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Labor Unions in the Boardroom: An Antitrust Dilemma

Historically, both labor and management in the United States have strongly opposed labor-union representation on corporate boards of directors. More recently, a number of American corporations have considered instituting board representation as a means of gaining union support for wage and benefit concessions.1 Doubts exist, however, as to whether current antitrust law proscribes such action. In particular, the prohibition against interlocking directorates found in section 8 of the Clayton Act2 may prevent different members of the same union from sitting on the boards of directors of competing firms.

This Note argues that the Clayton Act demands neither a blanket exemption for labor unions from section 8 coverage nor a blanket prohibition against union members serving as board representatives. On the one hand, labor unions have the same economic incentives as do other corporate directors to engage in the anticompetitive behavior that the drafters of section 8 sought to prevent. On the other hand, a complete bar against


Several other unions have unsuccessfully attempted to gain board representation. In 1972, the pilots of United Air Lines sought board representation at the annual shareholder meeting, but obtained only 5% of the vote. Wall St. J., Apr. 28, 1972, at 34, col. 1; id., Dec. 13, 1971, at 25, col. 5. In 1973, the United Rubber Workers unsuccessfully proposed that General Tire & Rubber Co. appoint a union member to its board of directors. N.Y. Times, Mar. 27, 1973, at 5, col. 2. In 1976, the Teamsters reportedly demanded that two union representatives be appointed to the board of Anheuser-Busch, Inc. Lassus, What the Teamsters Really Wanted, BEVERAGE WORLD, June 1976, at 34. Also in 1976, the International Federation of Professional and Technical Engineers submitted a proposal during the annual meeting of the American Telephone & Telegraph Co. that a union representative be appointed to the board of directors. The proposal received 3.3% of the votes cast. R. KUHNE, CO-DETERMINATION IN BUSINESS: WORKERS' REPRESENTATIVES IN THE BOARDROOM 103-04 (1980).

2. 15 U.S.C. § 19 (1976). In relevant part, this section provides:

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

The potential conflict between § 8 and labor-union board representation arises when the board representative is a member of a union that represents the employees of competing companies and that has a representative on the board of another firm in the same industry.
employee representation in unionized industries would prohibit many desirable board representation arrangements that pose no anticompetitive dangers. A means of preserving the benefits of employee representation in unionized industries while avoiding the possibility of anticompetitive behavior would be to apply section 8 limitations only to those board members who "represent" a national union. The Note proposes a twofold test for identifying this class of board members.

I. Labor-Union Board Representation in the United States

Labor-union board representation is widespread in Western Europe, but both labor and management in the United States have generally opposed such representation. In recent years, however, certain American corporations and labor unions have shown greater interest in board representation. This increased interest, arising out of economic difficulties, is based on a belief that board representation would mitigate certain shortcomings of the collective bargaining process and would increase worker productivity.

A. American Labor Unions and Board Representation

American labor unions, unlike their European counterparts, have tra-
ditionally rejected board representation as a proper role for the union.\(^5\) Whereas West German unions, for example, have demanded a full voice in the decisions of management through works councils\(^6\) and board representation,\(^7\) American unions, perceiving that participation in management might threaten their independence, have sought to maintain an adversarial position with respect to management by dealing with the firm exclusively through the confrontational collective bargaining process.\(^8\) This reluctance to pursue board representation has been based on a perception that participation in management would decrease the union’s independence and effectiveness. As an official of the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) has stated, American unions already “bargain on more issues than the number [they] might have any impact on as members of a board of directors.”\(^9\)

In the past few years, however, American unions have begun to demand more participation in corporate decisionmaking at all levels of the enterprise. Within the plant, there has been a dramatic increase in joint labor-management committees designed to improve productivity, quality of working life, and community relations.\(^10\) Furthermore, a few unions, such as the United Automobile Workers (UAW) and the Teamsters, have suc-

5. The longstanding view of the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) with respect to union board representation was summed up in some widely quoted remarks by Thomas R. Donohue, executive assistant to former union president George Meany, in 1976: “We do not want to blur in any way the distinction between the respective roles of management and labor in the plant.” Wall St. J., July 17, 1976, at 1, col. 5. Meany himself argued that union board representation “will not work here. The Germans did it because they were worried about someone like Hitler reappearing. I never saw a union that was worth a damn unless it was free—completely and absolutely free.” Workers on the Board?, FORBES, June 1, 1976, at 66.

6. Under the Works Constitution Act of 1972, West German employees have extensive participatory rights within the enterprise through employee works councils. The Act requires the employer to obtain the consent of the works council in matters concerning the structure, organization, and design of jobs; if the works council refuses its consent on any matter governed by the Act, the issue is arbitrated by a labor court. Furthermore, the works council has the right to be informed on a large range of issues, including financial matters. CO-DETERMINATION IN GERMANY, supra note 4, at 99-101.

7. See supra note 4.

8. For a number of historical reasons, American unions have been much less receptive to participation than their European counterparts. First, American workers have traditionally been less class-conscious than European workers. Second, employee representation in the United States has traditionally been a tool of antiunionism. After World War I, employers presented representation plans as a substitute for unions and collective bargaining. As a result, the American union developed a deep-seated hostility to any non-union type of worker representation in the enterprise. The National Labor Relations Act (NLRA) was in large part a response to company unions and established collective bargaining independent of employer influence. Summers, Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective, 28 AM. J. COMP. L. 367, 375-76 (1980).


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cessfully demanded board representation.\textsuperscript{11} Although the labor laws do not require employee participation in corporate decisionmaking\textsuperscript{12} and American management historically has strongly opposed such participation,\textsuperscript{13} recent economic downturns have softened management’s position on this issue. For example, certain companies that faced losses have agreed to labor-union board representation in return for wage and benefit concessions from the union.\textsuperscript{14} Furthermore, some analysts have predicted that sluggish economic growth and trade deficits will encourage future labor-management cooperation in the United States that might lead to further union participation in corporate decision-making, including board representation.\textsuperscript{15}

B. Rationales for Labor-Union Board Representation

Companies expect labor-union board representation to aid profitability in two ways. First, board representation might mitigate certain negative effects of the bargaining system. Under collective bargaining, labor and management are natural adversaries, each attempting to secure the best possible contract.\textsuperscript{16} Although both sides have a statutory duty to bargain in good faith over issues such as wages and benefits,\textsuperscript{17} neither side is com-

\textsuperscript{11} See supra note 1.
\textsuperscript{12} The National Labor Relations Act requires employers to bargain with the union concerning “wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d) (1976). This duty to bargain, however, does not encompass “managerial decisions which lie at the core of entrepreneurial control.” Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964); see, e.g., First Nat. Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (no duty to bargain over the decision to terminate part of operations); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965) (“Employer has the absolute right to terminate his entire business for any reason.”). See generally Summers, supra note 8, at 381 (1980) (employee board representation is not a mandatory subject of collective bargaining).
\textsuperscript{13} Management has generally opposed labor-union board representation as being contrary to traditional forms of labor-management relations. See B. ROBERTS, H. OKAMOTO & G. LODGE, supra note 10, at 70. John Zalusky, an economist in the Research Department of the AFL-CIO, commented in 1976: “a fundamental problem with the concept of co-determination in the United States is that it seems likely that management is unwilling to surrender any part of its decision making rights, unless the firm is in trouble.” R. KUHNE, supra note 1, at 103. The Business Roundtable rejected employee board representation as “inconsistent with U.S. traditions and [the] style of management-labor relationships at arms length.” Statement of Business Roundtable, 33 BUS. LAW. 2083, 2107 (1978).
\textsuperscript{14} See supra note 1. The Chrysler, American Motors, and Pan American union board representation plans were all devised in conjunction with wage and benefit concessions.
\textsuperscript{15} See B. ROBERTS, H. OKAMOTO & G. LODGE, supra note 10, at 69 (“[a] growing number of analysts of trends in the United States believe that changes in the economic and social climate” will lead to increased employee participation). But see Summers, Codetermination in the United States: A Projection of Problems and Potentials, 4 J. COMP. CORP. L. & SEC. REG. 155, 157 (1982) (“Employee representation on corporate boards in any meaningful form can be achieved only by legislation.”).
\textsuperscript{16} The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), is written with the presupposition that labor and management are natural antagonists and thus stipulates the rules that each side must follow with respect to the other; in particular, it mandates that all dealings be in good faith. See generally Summers, supra note 15, at 163.
\textsuperscript{17} Section 8(d) of the NLRA, 29 U.S.C. §158(d) (1976), requires the employer to bargain with
elled to accept the other's position. Furthermore, neither side is fully aware of the other's strengths and weaknesses and hence is skeptical of the other's proposals. This lack of information can prove inefficient particularly when management is unable to grant certain of the basic demands of the union, and the union decides to strike. In such a case, even though it may be in the union's best interest to accept a less-than-ideal contract in order to maintain members' jobs, the confrontational bargaining system makes such concessions difficult to achieve.

Board representation can supplement the collective bargaining system in this situation by fostering a recognition of the mutuality of interests between the union and management. By giving the union more information about the financial health of the company and its long-term prospects, the likelihood of stalemate is reduced and that of good faith bargaining increased. Board representation thus gives management credibility that it would otherwise not have.

The second rationale behind labor-union board representation is that it facilitates the participation of employees in the control of their work environment, thereby increasing their productivity. Commentators have argued that the current malaise in American industry, characterized by high absenteeism, labor turnover, and low productivity growth, is due in part to the failure of the enterprise to allow employees more control over the direction of the firm. In Western Europe, and to a lesser extent in the United States, companies that have given workers greater decisionmaking control over their immediate work environment have achieved favorable

a union in good faith: "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

18. Summers, supra note 8, at 380.
19. Collective bargaining leads to inefficient results when labor and management are unable to reach an agreement and the union responds with a strike. While such failure to reach an accord is sometimes due to the intransigence of management, it may also be due to the union's ignorance of the true financial position of the enterprise. Even though the bargaining table is a poor place for such information to be conveyed, under the present labor-management relations system in the United States there is no alternative. See Summers, supra note 15, at 164-66.
20. Union representatives on the board of directors would have access to information concerning the financial prospects of the firm that they would presumably convey to the union's bargaining representatives, if only in general terms. Such information would significantly alter the bargaining process by forcing the union to deal with the firm's actual financial condition. Such information would be particularly important in the case of the less successful firm. See generally Summers, supra note 15, at 165-66 (board representation would "strengthen and improve" collective bargaining).
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results. Although the productivity benefits of board representation as a form of employee control over long-term corporate decisionmaking are more tenuous, the Western European experience suggests that board representation is an effective complement to other forms of employee participation in the enterprise.

II. Labor-Union Board Representation and the Antitrust Laws

Labor-union board representation can be challenged on a number of statutory grounds: federal labor law, state corporation law, or federal law.

22. The use of employee board representation has improved the profitability of West German firms. In 1970, a government commission conducted a thorough study of the impact of employee board representation in West Germany. The Commission concluded that cooperation between labor and management induced by worker participation had significantly increased profitability by minimizing industrial strife. See Note, Employee Codetermination, supra note 4, at 960.

23. See, e.g., Strauss & Rosenstein, Workers Participation: A Critical View, 9 INDUS. REL. 197, 200, 212 (1970) (studies in Germany suggest that board representation increases employees' sense of identification with company); Note, Employee Codetermination, supra note 4, at 992-93 (Scandanavian shopfloor innovations have limited effectiveness unless accompanied by board representation).

There are other rationales that also support the promotion of employee board representation. First, even though employee pension funds currently own at least 35% of the equity capital in the United States, Drucker, Pension Fund "Socialism," 42 PUB. INTEREST 3 (1976), the fiduciaries holding these shares are prohibited by the Pension Reform Act, 29 U.S.C. § 1106(b)(2) (1976), from participating in management. Hence, employees are denied the opportunity to reap one of the benefits of capital ownership: the ability to control the ways in which that capital is used. Employee board representation would be a partial solution to this denial of participation in the fruits of ownership. Second, employee board representation arguably would bring a new perspective to boardroom deliberations, as the employee representative would be more likely to challenge management's proposals. Such challenges would possibly increase the board's control over the affairs of the firm. See Summers, supra note 15, at 185.

24. Labor-union board representation could be challenged under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), or the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1976). Section 8(a)(2) of the National Labor Relations Act provides that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." 29 U.S.C. § 158(a)(2) (1976). When a union member serves as a board director, he becomes a member of management. It is therefore arguable that his continued membership in the union constitutes employer domination or interference under § 8(a)(2). See, e.g., Local 636, United Ass'n of Journeymen v. NLRB, 287 F.2d 354, 361 (D.C. Cir. 1961) (union official's continued participation in union after promotion to supervisor violates § 8(a)(2)); Note, Serving Two Masters: Union Representation on Corporate Board of Directors, 81 COLUM. L. REV. 639, 640-41 (1981) (union official as board director may constitute employer interference under § 8(a)(2)).

Section 501(a) of the Labor Management Reporting and Disclosure Act provides:
The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person . . . . to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties. . . . 29 U.S.C. § 501(a) (1976). A union member, in his capacity as a board director, may wish to take actions that seem adverse to his union's interest. Section 501(a) appears to place important limitations on his ability to take such actions as a board member. See Note, supra, at 645-48 (analyzing union official's fiduciary obligations under § 501(a)). For example, UAW President Douglas Fraser, while sitting on the board of directors of Chrysler Corp., called for the union to make additional wage concessions to stave off impending bankruptcy. See N.Y. Times, Dec. 17, 1980, at 1, col. 3.

25. It is a fundamental principle of state corporation law that a director has a fiduciary duty to
promote the corporation's interests. See Pepper v. Litton, 308 U.S. 295, 311 (1939) (board director cannot "violate the ancient precept against serving two masters" by acting "to the detriment of the stockholders"). Indeed, a number of state statutes expressly provide that the director owes a fiduciary duty to the corporation: "Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its shareholders and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions." N.C. GEN. STAT. § 55-35 (1982).

A labor-union official has a duty to represent the interests of the union. See 29 U.S.C. § 501(a) (1976) (describing fiduciary responsibilities of labor-union officials). When the interests of the union conflict with the interests of the corporation, a labor-union board representative might be forced to violate his fiduciary duty to the corporation as well as to the union.

26. The major problem under the antitrust laws, and the problem that this Note addresses, arises under the Clayton Act's prohibition against interlocking directorates. See supra note 2 (quoting § 8 of the Clayton Act).

At least one commentator, however, has argued that the mere presence of an employee representative on a board of directors in a unionized industry might provide circumstantial evidence of agreement or conspiracy to limit competition and thereby violate § 1 of the Sherman Act, 15 U.S.C. § 1 (1976), which forbids combinations and conspiracies in restraint of trade. See Comment, Broadening the Board: Labor Participation in Corporate Governance, 34 SW. L.J. 963, 971 (1980). Although circumstantial evidence may create an inference of conspiracy sufficient to prove a violation of the Sherman Act, it is unlikely that the mere presence of a labor-union official on the board of directors would be sufficient to prove a violation of § 1 without some evidence of actual agreement to restrain trade. Thus, under § 1, union board representation would be prohibited only if evidence of actual agreement could be produced.

27. With respect to § 8(a)(2) of the National Labor Relations Act, courts generally have not found a violation unless management actually controlled the union. See, e.g., Hertzka & Knowles v. NLRB, 503 F.2d 625, 650-31 (9th Cir. 1974) (management representatives on employee committees formed to deal with employer do not violate § 8(a)(2)), cert. denied, 432 U.S. 875 (1975); Federal-Mogul Corp. v. NLRB, 394 F.2d 915, 918 (6th Cir. 1968) ("It is not the potential for control that the Act declares unlawful but the actual domination of a labor organization."); Modern Plastics Corp. v. NLRB, 379 F.2d 201, 204 (6th Cir. 1967) (NLRB "must prove that the employer's assistance is actually creating Company control over the Union before it has established a violation"); Cuppos Eng'g Corp. v. NLRB, 240 F.2d 564, 573 (1st Cir. 1957) (§ 8(a)(2) not violated where plaintiff demonstrates "no more than cooperation by [the employer] and a possibility of company control"); Anchorage Community Hosp., 225 NLRB Dec. (CCH) ¶ 16,966, at 28,112 (1976) (§ 8(a)(2) not violated despite union's control of 7 of 15 seats on board of trustees); Note, supra note 24, at 643-45 (union board representation not per se unlawful under § 8(a)(2)).

The language of § 501(a) of the Labor Management Reporting and Disclosure Act requires that the "special problems and functions of a labor organization" be considered in evaluating the actions of union officials. 29 U.S.C. § 501(a) (1976). This clause was specifically designed to ensure that union officials had broad discretion in conducting union affairs. Therefore, courts have intervened to condemn a union official's conduct under § 501 only when the official has manipulated democratic procedures within a union or when he has profited personally at the union's expense. See, e.g., Hood v. Journeymen Barbers Int'l Union, 454 F.2d 1347, 1355 (7th Cir. 1972) (union officials' breach of fiduciary duties in managing union pension funds violates § 501(a)); Blanchard v. Johnson, 388 F. Supp. 208, 214-15 (N.D. Ohio 1974) (union official's failure to inform rank and file adequately about implications of affiliation agreement undermines union democracy and violates § 501(a)), rev'd in part, 532 F.2d 1074 (6th Cir. 1975), cert. denied, 429 U.S. 834 (1976). Furthermore, as long as union officials do not violate the union's constitution, by-laws, and membership resolutions, they do not violate their fiduciary duties under § 501. See, e.g., Gabauer v. Woodcock, 594 F.2d 662, 668 (8th Cir.) (en banc) (finding no fiduciary violation when actions "authorized by the union's constitution and resolutions of the union's national convention"); cert. denied, 444 U.S. 841 (1979); McNamara v. Johnston, 522 F.2d 1157, 1164-65 (7th Cir. 1975) (same); cert. denied, 425 U.S. 911 (1976). Thus, if the union explicitly authorized board representation, a § 501(a) violation could not occur. But see Summers, Worker Participation in Corporate Management—The United States Version, 1 J. COMP. CORP. L. & SEC. REG. 157, 177 (1978) (union board representative would deal with union as "adverse party" and arguably violate § 501(a)).

28. Although directors owe a fiduciary duty to the corporation, they are given broad discretion in
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statutes suggest that they do not threaten union board representation. The antitrust laws, however, pose a more serious challenge to board representation. Unresolved at present is the issue of whether board representation in unionized industries violates the prohibition in section 8 of the Clayton Act against interlocking directorates between competing corporations. This ambiguity can have important consequences: fear of liability has prevented the spread of union board representation in the automobile industry and may discourage its use in other industries.

A. Prohibition Against Interlocking Directorates

The antitrust laws prohibit interlocking directorates between competitors because of the potential of these interlocks to facilitate anticompetitive behavior. The language and purpose of section 8 suggest that courts should apply the ban against interlocking directorates to labor-union board representation.

1. Antitrust Theory Behind Interlocking Directorates

A primary goal of antitrust law is to insure that society's productive making decisions on the corporation's behalf. Courts have permitted boards of directors to adopt policies promoting employee interests even though such policies may run counter to the short-run interests of the corporation. See, e.g., Herald Co. v. Seawell, 472 F.2d 1081, 1094 (10th Cir. 1972) (creation of employee stock trust to benefit employees within the discretion of management); Wachovia Bank & Trust Co. v. Steele's Mills, 225 N.C. 302, 308-09, 34 S.E.2d 425, 428 (1945) (trust to help needy employees valid); Steinway v. Steinway & Sons, 17 Misc. 43, 40 N.Y.S. 718 (Sup. Ct. 1896) (extensive employee benefits valid). Thus, because of the dependence of corporate profitability on employee good will, management has broad discretion to consider employees' needs in developing company policy. More specifically, because board representation improves employee good will, it is within the discretion of shareholders to choose an employee representative to serve on the board.

Moreover, even though a union member sitting on a corporate board may have conflicting interests when he participates in transactions between the union and the corporation, he can avoid this conflict by disclosing his union relationship and not voting on issues related to the collective bargaining agreement. Courts have generally upheld transactions between the corporation and another party to which one of the directors owes a fiduciary duty if the director makes full disclosure of his fiduciary interest to the board of directors and if the transaction is deemed "fair" to the corporation. See, e.g., State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co., 64 Wash. 2d 375, 385-86, 391 P.2d 979, 984 (1964) (transaction in which director has interest cannot be voided if fair to corporation); Voss Oil Co. v. Voss, 367 P.2d 977, 979-80 (Wyo. 1962) (same); H. Henn, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 238, at 465 (2d ed. 1970) (modern cases apply fairness test). Whether the interested director can count toward a quorum and vote on the issue in question depends on the relevant state statute. Id. § 238, at 467-68.

29. For example, American Motors Corp. abandoned its plan to place an employee representative on its board of directors because of uncertainty about the applicability of § 8 of the Clayton Act. For the same reason, the UAW has decided not to demand employee representation on the boards of other corporations that compete with Chrysler. Interview with Irving Bluestone, University Professor of Labor Studies, Wayne State University, in New Haven, Conn. (Nov. 7, 1981) (notes on file with Yale Law Journal).

30. Since the Justice Department issued an advisory opinion on February 26, 1981, concluding that § 8 should apply to labor unions, see infra p. 117, only one American corporation, Pan American World Airways, placed a union representative on its board of directors. Wall St. J., May 13, 1982, at 22, col. 5.

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resources are allocated throughout the economy in a manner that will permit consumers to satisfy their wants as fully as technological constraints permit. One of the chief functions of the antitrust laws, therefore, is to prevent competitors from engaging in behavior that would distort this efficient allocation of productive resources.

Consistent with this function, antitrust law prohibits various horizontal market agreements that restrict competition: explicit agreements between competitors to fix prices; divide markets; or dampen price competition without directly fixing prices; concerted refusals to deal with a firm; and the dissemination of data about production and pricing if deemed anticompetitive. Each of the prohibited horizontal agreements depends

31. Judge Bork has described this goal as “the maximization of consumer welfare.” R. BORK, THE ANTITRUST PARADOX 51 (1978). Maximization of consumer welfare means maximization of total societal welfare; it does not concern itself with how that welfare is allocated among members of society.

The legislative history of the antitrust statutes and the case law interpreting those statutes reveal a second purpose of the antitrust laws. This purpose may be characterized as a “populist” goal of dispersing wealth, limiting business size, and broadening entrepreneurial opportunities. Although the two goals of efficient allocation of productive resources and populism frequently conflict in such a manner that courts must choose between them, populist values often promote economic efficiency. See 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 103, at 7-8 (1978).

32. Antitrust law also prohibits various vertical agreements between suppliers and retailers that restrict competition, such as resale price maintenance and territorial restrictions on distribution. For a discussion of the law prohibiting vertical restraints, see L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 131-175, at 374-500 (1977). The potential anticompetitive effect of labor-union interlocking directorates is limited, however, to horizontal agreements to restrict competition, and hence this Note considers only those anticompetitive restraints.

33. See United States v. Trenton Potteries Co., 273 U.S. 392, 401 (1927) (price-fixing agreement where defendants control 82% of market is illegal per se). Even if price-fixing is not part of a cartel arrangement and the market share of the price-fixers is minimal, price-fixing agreements are still illegal per se. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225 n.59 (market power not necessary element in finding price-fixing to be illegal per se),reh. denied, 310 U.S. 658 (1940). Maximum price-fixing is also illegal per se. See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (agreement among liquor distillers to fix maximum prices above which wholesalers could not resell is illegal per se),reh. denied, 340 U.S. 939 (1951).

34. See United States v. Topco Assoc., Inc., 405 U.S. 596, 608 (1972) (per se rule applies to market division arrangements regardless of whether linked to price-fixing or other restraints).

35. See, e.g., United States v. Tailano, Inc., 446 U.S. 643, 650 (1980) (per curiam) (agreement to eliminate free short-term credit sales to retailers is illegal per se); National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 426 (7th Cir. 1965) (agreement among competitors to reduce durum wheat content of macaroni is illegal per se); United States v. Gasoline Retailers Ass'n, 285 F.2d 688, 691 (7th Cir. 1961) (agreement not to advertise price except by sign on pump held illegal); Plymouth Dealers' Ass'n v. United States, 279 F.2d 128, 132 (9th Cir. 1960) (agreement between competing car dealers on “list price” is illegal per se, even though cars almost never sold at that price).

36. See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210 (1959) (conspiracy between retailer and manufacturers not to sell to rival retailer illegal); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 465 (1941) (agreement among guild members not to sell to retailers who stocked garments copied by other manufacturers from designs of guild members illegal).

37. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 458-59 (1978) (comparison of competitor prices before making price concessions to buyers illegal); United States v. Container Corp. of America, 393 U.S. 333, 335 (1969) (informal exchange among suppliers of price information about most recent sales illegal). But see Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 582 (1925) (mere exchange of information is not "an unreasonable restraint, or in any respect unlawful").
upon some form of direct or indirect communication among competitors. Therefore, the antitrust laws proscribe certain business relationships, even in the absence of an actual showing of anticompetitive behavior, if those relationships are presumed to facilitate such behavior. The section 8 ban against interlocking directorates between competing corporations is an example of this latter type of prohibition. Congress perceived the interlocking directorate to be an important means by which competitors consummate horizontal agreements—both formal cartel agreements and informal sharings of commercial information—that facilitate anticompetitive decisions on pricing and output.

38. Although § 8 is the primary statute prohibiting interlocking directorates, other statutes have been used to the same end. For example, in recent years, the FTC has used § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976), to challenge interlocking directorates as an unfair method of competition. See, e.g., Perpetual Fed. Sav. & Loan Ass'n, 90 F.T.C. 608, 648 (1977) (using § 5 of FTC Act against savings and loan institution interlocks not covered by § 8 of Clayton Act), order withdrawn and complaint dismissed, 94 F.T.C. 401 (1979) (§ 5 amended to exempt interlock in question); Kraftco Corp., 89 F.T.C. 46, 60 (1977) (interlocking directorate violates § 5 in addition to § 8), remanded on other grounds sub nom. SCM Corp. v. FTC, 565 F.2d 807 (2d Cir. 1977), petition for review denied, 612 F.2d 707 (2d Cir.), cert. denied, 449 U.S. 821 (1980). One commentator has argued that § 8 was not worded more broadly because Congress believed that other interlocks would be covered by § 5. Note, Keys to Unlock the Interlocks: Dealing with Interlocking Directorates, 11 J.L. REFORM 361, 379 (1978).

Furthermore, interlocking directorates in conjunction with conspiracies or combinations in restraint of trade have been prohibited in consent decrees terminating government antitrust actions under §§ 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3 (1976). These decrees prohibit interlocking directorates and, unlike § 8 of the Clayton Act, prohibit interlocking officers and employees. See, e.g., United States v. True Temper Corp., 1959 Trade Cas. (CCH) ¶ 69,441, at 75,664 (N.D. Ill. 1959) (manufacturer prohibited from permitting officers, directors, or employees to serve as officer, director, or employee of competitor); United States v. Pittsburgh Crushed Steel Co., 1954 Trade Cas. (CCH) ¶ 67,892, at 69,884 (N.D. Ohio 1954) (same). Other statutes regulate interlocks in particular industries. See, e.g., Federal Alcohol Administration Act § 8, 27 U.S.C. § 208 (1976) (regulating interlocks between companies in liquor industry); Communications Act of 1934 § 212, 47 U.S.C. § 212 (1976) (regulating interlocks between communications carriers).


The House Judiciary Committee Report on the Clayton bill spelled out the purpose behind the ban on interlocking directorates: "The truth is that the only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the entire system ... to the detriment of the public generally." H.R. REP. NO. 627, supra, 19-20 (1914). The Senate Committee Report adopted this analysis in recommending passage of the bill. S. REP. NO. 698, supra, 48 (1914).

Section 8 of the Clayton Act was therefore premised on the notion that "elimination of the competition between the corporations was to be presumed from the very existence of common directors." United States v. Crocker Nat'l Corp., 656 F.2d 428, 438 (9th Cir. 1981). Through § 8, Congress
Every participant in a formal cartel agreement to restrict pricing or output is under great pressure to cheat on the agreement: to lower its prices and receive greater revenues through increased sales. Such agreements thus will break down unless each member knows that any cheating will be detected immediately. Although there are other methods of monitoring anticompetitive agreements—telephone calls, trade association meetings, and business lunches—none of these is as effective as an interlocking directorate. If members of the interlocked firms' boards of directors can trust each other to broadcast each firm's operations to other members of the cartel, then the incentive to cheat is eliminated and the cartel is preserved.\textsuperscript{40}

Of greater significance is the role of interlocking directorates in facilitating informal sharings of commercial information. For example, a firm could use an interlock to inform other firms of its pricing schedules, production plans, and marketing strategies, all of which might promote the coordination of pricing and output decisions. In each of these cases, antitrust enforcement officials face the problem of detecting an agreement. An interlock, by eliminating the need for telephone calls or other forms of communication, makes such detection extremely difficult. Although an interlock is merely an enforcement mechanism and not itself anticompetitive, Congress decided to make both the interlock and the agreement it facilitates illegal per se.\textsuperscript{41}

\textsuperscript{40} J. HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 358 (2d ed. 1980) (stressing importance of effective and secret enforcement of cartel agreements).

\textsuperscript{41} See, e.g., Perpetual Sav. & Loan Ass'n, 90 F.T.C. 608, 619 (1977) ("[T]here is no need to assess the nature of the industry or to look at mitigating circumstances. [Section 8] is a per se statute."). See, e.g., United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953).
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2. Application of Section 8 to Labor-Union Board Representation

The application of section 8 to labor-union board representation has not yet been considered by any court. Both the Federal Trade Commission (FTC) and the Department of Justice, however, have issued advisory opinions on the subject. The Department of Justice concluded that section 8 should apply to labor unions because unions have "an incentive to become aware of and influence . . . the commercial and financial affairs" of their employers. Because of this incentive, the Justice Department concluded that employee representation in unionized industries should be prohibited when the union members sit "as representatives of the union." The Justice Department did not specify the criteria for determining when a union member sits as a union representative.

The FTC reached the opposite conclusion. It reasoned that Congress did not intend section 8 to "reach interlocking directorates formed through 'representatives' of a common labor union" and that thus this form of interlock should be exempt from section 8 coverage. The FTC's analysis was twofold: first, such an application of section 8 "would extend its reach beyond the situations which Congress intended to be per se unlawful," and second, labor-union director interlocks do "not present the risk of individuals' service on other boards in the same industry. Congress determined, however, that the anticompetitive dangers of the interlock far outweighed that possible benefit. H.R. REP. NO. 627, supra note 39, at 19-20 (1914).

Other reasons for prohibiting interlocking directorates are unrelated to the anticompetitive dangers of interlocks and, hence, are not considered in this Note. These reasons include the diminished opportunity for advancement by young corporate managers, the fear of consolidation of corporate power into a few hands, and the adverse effect on the quality of management of multiple commitments. See Travers, Interlocks in Corporate Management and the Antitrust Laws, 46 TEX. L. REV. 819, 833-38 (1968).

42. There is at least one case involving a union member on a board of directors. United Mine Workers President W.A. Boyle served on the board of directors of a bank whose stock was owned primarily by the union. The court held that Boyle had violated § 501(a) of the Labor Management Reporting and Disclosure Act, see supra note 24, because he was compensated for his service. United Mine Workers v. Boyle, 78 Lab. Cas. (CCH) ¶ 11,183, at 20,051 (D.D.C. 1975). Because the case did not involve union membership on boards of competing firms, the § 8 issue did not arise.

43. Interlocking Directorates-Union Representation, 5 TRADE REG. REP. (COH) ¶ 50,425, at 55,967 (Feb. 26, 1981). The Justice Department, in its advisory opinion to the UAW, noted that in United States v. Cleveland Trust Co., 392 F. Supp. 699 (N.D. Ohio 1974), aff'd mem., 513 F.2d 633 (6th Cir. 1975), the government had argued that "a corporation sat on the boards of competing corporations through representatives" and therefore concluded that "there is no reason why the UAW, under the proper circumstances, could not also violate Section 8 under this theory." The Justice Department concluded that "if 'the union' should sit on the boards of both Chrysler and AMC through representatives, Section 8 would be violated." Interlocking Directorates-Union Representation, 5 TRADE REG. REP. ¶ 50,425, at 55,967 (Feb. 26, 1981).


45. See International Union, United Automobile Workers of America, 3 TRADE REG. REP. (CCH) ¶ 21,822, at 22,055 (May 8, 1981).

46. Id.
competitive harm at which Section 8 was aimed."

An analysis of the text and purpose of section 8 suggests that the Justice Department's interpretation is correct. First, the text of section 8 does not foreclose application to labor-union director interlocks. Section 8 states that no "person" shall sit on the boards of directors of competing corporations. Because section 1 of the Act defines "persons" to include associations, and the Supreme Court has held that labor unions are associations for the purposes of the antitrust laws, unions fall within the literal purview of section 8. In addition, there is no indication in the legislative history that Congress intended such interlocks to be excluded from the coverage of section 8.

Unions have the same economic incentives to restrict product-market competition as does management and thus fall within the prophylactic purpose of section 8. A union is chiefly concerned with maximizing the wages and benefits of its members. The revenues that a firm receives necessarily set a ceiling on the wages payable to employees; if total revenues are increased, then wages and benefits can be increased. Because a firm's revenue generally can be increased through a restraint on product-market competition, a union has a strong incentive to help an employer maximize revenues by restricting competition. A reduction in product-market competition would also protect the jobs of fellow union members employed by less efficient competitors. Finally, severe product-market competition, particularly with nonunion firms, can increase employer re-

47. Id.
49. Section 1 of the Clayton Act provides: "The word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of . . . the United States . . . " 15 U.S.C. § 12(a) (1976).
51. A secondary purpose of the union is to "enable workers to participate jointly with management in the government of their industrial lives through chosen representatives even as all of us may participate, through elected representatives, in political government." Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, 610 (1959).
52. See Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L.J. 14, 17, 22 (1963) ("Labor and management are unified by their mutual interest in seeing [product market] competition limited. . . . Empirical evidence bears out these conclusions. There have been many instances of direct or indirect price-fixing by unions."). The UAW, for example, has actively sought the imposition of import quotas and other barriers to foreign competition in order to protect union interests. See, e.g., Testimony of UAW President Douglas A. Fraser Before the International Trade Commission (Oct. 8, 1980), quoted in Memorandum of American Motors Corporation, Interlocking Directorates—Union Representation, 5 Trade Reg. Rep. (CCH) ¶ 50,425, at 55,967 (Feb. 26, 1981).
53. See Summers, supra note 27, at 178. A reduction in product-market competition is designed to reduce the available supply of a product in order to raise its price. The effect of such a reduction would be to reduce the likelihood of further employment, but the union is arguably more concerned with its present members than with the possibility of future members.
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...istance to collective bargaining demands, creating further incentives for the union to restrict competition in the product market.\(^5\)

Unions representing the employees of several competitors within an industry are particularly well situated to facilitate product-market restraints, whether through formal agreements with employers or through less visible and more informal agreements consummated in directors' meetings.\(^5\) The courts have found many examples of agreements between unions and employers.\(^5\) Application of section 8 to labor-union board representation is consequently consistent with the statute's purpose of forbidding practices that facilitate agreements to restrain competition.

The mere fact that the same union member or officer would not sit on more than one board within an industry should not insulate the union from section 8 coverage. Courts have held in other areas of the law that an entity, such as a corporation, a partnership, or a union, can incur liability through the actions of a "deputy" or "representative" of that entity.\(^5\) According to this deputization theory, a person is a "deputy" of an

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Furthermore, profit-sharing compensation plans and union pension funds with significant investments in the employer-corporation create additional union incentives to foster employer profitability. Steuer, supra note 4, at 272.

55. This analysis assumes that the product market is competitive. If the product-market price is already a monopoly price, then the union would be unable to increase its own wage share by restraining product-market competition. In this type of industry, therefore, a labor-union interlock would not pose anticompetitive dangers. Likewise, this analysis assumes that the labor market is competitive. If the union were powerful enough to control the labor supply perfectly, then it could regulate entry into the industry and determine the market price through its control of labor costs.


Furthermore, the greater the elasticity of demand for labor in a particular industry, the less the union would benefit from restraints in product-market competition. In the case of high elasticity of demand for labor, capital could be substituted easily for labor, putting the union in a weaker bargaining position when seeking higher wages. As the Antitrust Division of the Justice Department noted: "[t]he higher the labor costs as a component of the final product, . . . the more likely that labor unions will become involved in trying to control secondary market competition." REPORT OF THE TASK GROUP ON ANTITRUST IMMUNITIES 34 (1977).

56. See, e.g., United Mine Workers v. Pennington, 381 U.S. 657, 659-61 (1965) (union conspired with large coal operators to impose agreed-upon wage and royalty scales upon smaller operators to drive latter from market); United States v. Employing Lathers Ass'n, 347 U.S. 198, 199-200 (1954) (union combined with trade association to exclude out-of-state contractors from local market); United Bhd. of Carpenters v. United States, 330 U.S. 395, 398-99 (unions and millwork manufacturers conspire to prevent out-of-state manufacturers from selling in local market and to prevent area dealers from handling out-of-state goods); Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 799-800 (1945) (union combined with local electrical equipment manufacturers to exclude out-of-state manufacturers, thereby allowing local manufacturers to engage in price-fixing).

57. This "deputization theory" has been adopted by the courts in enforcing § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1976). See, e.g., Blau v. Lehman, 368 U.S. 403, 409
entity if that person has a fiduciary relationship to the entity and a concomitant obligation to represent its interests. Thus, if a board member has a fiduciary duty to the union to represent its interests, then, for the purposes of section 8, the "union" is sitting on the board of directors. Although no court has applied the deputization theory to section 8, the theory's recent acceptance by the FTC and the Department of Justice may be tantamount to judicial approval because section 8 cases are rarely litigated.

B. Labor Exemption from Antitrust Prosecution

Both a statutory and a nonstatutory exemption protect labor unions from antitrust prosecution. Neither of these exemptions, however, should protect labor-union board representation from section 8 enforcement.

1. Statutory Exemption

Congress has passed two statutes—the Clayton Act and the Norris-Proctor Act (1962) (noting in dictum that partnership could be "director" of company under deputization theory in action based on § 16(b) of 1934 Act); Feder v. Martin Marietta Corp., 406 F.2d. 260, 263-66 (2d Cir. 1969) (corporation held director of another corporation under deputization theory because officer of first corporation served as director of second corporation), cert. denied, 396 U.S. 1036 (1970). But see Marquette Cement Mfg. Co. v. Andreas, 239 F. Supp. 962, 967 (S.D.N.Y. 1965) (stockholder in family corporation held not to be deputy of corporation while sitting on board of another corporation).

The government argued that the deputization theory should be applied to § 8 in United States v. Cleveland Trust Co., 392 F. Supp. 699 (N.D. Ohio 1974), aff'd mem., 513 F.2d 633 (6th Cir. 1975). The case was subsequently settled pursuant to a consent decree that endorsed the government's theory.

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59. In its advisory opinion to the UAW, the FTC concluded that the deputization theory applied to § 8 but concluded that § 8 did not cover labor-union interlocks. International Union, United Automobile Workers, 3 TRADE REG. REP. (CCH) 21,822, at 22,055 (May 8, 1981).

60. See, e.g., International Union, United Automobile Workers v. Cleveland Trust Co., 392 F. Supp. 699, 711 (N.D. Ohio 1974) (Justice Department arguing deputization theory applies to § 8 cases), aff'd mem., 513 F.2d 633 (6th Cir. 1975); Interlocking Directorates—Union Representation, 5 TRADE REG. REP. (CCH) 50,425, at 55,967 (Feb. 26, 1981) (Justice Department advisory opinion concluding that UAW representation violates § 8 under deputization theory).

61. Generally, either the FTC or the Department of Justice will file a complaint and convince the defendant to resign one of the directorates to avoid litigation. Thus, the antitrust enforcement agencies' view of the law is extremely important in the absence of a definitive judicial decision on the subject.

From 1914 until 1965, the Department of Justice instituted only 10 § 8 suits. During the same period, the FTC filed 13 complaints, 12 of which were dismissed after the directors involved voluntarily resigned from all but one of the directorships in question. STAFF OF HOUSE COMM. ON THE JUDICIARY, REPORT ON INTERLOCKS IN CORPORATE MANAGEMENT, 89th Cong., 1st Sess. 227 (1965).

Until 1974, only nine § 8 suits had been brought by private parties. See Note, Private Enforcement of Section 8's Prohibition of Interlocking Directorates, 54 B.U.L. REV. 659, 660 n.11 (1974). During the 1970's, however, both the FTC and the Justice Department stepped up their enforcement of § 8. See Wilson, Unlocking Interlocks: The On-again Off-again Saga of Section 8 of the Clayton Act, 45 ANTITRUST L.J. 317, 318 (1976) (citing "unprecedented number of recent cases challenging corporate interlocks").

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LaGuardia Act—63—that declare that labor unions are not combinations in restraint of trade. 64 The courts have consistently held that these statutes exempt certain union activities from the operation of the antitrust laws. 65 These exempted activities include those unilaterally undertaken by a union in the furtherance of its own interests. 66 This statutory exemption, however, does not protect agreements between unions and nonlabor groups, such as employers. 67 Because board representation arises out of a

64. Although Congress passed the Sherman Act in 1890 to eliminate agreements in restraint of trade among business corporations, the Act initially was applied more frequently to labor unions than businesses. A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 33 (9th ed. 1981).

Believing that employee collective action served a valuable function in equalizing bargaining power between labor and management, Congress explicitly exempted labor unions from antitrust prosecution under the Clayton Act in 1914. Section 6 of the Act states that “nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . 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.” 15 U.S.C. § 17 (1976). Section 20 of the Act limits the power of the federal courts to grant injunctions in labor disputes and specifically exempts labor union activities from the antitrust laws:

No restraining order or injunction . . . shall prohibit any person or persons . . . from ceasing to perform any work . . . ; or from peacefully persuading any person . . . to abstain from working; or from ceasing to patronize . . . any party to such dispute . . . ; or from paying . . . any strike benefits . . . ; or from peaceably assembling in a lawful manner . . . .


The Supreme Court severely limited the scope of § 20 in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 469 (1921) (Clayton Act confers no antitrust immunity when union departs from “normal and legitimate” behavior). Thus, Congress passed the Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 104-105 (1976), containing a declaration of policy favoring the freedom of employees to organize collectively and forbidding the issuance of injunctions by federal courts against employees engaged in certain specified activities in the context of a labor dispute, closely resembling those activities protected by § 20 of the Clayton Act. In particular, § 5 of the Act prohibited the issuance of an injunction on the ground that the union is “engaged in an unlawful combination or conspiracy because of the doing in concert” of various acts enumerated in § 4 of the Act and § 20 of the Clayton Act. 29 U.S.C. § 105 (1976).

65. Connell Constr. Co. v. Plumbers Local Union No. 100, 421 U.S. 616, 621-22 (1975). This “statutory” exemption was first articulated by the Court in United States v. Hutcheson, 312 U.S. 219 (1941). In that case, the Court held that those union actions that are immune from injunction by virtue of the Clayton or Norris-LaGuardia Acts are also immune from antitrust enforcement. Id. at 236; see, e.g., United States v. American Fed’n of Musicians, 47 F. Supp. 304, 308-09 (N.D. Ill. 1942) (union efforts to secure agreements from employers not to employ nonunion musicians constitute “labor dispute” within meaning of the Norris-LaGuardia Act and are exempt from Sherman Act), aff’d sub nom. United States v. International Hod Carriers District Council, 313 U.S. 539 (1941); Handler & Zifchak, Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption, 81 Colum. L. Rev. 459, 475-79 (1981) (discussing labor’s statutory exemption from antitrust prosecution).

67. The Supreme Court noted in United States v. Hutcheson, 312 U.S. 219 (1941), that “[s]o long as a union acts in its self-interest and does not combine with non-labor groups,” the union is exempt from antitrust enforcement. Id. at 232. The Supreme Court has consistently held, however, that if a union combines with a non-labor group, it loses its statutory exemption. See, e.g., United Mine Workers v. Pennington, 381 U.S. 657, 662-63 (1965) (statutory immunity lost when union agrees with one employer about wages it will exact from another employer not involved in same negotiations); Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 808-10 (1945) (statu-
union-management agreement, it is not protected by the statutory exemption.

2. **Nonstatutory Exemption**

If a union combines with a nonlabor group, thereby precluding application of the statutory exemption, the union's activities may still be exempt under a judicially created "nonstatutory exemption.” The Supreme Court held in *Connell Construction Co. v. Plumbers Local Union No. 100* that "a proper accommodation between the congressional policy favoring collective bargaining . . . and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions."70

The source of this nonstatutory exemption is the national labor policy articulated in the National Labor Relations Act favoring the association of employees to eliminate competition over wages and working conditions.71 Although union organization of employees and standardization of wages ultimately decrease price competition among employers in product markets, the Supreme Court has recognized that the "goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws."72 In light of the competing goals of increased product-market competition and promotion of worker organization, courts have been forced to distinguish those union-employer agreements that are legitimate from those that are not.

To draw this distinction, courts have examined whether the union-employer agreement in question restrains competition only in the labor market, in which case the agreement is legitimate, or whether the agreement...
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restrains competition in the product market, in which case a more careful analysis is required. The Supreme Court first considered the issue of union-employer agreements restraining product-market competition in *Allen Bradley Co. v. Local Union No. 3, IBEW*. The Court held that a union-employer agreement excluding out-of-state manufacturers from the local market was not exempt from Sherman Act enforcement despite its furtherance of union interests because it directly restrained product-market competition.

Twenty years later, the Court modified its blanket rule against union-employer agreements that restrain product-market competition. In *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, the Court allowed a union-employer agreement restricting retail marketing hours because of the importance of the union interest at stake. Justice White wrote that agreements restraining product-market competition should be exempt from antitrust sanctions if they are "intimately related to wages, hours and working conditions. . . ." By weighing the severity of the restraint on competition against the labor interest protected by that restraint, Justice White introduced a balancing test into the process of determining the legitimacy of union-employer agreements. In *Connell

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73. 325 U.S. 797 (1945).
74. The Court held:
[W]e think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services. . . . [W]hen the union participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts. *Id.* at 808-09.
75. 381 U.S. 676 (1965).
76. The Court split into three opinions, each signed by three Justices. Justice White's opinion is the Opinion of the Court.
77. 381 U.S. at 689. The district court had found as an issue of fact that a limitation on marketing hours was necessary to protect union member's jobs and working hours, which, for Justice White, satisfied the "intimately related" test. *Id.* at 694-96.
78. Justice White stressed in a footnote that the "crucial determinant is not the form of the agreement" but rather "its relative impact on the product market and the interests of the union members" which the restraint protects. *Id.* at 690 n.5. White noted: "Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects." *Id.* at 689. Other Justices sharply criticized this balancing test. Justice Goldberg, in a concurring opinion joined by Justices Harlan and Stewart, characterized the test as "a throwback to past days when courts allowed antitrust actions against unions and employers engaged in conventional collective bargaining, because 'a judge considered' the union or employer conduct in question to be 'socially or economically' objectionable." *Id.* at 700 (Goldberg, J., concurring) (citing Duplex Printing Co. v. Deering, 254 U.S. 443, 485 (1921) (Brandeis, J., dissenting)). Commentators also have criticized the test. See, e.g., Leslie, supra note 54, at 1217 (*Jewel Tea test leads to "unprincipled and inconsistent decisionmaking"); St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, 62 VA. L. REV. 603, 616 (1976) ("Any reintroduction of the pre-Norris-La Guardia judicial technique of balancing the social plusses and minuses of union objectives must be viewed with some apprehension.").
Construction,\textsuperscript{79} the Court affirmed this balancing test, noting that restraints on product-market competition would not be covered by the nonstatutory exemption if they did not “follow naturally from the elimination of competition over wages and working conditions.”\textsuperscript{80}

No court has ever considered the applicability of the nonstatutory exemption to labor-union director interlocks. Union board representation, however, is not “intimately related” to protected labor-union interests and hence should not be exempt from antitrust prosecution. Although improvement of wages, hours, and working conditions is one of the indirect goals of union board representation, there is no intimate relationship between the two. Furthermore, board representation is not a mandatory subject of collective bargaining.\textsuperscript{81} In Jewel Tea, the Court indicated that product-market restraints arising out of agreements on nonmandatory bargaining subjects do not meet the “intimately related” test.\textsuperscript{82} Hence board representation should not be accorded a nonstatutory exemption.

III. Distinguishing Permissible from Impermissible Labor-Union Board Representation

Section 8 does not ban all employee representation in unionized industries. For example, an employee representative who is neither a member nor an agent of a union would not raise section 8 problems.\textsuperscript{83} Similarly, a representative who belongs to a union with membership limited to one firm would avoid section 8 strictures. The problem case occurs when the employee representative is a member of a union representing more than one firm and when that representative is found to be an agent of the national union under current deputization theory.\textsuperscript{84} This Note proposes a

\textsuperscript{79} Connell Constr. Co. v. Plumbers Local Union No. 100, 421 U.S. 616 (1975). The Court stated:
This kind of 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. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.
\textsuperscript{80} 421 U.S. at 623.
\textsuperscript{81} See supra note 12.
\textsuperscript{83} An example of such an employee representative would be someone sympathetic to the union's interest but who has no fiduciary responsibility to the union, such as a labor lawyer.
\textsuperscript{84} Indeed, the Justice Department, which stated in its advisory opinion that labor unions should
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twofold test whereby an antitrust enforcement agency can determine whether an employee representative who is a union member represents only the employees in his own firm, or whether he represents the national union.

A. Identifying Labor-Union Representatives that Violate Section 8

Labor unions in the United States are far less oligarchic than their European counterparts. Although the local is subject to the national constitution, it functions within the national union as a separate political unit with significant local autonomy. It elects its own officers by a direct vote of the members and makes its own policies. Furthermore, many locals negotiate their own employment contracts without the direction of the national union. Product-market competition reinforces this weaker loyalty to the national union. In many instances, the interests of one firm’s employees conflict with the interests of the employees of other firms in the same industry, even though both groups of employees are represented by the same union. For example, one firm may become more profitable at the expense of another firm through a shift in market share; in such a case, the employees of the successful firm stand to benefit indirectly at the expense of the employees of the less successful firm. Thus the interests of the local may at times actually conflict with the interests of the national.

In light of the realities of union structure, courts should consider two factors in distinguishing board members who should be considered representatives of the national union from those who are deputies of the local union. First, the representative should be neither a national union official nor chosen by the national union. Second, if the collective bargaining agreement is not negotiated by the local union, then the representative should not be a full-time union official. If the union representative meets these requirements, courts should find that he represents only the union members in his particular company and therefore his service as a board member does not violate section 8.

The proposed standard is premised on a recognition of the frequent independence of local unions from the national organization, and of rank-

not be excluded from § 8 coverage, argued that employee representation in unionized industries would be legitimate if the representative did not represent the union. See Interlocking Directorates–Union Representation, 5 TRADE REG. REP. (CCH) ¶50,425 (Feb. 26, 1981).

85. See Summers, supra note 8, at 384.
86. Id. at 385.
87. Id.
88. In a less successful industry with failing companies, there is a greater likelihood that one firm’s employees will prefer that firm’s interests over the interests of a rival company, thus indirectly pitting one local union against another. In a more successful industry, cooperation among locals at competing firms is more likely. Employee board representation has usually been proposed in the United States in less successful industries.
and-file members from the local union. The standard identifies collective bargaining as a proxy for independence of the local from the national. If the local union does its own bargaining, it is sufficiently independent of the national to avoid characterizing the local official as a deputy of the national union. Furthermore, even if the national union bargains on behalf of the local, union board representation would be illegal under the standard only when the representative was a full-time official of the local. Rank-and-file union members who serve on the boards of their employers have no agency relationship to the union. Their only real connection to the union is their obligation as employees to pay union dues. Without more, they are not deputies of the union any more than dues-paying members of a political party are deputies of their party.

B. Preserving the Benefits of Labor-Union Board Representation

Under the proposed standard, the advantages of union board representation are retained while avoiding the anticompetitive dangers of interlocking directorates. First, the benefit of union board representation as a supplement to collective bargaining is preserved by allowing full-time union officials chosen by the local to serve as board representatives. These officials would serve the legitimating function needed to persuade the membership to accept wage and benefit concessions or other less attractive contract offers. Even though a national union official such as UAW President Douglas Fraser would probably have the greatest legitimacy with the membership, such a high official is not necessary to achieve the desired result.

Second, the proposed standard would preserve the benefit of employee control of the work environment. Particularly in the case of a local union with significant autonomy from the national union, board representation by one of the local’s full-time officials would be an effective supplement to other forms of worker participation needed to permit employees to develop a sense of constituent control over the enterprise. With respect to this benefit of board representation, a local union official or member would be equally if not more effective than a national union official, because of that

89. This distinction between mere members and full-time officials is consistent with distinctions drawn in other areas of the law with respect to when a person is properly considered a deputy of an organization. For example, directors and officers of corporations are generally considered to be agents of the corporation, whereas mere employees are not so regarded. See H. HENN, supra note 28, § 235, at 457.
90. Arguably, a union official would not wish to serve as a board director as part of a wage and benefit concession package because of potential charges of co-optation from the rank-and-file. Therefore, a board representative who is not a union official may be the most satisfactory representative to all parties concerned in terms of legitimating the employer’s request for wage and benefit concessions.
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representative's close contact with the rank-and-file.91

Conclusion

This Note argues that the Clayton Act's ban on interlocking directorates should apply to labor-union director interlocks because union representatives have the same economic incentive as do other directors to violate the antitrust laws by restricting product-market competition. Moreover, the nonstatutory exemption for labor unions from antitrust sanctions should not apply in this context because of the interlock's significant effect on price competition. The Note proposes a test for determining when an employee representative in a unionized industry does in fact "represent" the union. The test preserves the advantages of employee board representation while proscribing employee representation that poses too great a danger of anticompetitive behavior.

91. The most important aspect of employee board representation in terms of providing employee control over decisionmaking within the enterprise is the ability of employees to choose the representatives who will articulate their views in board meetings. See P. BLUMBERG, supra note 21, at 126-39. The proposed standard preserves this right of election and thereby reinforces this sense of employee control.