹⁰² This provision in the contract proved to be of great value with the subsequent invention of sound films.

without the author's consent; and a provision for compulsory arbitration of all disputes arising in the course of the enforcement of the Agreement. Members of the Guild agreed not to show their plays to any manager who had not signed the agreement, on penalty of a \$1,000 fine and expulsion from membership. The managers agreed that while the parties would be free to arrange among themselves for terms over and above those specified in the MBA, no contracts would be entered into which did not embody at least the terms set forth therein. They also agreed not to enter into negotiations for plays written by non-Guild members and to abide by the Dramatists' Shop.¹⁰³ These have remained the basic terms and conditions governing the relations between managers and playwrights up to the present day, with minor changes in specific provisions such as amounts, percentages, etc., being made from year to year.¹⁰⁴

All but one of the 294 members of the Managers' Protective Association signed the MBA. Lee Shubert, one of the most powerful managers on Broadway, fought the Guild to the last. In April 1927 Shubert brought suit against the Guild, alleging that it was an illegal monopoly operating in restraint of trade, using coercion and boycott to compel compliance in violation of the New York State Anti-trust laws. The arguments presented by the Shuberts in that case anticipated almost phrase for phrase the language of Judge Clark in the *Spina* case. Inasmuch as the suit was withdrawn before judgment, there is no official report of the case and the only information we have to go by is counsel's account of the proceedings: "They took the position that while 'workers' may join together to bargain collectively for their services, yet dramatists did not render services, but sold plays; that the author was a 'factory,' his manuscript was a 'commodity' and the manager was a 'consumer.' Therefore, the applicable law is that which prohibits monopolization in 'trade and commerce.'"¹⁰⁵

The plea at that time met with no success,¹⁰⁶ but the case was not prosecuted to judgment. Had there been a reported opinion on the issue it would have stood the Guild in good stead twenty years later when another

¹⁰³ It must be noted that while under the terms of the MBA a manager in good standing may not deal with a non-Guild author, under its charter the Dramatists' Guild must admit to membership any dramatist who applies and who agrees to be bound by its constitution and by-laws. MBA Art. 1, § 2. Hence here, as in the fishermen's case, there were no independent dramatists who complained.

¹⁰⁴ For a summary of the significant provisions of the revised MBA of 1946, which is now in effect, see *op. cit.* supra note 95, at 14.

¹⁰⁵ Hays, *City Lawyer* 133 (1942).

¹⁰⁶ "Judge Aaron Levy, who heard the argument, has a social conscience. He felt that more was involved in the case than a point of law. He conferred with the lawyers, and Schubert signed the minimum basic agreement." *Ibid.*, at 134.

manager brought an almost identical complaint against the Guild for treble damages under the Sherman Act.

On May 18, 1944, a new musical, "Stovepipe Hat," opened at the Shubert Theater in New Haven. The book, written by Harold Spina, a member of the Dramatists' Guild, had been licensed to the producer, Irving Gaumont, under the terms of the Minimum Basic Agreement. Gaumont, needing financial assistance, called upon one Carl Ring, who invested over \$50,000 in the show. Due to financial difficulties, Gaumont assigned his rights in the production to Ring, who continued the show on his own. Ring was new to the theater, but, in spite of his lack of experience, took it upon himself to make certain changes in the script to which the author did not consent and in violation of his contract under the MBA. The matter was submitted to the Guild, which took steps to refer it to arbitration. Ring refused to arbitrate and applied to the district court for an injunction, alleging irreparable injury under the Sherman Act. Upon the district court's denial, the case was appealed to the Second Circuit Court, which granted a temporary injunction restraining arbitration and sent the case back to the district court for a final hearing on issues of both fact and law, where it is still pending. The issues of interstate commerce, *pari delicto*, and coercion discussed in the court's opinion are not relevant to our inquiry. The most significant aspect of the case, however, was treated as a secondary issue both by counsel in the briefs¹⁰⁷ and by the court in its summary one-paragraph dismissal of the issue, i.e., the Guild's status under the exempting Acts.¹⁰⁸ Without any discussion of the underlying economic facts of the dramatist's position in the play-producing industry, and looking only to the formal setting of the transaction, the court concluded, *a priori*, that the author was more nearly analogous to "the fishermen entrepreneurs of the *Hinton* case" than workingmen banded together in a union. In all fairness, however, it must be said that no attempt was made by counsel to bring these facts to the court's attention,¹⁰⁹ nor were there any findings of fact in the district court from which any picture of the industrial pattern could be obtained. It must also be noted that in his ruling on the motion for rehearing, the judge emphasized that the court "was making merely preliminary rulings to dispose of the particular appeal" and pointed out that "final rulings both of fact and

¹⁰⁷ Brief of Appellees on Appeal to the 2d Circuit, Point III c., at 26-27; Reply Brief of Appellants, at 6-7.

¹⁰⁸ 148 F. 2d 647, 651-52 (C.C.A. 2d, 1945).

¹⁰⁹ Brief of Appellees on Appeal to the 2d Circuit, Point III c., at 26-27; Reply Brief of Appellants, at 6-7.

law must await a definite hearing on the District Court."¹¹⁰ Under the circumstances all that can be said is that it was unfortunate that the court deemed it proper to make even a merely preliminary ruling on this particular point without having the necessary background in facts.¹¹¹

If, however, the district court on remand follows the approach of the Supreme Court in the *Hearst* case, it will, in all probability, find that by virtue of the nature of his product and his market the dramatist's bargaining position makes him subject to the ills at which the exempting Acts were aimed. Before the advent of the Guild, as has already been shown, his power to hold back his script was practically nil.¹¹² In addition to his generally poor financial position and the imperatives of keeping his family in three meals a day, which weaken any worker's bargaining power, there is the additional factor peculiar to the playwright, i.e., that a new play by an unknown author is absolutely worthless unless it is combined with actors, scenery, and a stage to bring it before the public. The playwright is caught in a vicious circle. He cannot get the backing of a manager unless he has made a name for himself with the public. And he cannot get his play before the public unless he can get the backing of a manager. To break into the circle, the young writer has been known to accept any compensation with any conditions, forfeit all rights, and on occasion has even paid the manager for producing his own play. It was for his benefit that the Minimum Basic Agreement was drawn up. Those who have already made their mark can and do command much better terms than the minimum set forth therein. Yet without their cooperation, the minimum standards under which their less prominent colleagues may be compelled to work could never have been enforced; for it is only under the threat that the master craftsmen may withhold their services that a manager can be

¹¹⁰ 148 F. 2d 647, 654 (C.C.A. 2d, 1945).

¹¹¹ The background of the rehearing indicates that the court was willing to consider the industrial facts, once an attempt was made to present them. Within two weeks after the case was decided, one of the biggest New York managers brought suit in the New York courts to restrain arbitration of a dispute under the MBA on grounds that the *Ring v. Spina* opinion invalidated it. Application of Shubert, 269 App. Div. 1015, 59 N.Y.S. 2d 143 (1945). On motion for rehearing, counsel pointed out to the court the disrupting effect its decision was bound to have on the whole pattern of the industry if allowed to stand: "How many more such applications will be made between now and the time this case can be tried on the merits . . . no one can say. Other damage could occur on the strength of this court's opinion. Many problems arise during a play's production which unless settled quickly by arbitration, may leave either party in doubt as to whether he is acting wrongfully, thus laying himself open to suits for considerable damage." Petition of Appellee on Rehearing, at 15. The court qualified its original holding as above. 148 F. 2d 647, 654 (C.C.A. 2d, 1945).

¹¹² It must be remembered that the mean subject of our study is not the Pulitzer Prize playwright but the multitude of struggling, unknown writers, including the 2,323 associate members of the Guild who have not yet seen one of their plays last out on Broadway for three consecutive weeks. Op. cit. supra note 95, at 3, 4.

made to respect the minimum basic rights of a journeyman or apprentice in the trade.

The name "Dramatists' Guild" rings true in its literal as well as in its figurative sense. The profession is one of the few which has remained relatively unaffected by the sharp diversification of function into capital and labor brought about by the industrial revolution and which still maintains the quality of the old guild system. It is this very ambivalence which makes for such difficulty when a problem arises which necessitates classifying its members into one or the other group. The dramatist is a literary craftsman, to be sure, and it is to preserve his integrity as such that he has been compelled to organize. He himself must be the final arbiter of what shall appear under his name. The circumstances of the *Ring* case demonstrate the great need for protecting the playwright's independence and his freedom from managerial control and domination over the shape of his handiwork.

Granted, arguendo, that under the common-law dichotomy he falls into the "independent contractor container"; we have seen the futility of using this outmoded criterion as a guide to present-day economic and social relationships, and the *Hearst* case has fortunately pointed the way toward a more realistic approach to the problem. The scope of the employee-employer relationship as therein reevaluated is broad enough to include independent craftsmen, or "independent contractors" when the economic realities of their situation warrants it. The playwright's status as an independent craftsman is essential not to his personal welfare alone but to the welfare of the art of playwriting in general. It is the pattern of employment which is best suited to the distinctive pattern of this industry.

The truth of this proposition is borne out chapter and verse by comparison with the experience of the playwright in Hollywood. There, as a general rule, he performs the same function as does the playwright in New York. But he works on a salary basis, and his workmanship is subject to the editing, alteration, or even collaboration, of the producer. He is a perfect employee under the common-law control test.¹¹³ And witness the result! Writing is an art in which creativity, originality, and imagination are at a premium. To impose upon the writer an employment pattern which evolved out of the necessities of the industrial revolution in mass-production industries, judging by its results, has the effect of conditioning a stereotyped, mass-production type of writing. The effect of the circuit

¹¹³ In the Matter of Metro-Goldwyn-Mayer Studios, and Motion Picture Producers Ass'n and Screen Writers' Guild, Inc., 7 N.L.R.B. 662, 686-90 (1938).

court's holding, if followed on remand, is to superimpose an arbitrary form which the court itself has determined to be "the" employee-employer relationship as the price of the statutory protection to which, as we have shown, the dramatists are in any event rightfully entitled by virtue of their underlying economic position. To impose such a form, which, as Hollywood's unfortunate example demonstrates, is basically unsuited to the peculiar quality of their craft, is to stifle the development of that craft itself as well as of the craftsman and his workmanship.

THE LEGAL PENDULUM

And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand.¹¹⁴

The significance of the two cases transcends the fate of the Oregon fishermen or the New York playwrights under the anti-trust laws. The cases must be regarded as a commentary and a caveat on the judicial process. They are but two recent examples of the inapplicability of legal concepts to determine economic facts.

We have shown that had the court in each case approached the problem at hand along the lines employed in the *Hearst* case, quite another conclusion would have probably been reached. For, as our studies of the fishermen and the playwrights, each within its respective industrial context, indicate, they are in fact subject to the abuses which Congress sought to remedy in the exempting acts; and the structure of the litigation in both cases in itself is real evidence of the need of these groups for the protection which the acts afford.

But to say that the two exclusionary decisions antedate that of the *Hearst* case, that therefore the latter indicates a change of heart on the part of the Court, and that were they to be reheard today, the courts would be bound to follow the latter approach and so arrive at a more appropriate judgment, would seem to overlook a basic aspect of the problem. For indeed it was substantially the same court which decided the *Hinton* case as decided the *Hearst* case. To be sure, Justice Rutledge, who wrote the opinion in the latter, was not on the Court when the former case was written. But it is doubtful that this single infusion of new blood into the Court would account for the complete metamorphosis in the decisions of the seven remaining members.¹¹⁵ Nor have there been any intervening

¹¹⁴ *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 126 (1944).

¹¹⁵ Justices Douglas and Roberts did not sit in the *Hinton* case; the remaining seven justices joined unanimously in the majority opinion written by Justice Black. Justice Roberts dissent-

cases which have set forth any landmarks which create a precedent for, or mark the transition to, a complete about-face in judicial technique.

Part of the explanation may well lie in the simple fact that in the *Hinton* case the problem was not presented in so sharp an outline as in the *Hearst* decision, so that the Court was not moved to reappraise its fundamental assumptions and tended rather to rely more or less unquestioningly on the vestigial remnants of an earlier climate of judicial opinion. But there was another element of the *Hearst* case which was lacking in the former decision: it came to the Court on appeal from a decision of the National Labor Relations Board, whereas the earlier case was, from its initial stages, the sole product of the judicial process; and that factor admittedly played a major role in the decision. It is one thing to hold that the determination of employment relationship cannot be made on the basis of any preconceived universal norm and that each must be decided individually as a function of the particular industrial pattern of which it is part. It is quite another matter for a court conscientiously and successfully to apply this method through the use of only the usual judicial techniques which are at its disposal.

Although we would not go so far as to say that an administrative investigation and finding on the facts is indispensable to the mischief-remedy approach, or that an accurate factual analysis cannot be made by a court without it, still a comparison of the cases discussed in this comment would seem to indicate that the administrative processing of the underlying framework within which the case is set is undoubtedly of great assistance to a court in these matters of classification and does increase the chances that its decision will be in keeping with what the economic realities demand. We do not mean to imply that a preliminary hearing by an administrative board will ipso facto insure a justifiable finding and decree. We merely wish to point out that by its very nature, the administrative agency is at a substantial advantage over the usual judicial fact-finding agencies.¹¹⁶ For it must be admitted that these are matters of a highly specialized sort, generally beyond the special competence of the "reasonable" district judge, whose own empirical knowledge tells him nothing about

ed in the *Hearst* case and Justice Reed concurred; the remaining seven justices joined in the Rutledge opinion.

¹¹⁶ Compare the following excerpt from the Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 19: "Because the members of an agency or of its staff—like persons of similar experience in private affairs—approach the problem with a considerable background of knowledge and experience and with the equipment for investigation, they can accomplish much of the work without the necessity of informing themselves by the testimonial process."

such esoteric judicial material as gill-net fishing on the Umpqua River or playwriting for the New York theater, and whose daily docket of torts, trusts, and contingent remainders can hardly be said to provide any added qualifications for making such a specialized economic determination. The court is generally dependent on what counsel tells it for its knowledge of the fact situation. If counsel does not present an adequate picture of the industry under consideration, the court decides the case on the incomplete picture before it, and you have the result of the *Spina* case. The appointment of a referee or special master is obviously an aid, but here too the method is costly, inefficient, and of questionable accuracy.¹¹⁷

Whether this means, as some have suggested,¹¹⁸ that a special agency should be created to handle the problems of labor groups under the administration of the anti-trust laws, is beyond the scope of this comment. On its face, it is doubtful whether the advantages to be derived from such a suggestion as it bears on this particular problem alone would, in either quantitative or qualitative terms, be sufficient to justify our embarking on such a project. Whether it is feasible to refer such determinations to some existing agency such as the NLRB, for example, is likewise outside our province.

And so, at the conclusion of this study, a basic question remains unresolved: Can "the reasonable court," unaided by an administrative processing of the sort which formed the base for the Court's opinion in the *Hearst* case, successfully apply the mischief-remedy approach therein set forth with its exacting demands upon the fact-finding mechanisms of our present court system? The question, to be sure, is incapable of any conclusive answer at this writing and will only be decided by future experience. One thing is clear, however, from our investigation: the former conceptualist approach of the *Hinton* and the *Spina* cases, while providing a ready-mix formula of quick and easy judicial application, makes no sense in terms of the economic realities involved, and in terms of results has served only to frustrate the legislative policy of the exempting Acts. On the other hand, we have seen that the approach of the *Hearst* case, when conscientiously applied, does allow for a more fitting treatment of these perplexing borderline cases. True, it is of great help to a court in applying

¹¹⁷ The appointment of a new referee in each case who must in each instance start from scratch would seem to be a vastly inferior method to that of the board which specializes in such problems and brings its knowledge acquired in the handling of one case to bear on its determination of the next.

¹¹⁸ Steffen, *Labor Activities in Restraint of Trade: The Hutcheson Case*, 36 Ill. L. Rev. 1 (1941).

it to have an administrative hearing to start with. But it cannot be said that the judiciary, aided by counsel, is incapable of handling it alone; it has yet to try. Granted, the *Hearst* test makes greater demands on the resources of the judicial process than did the traditional norm. But it is a far more fruitful endeavor to tax the resources of the court to meet the demands of a more exacting judicial method than to compromise the quality of our law to meet the limitations of the men who administer it.