ANTI-TRUST LAW LABOR EXEMPTIONS:

THE LMRA’S DISTANT COUSINS

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I. THE APPLICABLE STATUTES.

A. Sherman Antitrust Act.

Section 1 of the Sherman Act provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.


Section 1 of the Sherman Act requires proof of three elements in order to show an anti-trust violation: (1) concerted activity involving more than one actor; (2) an unreasonable restraint of trade; and (3) an effect on interstate or foreign commerce.

Concerted activity means that there is “a conscious commitment to a common scheme designed to achieve an unlawful objective” and “evidence that tends to exclude that [the parties] were acting independently.” Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

Unreasonable restraints on trade are examined in terms of horizontal restraints (parties operating at the same level of market, i.e., direct competitors) and vertical restraints (parties operating at different levels, such as a manufacturer and distributor). Vertical restraints, other than those involving price fixing, are usually analyzed under the “rule of reason.” That analysis evaluates the product market, the market power of the party allegedly imposing the restraint and the purpose and effect of the restraint to determine whether there is a restraint on trade and, if so, whether the restraint is unreasonable (see discussion regarding harm to competition below).


Section 6 of the Clayton Act exempts lawful labor activity from the Sherman Antitrust Act as follows:

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, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.


Section 20 of the Clayton Act also provides that:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or
conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law.

29 U.S.C. § 52. Section 20 also prohibits injunctions against identified types of union activity, including strikes, boycotting, picketing, persuading others by peaceful means not to work, and peacefully assembling in a lawful manner and for lawful purposes. *Id.*


After judicial rulings weakened Sections 6 and 20 of the Clayton Act, Congress passed the Norris-LaGuardia Act, which provides in pertinent part:

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute.

. . .

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated [in this Act].


Acts expressly enumerated under the Norris-LaGuardia Act include strikes, joining a union, picketing, “[g]iving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other [peaceful] method,” advising or urging others to do so peacefully and (unlike Section 20 of the Clayton Act), secondary boycotts. 29 U.S.C. § 104.

Further, a union may maintain a labor dispute with an employer that does not employ the union’s members. *E.g.*, Burlington N. Santa Fe Ry. Co. v. Int’l Bhd. of Teamsters Local No. 174, 203 F.3d 703, 707 (9th Cir. 1999) (determining threats to picket a railroad unless the railroad agreed to subcontract work only to subcontractors who employ the union’s members was a labor dispute); Smith’s Mgmt. Corp. v. IBEW, Local Union No. 357, 737 F.2d 788, 790 (9th Cir. 1984) (determining secondary boycott against lessee of plaza that had hired a nonunion subcontractor was a labor dispute).

II. THE STATUTORY EXEMPTION.

The United States Supreme Court, in reading the Sherman Act, Clayton Act, and Norris-LaGuardia Act in a cohesive manner, has determined that they provide unions a statutory exemption to the antitrust laws, “[s]o long as a union acts in its self-interest and does not combine with non-labor groups.” United States v. Hutcheson, 312 U.S. 219, 232 (1941). In other words, the statutory exemption does not apply when: (1) the dispute is not a “labor dispute” involving a “labor group”; (2) the union conspires with any business or nonlabor group rather than acting unilaterally; or (3) the union’s conduct is not expressly protected by the Acts. *Id.*; accord Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 808-10 (1945). The Ninth Circuit, in collecting cases from other jurisdictions, has expressly noted that those restrictions are independent requirements; proof of any one renders the exemption
inapplicable. **USS-Posco Indus. v. Contra Costa County Bldg. & Constr. Trades Council**, 31 F.3d 800, 806 (9th Cir. 1994).

“Labor groups” are limited to “bona fide labor organizations, and not an independent contractor or entrepreneur.” **H. A. Artists & Assoc., Inc. v. Actors’ Equity Ass’n**, 451 U.S. 704, 717 n.20 (1981). A labor organization, however, may include “non-employee parties [who] are in job or wage competition with the employee parties, or in some other economic interrelationship that substantially affects the legitimate interests of the employees,” such as band leaders who compete with union-member musicians for a share of club fees, **Am. Fed. of Musicians v. Carroll**, 391 U.S. 99 (1968), or agents for stage actors, **H. A. Artists & Assoc., Inc.**, 451 U.S. at 717-22.

The Ninth Circuit examined the definition of a “nonlabor group” and ultimately determined that this concept applies to entities that “operate[s] in the same market as the plaintiff to a sufficient degree that it would be capable of committing an antitrust violation against the plaintiff, quite independent of the union’s involvement.” **USS-Posco Indus.**, 31 F.3d at 806. The Ninth Circuit noted that an employer’s competitor, “as well as a supplier or purchaser of the plaintiff’s goods or services,” are within the nonlabor group “paradigm.” **Id.**. The court went on to note that other groups involved in the same market, while somewhat more remote, could nonetheless constitute a nonlabor group under the anti-trust laws. **Id.** (citing **Allied Tube & Conduit Corp. v. Indian Head, Inc.**, 486 U.S. 492 (1988) (antitrust suit by manufacturer against private standard-setting organization); **Brown v. Ticor Title Ins. Co.**, 982 F.2d 386 (9th Cir.1992) (antitrust class action by title insurance consumers against insurers for participation in state-licensed rating bureaus); accord **Larry V. Muko Inc. v. Sw. Penn. Bldg. & Constr. Trades Council**, 609 F.2d 1368, 1370 (3rd Cir. 1979) (“Muko I”) (determining statutory exemption did not apply when “the jury could have found concert of action” based on the plaintiff’s allegation that a restaurant chain and a union council agreed that the restaurant chain “would not award building and construction contracts to any contractor that was not a party to a current collective bargaining agreement with member unions” of the council) (internal citations omitted); **U.S. Info. Sys., Inc. v. Int’l Bhd. of Elec. Workers Local Union No. 3, AFL-CIO**, 2002 WL 91625, at *1-*2 (S.D.N.Y.) (noting the union “coerce[d] and induce[d] building owners and tenants, building managers, general contractors, information technology consultants, and others in the construction industry to exclude the plaintiffs from the market for telecommunications installation work” and stating that the Clayton Act “does not exempt concerted action or agreements between unions and nonlabor parties, such as are alleged here, from the Sherman Act”); **C & W Constr. Co. v. Bhd. of Carpenters & Joiners of Am., Local 745**, 687 F. Supp. 1453, 1464 (D. Haw. 1988) (characterizing contractor’s suppliers as a nonlabor group and finding the statutory exemption did not apply to the suppliers’ agreement with a union not to deliver supplies to a building contractor); **Schnabel v. Bldg. & Constr. Trades Council of Philadelphia & Vicinity**, 563 F. Supp. 1030, 1047 (E.D. Pa. 1983) (reciting allegation that union conspired with “union contractors, material suppliers and construction users” to keep nonunion subcontractors out of the construction business and stating that “[b]ecause [this] count . . . alleges combinations and conspiracies with nonlabor entities, the statutory immunity offers the defendants no protection).

Consequently, the statutory exemption does not protect agreements between unions and a range of nonlabor groups that otherwise would violate anti-trust laws.
III. THE NONSTATUTORY EXEMPTION.

The United States Supreme Court has also developed a nonstatutory exemption to antitrust laws for certain union-employer agreements based on an “accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets.” Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975). Even agreements that address legitimate union concerns, however, are not protected under this exception when the union conspires with the nonlabor group for purposes of restraining trade. Compare United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965) (striking down a collective bargaining agreement setting a wage scale that exceeded the financial ability of some coal mine operators to pay employees for the purpose of forcing those operators out of the business), with Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) (upholding collective bargaining agreement limiting the hours during which supermarket employers could sell fresh meat, when the case was “stripped of any claim of a union-employer conspiracy against” the plaintiff).

While most commonly applied to collective bargaining agreements, the Supreme Court has also analyzed the nonstatutory exemption in relation to agreements outside the collective bargaining context. Connell Constr. Co., 421 U.S. at 621-26 (analyzing, and ultimately rejecting, nonstatutory exception’s protection of agreements between union and contractors to deal only with subcontractors with whom the union had a current collective bargaining agreement). In Connell, the Court focused on the fact that the agreements “indiscriminately excluded nonunion subcontractors for a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient working methods.” Id. at 623. The Court went on to note that prohibiting nonunion subcontractors from “competing for a portion of the available work” was a “direct restraint on the business market” as opposed to an indirect restraint that would “follow naturally from the elimination of competition over wages and working conditions.” Id. at 625. Opinions following Connell have noted the distinction between “‘direct restraint on the business market,’ as opposed to an indirect restraint that would ‘follow naturally from the elimination of competition over wages and working conditions.’” Mid-Am. Regional Bargaining Ass’n v. Will County Carpenters Dist. Council, 675 F.2d 881, 892 (7th Cir. 1982).

Importantly, the Court in Connell also explicitly stated that, while such an agreement “might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement, . . . [i]n this case, [the union] had no interest in representing [the employer’s] employees. The federal policy favoring collective bargaining therefore can afford no shelter for the union’s coercive action . . . to exclude nonunion firms from the subcontracting market.” 421 U.S. at 625-26 (emphasis added). In comparison, the Supreme Court later held that the nonstatutory exemption did apply to a salary cap and developmental squad plan agreement between an NFL owners and a players’ union, even though the parties’ collective bargaining agreement had expired, because it “grew out of, and was directly related to, the lawful operation of the bargaining process.” Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996). In particular, the agreement “involved a matter that the parties were required to negotiate collectively,” and, importantly, “concerned only the parties to the collective-bargaining relationship.” Id. (emphasis added). In so holding, the Court found that the non-statutory exemption protects not only
employer-union collective bargaining agreements, but also agreements among employers regarding bargaining tools to be utilized by their multiemployer bargaining unit. See Brown, 518 U.S. at 246-48.1

In Muko I, 609 F.2d at 1370, the Third Circuit examined the nonstatutory exemption under the Connell framework. The court stated that, because the Long John Silver’s restaurant chain had “no collective bargaining relationship, actual or potential, with the Councils or their members local” and because “the defendants entered into an agreement not to deal with nonunion contractors, which operates as a direct restraint on the business market by making those contractors ‘ineligible to compete for a portion of the available work,’” the “jury could have found such an agreement . . . is not exempt from antitrust scrutiny.” Id. at 1373-74 (quoting Connell, 421 U.S. at 625) (reversing directed verdict and remanding for a jury determination of the anti-trust issues); accord Altemose Constr. Co. v. Bldg. & Constr. Trades Council of Philadelphia & Vicinity, 751 F.2d 653, 657-58 (3rd Cir. 1985) (determining summary judgment was not proper where circumstantial evidence showed potential concert of action between union and contractors that “almost totally excluded from the market” subcontractors not on the union council’s fair contractors list); Schnabel, 563 F. Supp. at 1047 (finding nonstatutory immunity was not applicable where union, outside of the collective bargaining context, had conspired with “union contractors, material suppliers and construction users” to keep nonunion subcontractors out of the construction business, because such a “direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions”)

IV. INJUNCTIVE RELIEF.

The traditional factors in considering a preliminary injunction are: “(1) clear likelihood of success on the law and the facts then available and possible irreparable injury, or (2) sufficiently serious questions on the merits making them fair ground for litigation and a balance of the equities tipping decidedly in favor of preliminary relief.” Supermarket Servs., Inc. v. Hartz Mountain Corp., 382 F. Supp. 1248, 1254 (D.C.N.Y. 1974). In the anti-trust context, such irreparable injury can include harm to a company’s business reputation and goodwill that causes a loss of business. Id. at 1256.

A. THREATENED LOSS OR DAMAGES TO BUSINESS OR PROPERTY.

Under section 20 of the Sherman Act, a private party must show “threatened loss or damage” in order to obtain injunctive relief. 15 U.S.C. § 26. This requires a showing that the plaintiff would be entitled to monetary damages under section 4 if the injury had actually occurred. Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113 (1986). In turn, section 4 requires proof of “injury to

1 The Court did not give blanket protection to all multiemployer agreements because “an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.” Id. at 250. The Court did not attempt to define what “sufficiently distant in time and in circumstances” means. Rather, the Court held that a court should not attempt to make that determination “without the detailed views of the [National Labor Relations] Board,” “to whose specialized judgment Congress intended to leave many of the inevitable questions concerning multiemployer bargaining bound to arise in the future.” Id.
business or property.” 15 U.S.C. § 15. The United States Supreme Court has construed this to be “a naturally broad and inclusive meaning. In its dictionary definitions and in common usage ‘property’ comprehends anything of material value owned or possessed,” including money, _Reiter v. Sonotone Corp._, 442 U.S. 330, 338 (1979), and profits and revenues, _see Ashley Meadows Farm Inc. v. Am. Horse Shows Assoc._, 624 F. Supp. 856, 857 (S.D.N.Y. 1985).

Additionally, a developer or property owner’s refusal to lease space to a company can result in antitrust injury where there are no alternative sites in the area and the business is effectively barred from competing, thus “seriously restrain[ing] competition in the marketplace.” _E.g._, _Pay Less Drug Stores Nw., Inc. v. City Prods. Corp._, 1975 WL 906, at *3 (D. Or.). In comparison, the availability of other retail locations within the relevant market, even if those locations are less ideal, may defeat an antitrust injury argument as disappointment in not operating in a desired retail space is not enough to constitute an antitrust injury. _E.g._, _Recetas Por Menos, Inc. v. Five Development Corp._, 368 F. Supp. 2d 124, 134-35 (D. Puerto Rico 2005) (citing _Double D Spotting Serv., Inc._, 136 F.3d 554, 561 (8th Cir. 1998) (“Disappointment at not receiving one unloading contract at one particular warehouse is insufficient as a matter of law to rise to the level of an antitrust violation within a relevant market.”)).

**B. Harm to Competition.**

Because “[t]he antitrust laws, however, were enacted for the protection of competition not competitors,” _Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc._, 429 U.S. 477, 488 (1977), a plaintiff “must allege harm to the general market that has, in turn, harmed their own interests.” _E&L Consulting, Ltd. v. Domain Indus. Ltd._, 360 F. Supp. 2d 465, 474 (E.D.N.Y. 2005). In other words, showing only individual harm to the plaintiff’s business is not sufficient; the plaintiff must also show that “competition in the relevant market has been impermissibly affected.” _Bocobo v. Radiology Consultants of S. Jersey, P.A._, 305 F. Supp. 2d 422, 425 (D.N.J. 2004).

“Anticompetitive effects, more commonly referred to as ‘injury to competition’ or ‘harm to the competitive process,’ are usually measured by a reduction in output and an increase in prices in the relevant market.” _Sullivan v. Nat’l Football League_, 34 F.3d 1091, 1096-97 (1st Cir. 1993) (citation omitted). “Injury to competition has also been described more generally in terms of decreased efficiency in the marketplace which negatively impacts consumers.” _Id._ at 1097 (citation omitted).

Under the rule of reason (see above), the plaintiff must provide a well-pled description of the relevant market, both in terms of product and geographical area, in order to withstand a motion to dismiss. _Moccio v. Cablevision Sys. Corp._, 208 F. Supp. 2d 361, 377 (E.D.N.Y. 2002). The plaintiff must also determine the defendant’s market power, which “is the power to restrict output and thereby increase the selling price of a company’s goods in the market. Market power may be shown by a dominant percentage of sales in a well-defined relevant market and where there are significant barriers either to the entry of new firms or to increased output by existing firms.” _Dunafon v. Delaware McDonald's Corp._, 691 F. Supp. 1232, 1241 (W.D. Mo. 1988) (internal citation omitted). The relevant product market and market power are often developed through expert testimony, _e.g._, _Synergetics, Inc. v. Hurst_, 2007 WL 313585, at *4 (8th Cir.); _Spirit Airlines, Inc. v. NW. Airlines, Inc._, 431 F.3d 917, 931 (6th Cir. 2006).

“The availability of [alternative retail spaces] is an important factor that supports a determination that the exclusivity clause here does not unreasonably restrain competition.” _Optivision, Inc. v. Syracuse_
Shopping Cir. Assocs., 472 F. Supp. 665, 677 (N.D.N.Y. 1979); accord Dunafon, 691 F. Supp. at 1242 (“The fact that plaintiff cannot place a Taco Bell restaurant at his ideal selection site does not establish that there is a restriction of sites available to competitors generally and thus an exclusion from the relevant market.”). Intent of the defendants is also relevant. Larry V. Muko Inc. v. SW. Penn. Bldg. & Constr. Trades Council, 670 F.2d 421, 432 (3rd Cir. 1982) (“Muko II”) (finding no unreasonable restraint of trade when restaurant chain agreed with union to use only union subcontractors because, in part, “it is uncontradicted that Silver’s sought only to retain the goodwill of its customers in a new market. The Councils’ goal was to ensure payment of the prevailing union wage to Pittsburgh-area construction workers”).

Additionally, courts, in addressing situations where one entity has refused to lease space or otherwise deal with another entity, have often considered whether the refusing entity “received any economic benefit or competitive edge by refusing to deal,” finding that a lack of such a benefit precludes a finding that a refusal to deal harmed competition, at least when the plaintiff remains free to deal with other entities. E.g., Eastway Const. Corp. v. City of New York, 762 F.2d 243, 251 (2d Cir. 1985) (“Even if Eastway was excluded from the relevant market, and even if its exclusion was the result of a “contract, combination or conspiracy” between the City and CPC, such action could not possibly have injured competition. Indeed, Eastway does not even allege anti-competitive effect. In plain fact, neither the City nor CPC in their roles as mortgage lenders stood to gain from the inhibition of competition among general contractors.”); PAS Comms., Inc. v. U.S. Sprint, 112 F. Supp. 2d 1106, 1114 (D. Kan. 2000) (“Despite defendant’s alleged refusal to deal with plaintiffs, each plaintiff remains free to sell its particular services to other buyers. Moreover, there is no argument (and indeed, plaintiffs do not attempt to make one) that defendant received any economic benefit or competitive edge by refusing to deal with plaintiffs.”).