Multiemployer Bargaining and Monopoly: Labor-Management Collusion and a Partial Solution

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ABSTRACT

Multiemployer collective bargaining relationships between unions and employer associations easily devolve into legalized cartels. Once unions establish themselves as the bargaining representative for employers’ employees, the employers have much to gain from banding together as an association, raising their prices and eliminating non-union competition, with unions happily serving as enforcement agents in the scheme. In return, unions receive a share of the increased oligopolistic profits in the form of higher wages and benefits.

A threat to such a cartel is an employer who wants to bargain with the union but does not want to accept the terms the association has bargained for. This Article examines the status of such an employer. It outlines how unions and (especially) associations work to thwart such an employer from bargaining directly with a union despite the federal labor policy of protecting an employer’s freedom in selecting its bargaining representative. This anticompetitive behavior not only hurts individual non-association employers but also non-association employers’ union employees, as the union will refuse to realistically bargain with their employer unless it agrees to the terms in the association agreement. This leads to the employer either being forced to accept the association’s terms, which it cannot afford, or, if it survives a strike and picket, becoming non-union. A middle ground of real bargaining that serves the non-association employer’s union employees’ interests is not available. In enforcing this scheme a cartel’s primary tactic is the use of “most favored nations” clauses in multiemployer collective bargaining agreements. Another is the design and use of multiemployer ERISA plans.

The Article also discusses the labor antitrust exemptions and how, notwithstanding the suggestions of other scholars, antitrust law is an ineffective tool to remedy union-association cartel behavior. Instead, the

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Article puts forward changes that can be made to the labor laws and to ERISA that would allow individual employers to escape the terms of association collective bargaining agreements and encourage unions to nevertheless bargain with them. This does not mean that multiemployer bargaining itself should be banned. Multiemployer bargaining has always been with us, and is not going away, but its anticompetitive effects can be tempered.

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INTRODUCTION

When one envisions a small painting contractor the word “unionized” generally fails to come to mind. In popular—and even legal—consciousness, unions are employee organizations who bargain with large Fortune 500 companies. Mammoth armies assemble on either side of a picket line or negotiating table in a drama affecting assembly line employees of a huge, unitary enterprise. The unions organize in factories or mines and their members work—or at least aspire to work—for the same employer their entire lives.

This Hollywood image of collective bargaining applies to a fraction of unionized employers. In reality a union employee will often work for a small family-owned business with a handful of workers.1 Their work for

that employer might be seasonal, or even just for one project. The bargaining unit the employee belongs to not only includes his coworkers but also other employees working for competing companies. As for these companies themselves, they may belong to an employer association that bargains as a whole with a union for their members’ wages and other terms and conditions of employment. Through this process all of them—the employers and employees—will agree to one solitary collective bargaining agreement. On one side rests a single union but on the other sits a multitude of employers, small, large, and even one-man shops, competing with each other while bargaining with their employees’ representative as one. Collectively this phenomenon is known as “multiemployer bargaining.” Almost half of all private-sector collectively-bargained workers work for employers who bargain in this manner.

This Article explores the status of a unionized employer who competes in an industry where multiemployer bargaining prevails. The employer is not necessarily interested in becoming “non-union,” but is interested in bargaining directly with a union instead of through an association. This Article demonstrates a little-noticed, but influential, difficulty that such an employer encounters when it leaves an association relationship. Because of a number of structural realities in how multiemployer bargaining functions, an employer who exits from a multiemployer association and bargains directly with a union will be forced to either accept the contractual terms the association has separately bargained for, the employer’s exit notwithstanding, or will be unable to agree to a contract with the union at all and may eventually become nonunion by default. In addition, because of the association and union’s control of the relevant product market, even if the employer seeks to become nonunion that may not be an option either. Its options may starkly be to agree to the terms of the association’s contract or cease operations altogether.

This state of affairs is not only highly anticompetitive, but thwarts the most basic rule of multiemployer bargaining: that employers are free to assign and withdraw their bargaining rights to an association. A

(“About 83 percent of construction establishments employ fewer than 10 workers; less than 1 percent of construction establishments employ 100 workers or more.”).  
3 See Haas Garage Door Co., 308 NLRB 1186, 1187 (1992) (discussing the “one man unit” rule when an employer with only one bargaining unit employee participates in a multiemployer collective bargaining agreement).
multiemployer bargaining relationship only exists with the consent of all of those involved, the union and all of the employers. An employer must bargain with a union if the union has been certified as the bargaining unit representative of its employees. The same is not true of an employer vis-à-vis a multiemployer association. The employer can bargain directly with the union and ignore the association, if it so chooses. However, because of the structural realities of how multiemployer bargaining actually works, this “choice” does not exist. Therefore, if multiemployer bargaining prevails in an industry, employers, against their will, must negotiate, often with no success, with their own competitors in contracting with their employees.

This state of affairs is effectively protected from the antitrust laws because of the wide scope of the statutory and nonstatutory labor exemptions from the Sherman Act. It also is exacerbated by the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the resulting power of multiemployer employee benefit plans and their overseeing union and management trustees. Most importantly, it is enabled through the use of most favored nations clauses (MFNs) in union-association collective bargaining agreements.

This Article details how unions and associations collude against individual employers who try to bargain directly with their employees’ union and argues that the structure of multiemployer bargaining does not further the interests of such individual employers, nor does it further the interests of their unionized employees. An individual employer who disagrees with the bargaining goals of the predominant interests in its association is unable to escape those interests through direct bargaining, even though those interests favor its competitors. Instead, its competitors dictate its labor policy. Further, its employees may be willing to accept the alternative bargaining terms the individual employer is willing to offer, but cannot because of their union’s relationship to the association.

On the other hand, this structure does further the goals of the employers who predominate an industry. It creates an anticompetitive cartel that protects the dominate interests in associations by discouraging any other employers from bargaining on different terms with the union. It is at once anticompetitive and antiunion as it increases the chances that a firm that exits an association, and survives, will become nonunion.

This Article offers a partial solution to this problem. As long as there have been unions there have been multiemployer associations. They are not going away, nor should they. The danger with an association is that while countering the union’s bargaining power it will collude with the union to inhibit competition and share the resulting rents. Suggestions, going back to the crafting of the Taft-Hartley Act, have been made to simply ban multiemployer bargaining. However, banning association bargaining itself
would be ineffective, and would likely result in similar anticompetitive, but hidden, behavior. Further, the counter normally offered as a solution to union-association cartels—use of the antitrust laws—relies too heavily on questions of intent to be of much use to a hapless individual employer, or its employees, escaping a powerful association.

Instead, this Article recommends that individual employers who exit an association be granted extra allowances under the labor laws to “go it alone.” This includes a bar against area standards picketing and recognitional picketing after association exit when the relevant association collective bargaining agreement contains an MFN, and a bar on the imposition of withdrawal liability from defined benefit pension plans for employers who exit an association but nevertheless want to continue to participate in the union-association’s plan. With these protections in place unions will be less willing to grant MFN clauses to associations, and individual employers will then be free to bargain directly with unions. These changes are less intrusive in the collective bargaining process than simply banning MFNs, and in the case of the picketing bar can be implemented without Congressional action.

This Article begins in Part I with an outline of how multiemployer bargaining functions, including the part ERISA plays. Part II explains the extent of the antitrust exemption that multiemployer bargaining enjoys. Its review of labor antitrust cases will also provide examples of union-association anticompetitive practices. Part III discusses in detail the reasons why a union will not offer terms any different from those of an association to an individual employer. Part IV suggests several ways that labor law and ERISA could be used to protect the choices of individual employers and their employees and protect against union-association cartels.

I. MULTIEMPLOYER BARGAINING AND THE NATURE OF TAFT-HARTLEY FRINGE BENEFIT PLANS

A. Multiemployer Bargaining as a Phenomenon

Multiemployer associations have existed since at least classical antiquity, and seem to arise whenever unions themselves emerge. An episode of multiemployer bargaining is detailed, for example, on a stone tablet found at the site of ancient Sardis. Over the centuries associations have formed and interacted with unions in a multitude of variations. In  

5 CLARENCE E. BONNETT, HISTORY OF EMPLOYERS’ ASSOCIATIONS IN THE UNITED STATES 22 (1956) (“Both associations and unions existed, largely as secret organizations, in ancient Greece.”).

6 Id. at 23.
Medieval Europe this manifested itself robustly in the craft guild system.\(^7\) Later, however, the guild system was disappearing in England at the time of the founding of its American colonies, and by the American Revolution associations in the new United States were rather informal and local.\(^8\) Associations grew again with the coming of the factory system and the increasing force of the industrial revolution in the 1830s, following an organizing trend among workers.\(^9\) During this time association activity followed a “boom and bust” cycle of unions and the economy at large. In his comprehensive history of multiemployer bargaining in the Nineteenth Century, Professor Clarence Bonnett details time after time when employees across an industry would form a union and threaten to strike.\(^10\) Employers would meet and “fix” the wages they would pay those employees, the union would counter with an offer of their own, and some form of peaceful negotiation or, often, industrial strife would result. In these struggles the employers, of course, were by definition competitors of each other. Their “cartelization” was often only useful to the extent it was worth manning a united front against the union. Thus, before the federal labor laws cemented the modern structure of collective bargaining into place, associations constantly rose and fell in response to the rise of unions in different localities at different times for different purposes.

With the coming of federal labor legislation in the 1930s unions suddenly enjoyed the security of being certified as bargaining representatives with the force of the National Labor Relations Board behind them.\(^11\) To a much greater extent than before, unions and their corresponding employers could now count on collective bargaining remaining a fixture of their labor relations. This gave a much longer lifespan to associations, as employers who wished to organize in opposition to unions had an incentive to continue to do so on a practically permanent basis. If a union was going to last it made sense to organize a more-permanent association structure and to ally oneself with the union instead of seeking to crush it. Employer associations therefore became a permanent fixture of many industries, especially transportation, apparel, hotels and restaurants, and, more than any other, construction.\(^12\) Although private-

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\(^7\) Id. at 24-33 (recounting struggles between apprentices, journeymen, and masters, and the groups they formed).
\(^8\) Id. at 32-36.
\(^9\) Id. at 45-54 (detailing repeated strikes and employer counters in various industries during the 1830s).
\(^10\) See generally id. (extensively describing strikes and association activity during the Nineteenth Century).
sector unionism has dramatically declined since the years following the passage of the Wagner Act in 1935, the percentage of the unionized workforce that works under multiemployer bargaining has remained fairly constant at approximately half.

With so much variety in how associations operate, and how they interact with their members’ employees, pinning down what constitutes an employer association, and thus what constitutes multiemployer bargaining, is not a clean exercise. Professor Bonnett provided a very general definition that serves for present purposes: “The test whether an association exists is a functional one: is there concerted action among employers in promoting their interests in a particular labor controversy, or in labor matters in general?”13 Similarly, regarding how these associations attend to labor matters, the Developing Labor Law defines multiemployer bargaining as “collective bargaining in which more than one employer or an association of employers participate in common negotiations with a group or groups of unions as distinct from single-employer bargaining.”14

The National Labor Relations Board, and the federal courts, have generally followed these understandings. Neither the NLRA nor the Taft-Hartley Act explicitly discuss multiemployer bargaining.15 However, the fact that Congress failed to adopt an amendment to the Taft-Hartley Act that would have severely limited the practice,16 and the fact that it is a long-standing labor-management tool, have led the courts to not just tolerate but encourage it.17

and restaurants as industries where multiemployer bargaining is common). Readers will notice that much of the discussion in this Article relates to the construction industry. This reflects the numerical dominance of construction unions and employers in the multiemployer, employee-benefit universe. For example, according to the Department of Labor, 1,228 of the 2,945 multiemployer pension plans in the country are in the construction industry. The next highest is finance, insurance and real estate at 530, and 371 in the services industry. See U.S. Department of Labor, Pension & Welfare Benefits Administration Office of Research & Economic Analysis, ABSTRACT OF 2005 ANNUAL REPORTS 13 (2005), available at http://www.dol.gov/ebsa/PDF/2005pensionplanbulletin.PDF.

13 BONNETT, supra note 5, at 22.
17 NLRB v. Truck Drivers Local 449, 353 U.S. 87, 95-96 (1957) (recognizing multiemployer bargaining as allowed by labor legislation). Further, the legislative history to the Clayton Act indicates that as well as legislating to protect unions’ right to organize in
The exact details of how employers agree to bargain as an association can vary. The association does not have to have a formal structure, and does not even need one master agreement if the separate employers jointly bargain and execute substantially similar contracts with the union. Historically, as well as today, associations are often geographically defined to a metropolitan area, but some nationwide multiemployer bargaining exists. Multiemployer bargaining is distinct from pattern bargaining, in which a union negotiates a contract with one employer—often the largest employer in an industry—and then seeks to obtain contracts with the same terms from the other employers in that industry. In pattern bargaining, although the same terms are often negotiated in different contracts, each employer negotiates on behalf of itself. In multiemployer bargaining, however, the employers negotiate collectively on behalf of themselves. This distinction is key to the problem addressed in Part III, below.

The very existence of multiemployer bargaining is a bit of a mystery. Indeed, it is somewhat counterintuitive that the phenomenon exists at all. Multiemployer contracts generally provide for uniform wages and benefits across an industry and locality for all association employers. Since the price of labor is a large part, perhaps the largest, of an employer’s costs, the question arises of why an employer would agree to pay the same labor rates as all of its unionized competitors. An employer conceivably would be better served to bargain with the union individually for wages slightly below those of its competitors, thus lending it the upperhand in the marketplace but retaining its unionized status. One reason proffered for


18 HIGGINS, supra note 14 at 715-16, 716 n.422.


21 See Part III, infra.

22 “An ‘economic analysis’ of multiemployer bargaining and the rules that govern it is thus devilishly difficult.” Leslie, supra note 12, at 278.

23 See Lande & Zerbe, supra note 15, at 216-17 (describing union efforts to regularize wages across their geographic jurisdictions); Comment: The Status of Multiemployer Bargaining Under the National Labor Relations Act, 1967 DUKE L.J. 558, 560 (1967) (describing how unions generally favor multiemployer bargaining in order to standardize wages and working conditions); Pierson, supra note 20, at 342 (stating that the obligations of various signatory employers to a multiemployer contract are largely uniform).

24 Further, where labor constitutes a greater portion of costs, multiemployer bargaining has been found to be more likely. See Lande & Zerbe, supra note 15, at 219 n.106.
why this does not occur more often is that a top political priority for unions is equal pay for equal work within a trade. Indeed, they are statutorily permitted to eliminate labor market competition. If a union is going to bargain for the same wage rate from all employers the employers might as well put forward a united front in keeping those wages as low as possible. Conspiring with this drive is multiemployer bargaining’s exemption from the antitrust laws, which allows competitors to collude on setting labor prices while engaged in collective bargaining. Dovetailing with the union’s desire for equal pay, employers may fear that if they bargain individually they will be left paying higher wages than their competitors, making the relative truce which is multiemployer bargaining an appealing second-best result. Further, perhaps most importantly, and as explained in detail below, through the antitrust exemption the association can use the union to inhibit nonunion competition, thus increasing the association members’ prices and profits.

Regarding the peace multiemployer bargaining can bring, employers may also agree to join associations to protect themselves from whipsaw strikes. A “whipsaw strike” is where a union strikes one employer at a time, focusing its resources on one target so that that employer succumbs to

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25 See id. at 219 n.105 (arguing that unions may choose not to price discriminate between employers, even when they can, because of the internal tension it might create); Jan Vetter, Symposium on the Law & Economics of Bargaining: Commentary on “Multiemployer Bargaining Rules”: Searching for the Right Questions, 75 Va. L. Rev. 285, 286 (1989) (“Among competing employers in the same market, the union will push for, while it is also pulled toward, the goal of equal pay for equal work.”)
27 See Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (detailing the “nonstatutory” labor antitrust exemption and extending it to collusion among firms after a bargaining impasse). The antitrust exemptions are discussed in detail, infra Part II.
28 See, e.g., Leslie, supra note 12, at 265 (“Multiemployer bargaining assures the manager that he and other firms’ managers will chose the same wage rates.”); Teresa Ghilarducci & Michael Reich, Complementarity of Pensions & Training under Multiemployer Plans: Part I of 4, 22 J. of Labor Research 3 (2001) (“[F]irms can garner rents if there is implicit collusion with other firms to take wages out of competition.”).
29 See Douglas L. Leslie, Labor Bargaining Units, 70 Va. L. Rev. 353, 416 (1984) (stating that risk-averse managers will be more likely to consent to multiemployer bargaining) Pierson, supra note 20, at 358 (arguing that multiemployer bargaining is largely a defensive measure by firms against unions); Cf. Lande & Zerbe, supra note 15, at 207 n.54 (stating that employers are often concerned not with absolute prices but prices in comparison to competitors).
30 See infra Part I.B.
31 See Comment: Employer Withdrawal from Multi-Employer Bargaining Units: A Proposal for Self-Regulation, 1982 U. Penn. L. Rev. 689, 693 (1982); Higgins, supra note 14, at 714 (“Employers recognize that an employers’ association can eliminate wage competition, help to prevent whipsaw strikes, and achieve certain economies of scale.”).
the union’s demands, allowing the union to then move on to the next. 32 A
union may dip into a strike fund to assist the striking workers of the first
employer while the rest of its membership continues to work for the
remaining employers. 33 Through an association, however, all of its
members can lockout their employees when the union threatens a strike
against one member, thereby nullifying the union’s targeting tactics and
bringing the employers’ collective resources into play. 34

Unions, in addition to employers, often regard multiemployer
bargaining favorably. First, it allows them to obtain equal wages and
working conditions across an industry through the employers’ collusion, in
turn dampening competition between employers. 35 Second, it conserves
union resources because the union only has to engage in one bargaining
relationship instead of negotiating the countless different collective
bargaining agreements it would have to enter into if the—often—hundreds
of members of the association all negotiated individually. 36 Third, it
centralizes employers into not just negotiating wages and working
conditions, but into funding and assisting in the administration of jointly-
managed employee benefit plans, including pensions, health care plans, and
apprentice programs. 37 These “Taft-Hartley Funds” are discussed below. 38

32 Michael H. LeRoy, Lockouts Involving Replacement Workers: An Empirical Public
Policy Analysis & Proposal to Balance Economic Weapons Under the NLRA, 74 WASH. U.
33 Note: Whipsawing in Multiemployer Bargaining, 3 STAN. L. REV. 510, 510 (1951)
(Explaining that when a whipsaw strike is called, “The union may exert full strike pressure
against one employer. Most of its members remain at work. Money jingles in their jeans
and morale is unimpaired. Strike benefit funds take care of the striking workers with
comparative ease.”).
34 NLRB v. Truck Drivers Local 449, 353 U.S. 87, 97 (1957) (recognizing employers’ right
to a collective lockout); Note, supra note 33, at 511 (Employers “know that if the union is
successful any one of them may be next. The employers claim that the strike against one is
really a strike against all. The unstruck employers shut down their plants as a concerted
action against the union.”).
35 See Lande & Zerbe, supra note 15, at 220 (multiemployer bargaining helps both unions
and employers to capture rents); Ralph K. Winter, Jr., Collective bargaining &
Competition: The Application of Antitrust Standards to Union Activities, 73 YALE L.J. 14,
20 (1963) (explaining that unions in competitive markets will try to prevent competition
between employers).
36 See Michael C. Harper, Multiemployer Bargaining, Antitrust Law, & Team Sports: The
This does not necessarily mean that employers as a whole would have a competitive
advantage over a union if they bargained individually, as unions would have greater
experience and skill in bargaining labor contracts. See Pierson, supra note 20, at 358
(stating that employers are usually at a serious disadvantage if they bargain alone).
37 See Harper, supra note 36, at 1681 (discussing how pooling of employer contributions
creates the opportunity for group benefits); Comment, supra note 23, at 561 (naming
apprentice programs as a benefit from multiemployer pooling).
B. Multiemployer Bargaining’s Anticompetitive Effects

Although employers can hardly be faulted for joining forces to counteract certain union divide-and-conquer tactics, such as whipsaw strikes, or for agreeing to pay the same wage when they suspect their competitors will negotiate the right to pay less, allowing employers to come together and set collective labor policy is fraught with the danger of collusion. As Adam Smith famously observed, “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”

The following illustrates some of the dangers of collusion in multiemployer bargaining, while later the application of antitrust law to these dangers will be considered. The economics of cartel behavior among employers and unions have been well documented in previous works on labor antitrust, so the following is a brief outline of what anticompetitive dangers multiemployer bargaining creates, drawn from the cited sources.

Employers may seek to collude on labor policy whether they are collectively-bargained or nonunion. Setting antitrust law aside for a moment, in a labor market without collective bargaining employers could conceivably collude and set wages at a lower level than would exist under a competitive market. However, the more employers that participate in the market, and the more competitive the market, the more organized the cartel must be and the more difficult holding the cartel together becomes. Employers who do not participate will have an incentive to be “free riders.” They can pay just enough more than the cartel wage to induce the cartel members’ best workers to work for them, and yet still pay less than the market wage that would exist without a cartel. Further, even employers participating in the cartel will have an incentive to cheat and receive the same benefit. As long as the eventual profit in higher prices that can be received through poaching better workers exceeds the difference between wages paid and the cartel wage, employers will have an incentive to “free ride” on the cartel. Note that this only concerns the danger of collusion in the labor market, not in the product market where there is also a danger to social welfare in the form of a cartel fixing above-market prices. However, collusion regarding prices in the product market will generally be illegal

38 See infra Part I.C.
39 ADAM SMITH, AN INQUIRY INTO THE NATURE & CAUSES OF THE WEALTH OF NATIONS, Book I, 10.82 (1776).
40 Especially helpful was Douglas L. Leslie, Principles of Labor Antitrust, 66 VA. L. REV. 1183 (1980).
under the antitrust laws. Not so in the labor market if the cartel members collectively bargain.

In a collectively-bargained regime under a multiemployer CBA the potential for cartel behavior becomes the mirror-image of the above scenario. The union bargains with the employers for a certain wage. This wage is higher than the market wage through the union’s successful certification as the exclusive bargaining representative, i.e. a monopoly of the employers’ labor supply. However, as long as the relevant competing employers are all members of the multiemployer association, they can agree to an above-market wage and pass that cost, en mass, along to their customers, assuming some inelasticity in the product market. Thus, instead of obtaining rents through collusion of below-market wages, the employers obtain rents through collusion of above-market wages and a subsequent mark-up beyond the cost of those wages in the product market.

The union and the employers each enjoy a share of this mark-up. Just as in the nonunion scenario there is the possibility of competitors refusing to participate, cheating, or participating but then openly leaving the cartel. However, now, instead of policing themselves, the employers have the union to assist them, making cartel behavior more likely and more successful because there is an outside agent enforcing cartel rules.

In this policing, the union has a variety of tactics to ensure the association’s competitors, and cheating members, do not threaten the association’s members’ mark-up. First, if a new competitor arises the union can seek to organize that competitor’s workforce, in essence making them join the cartel. If the employer refuses to bargain with the union even after a showing of majority support it can, through a successful organizing campaign, petition and win an election. As part of this process it can picket the place of business of the recalcitrant employer, or a job site on which it is working, either for recognition or, for a period of up to 30 days, to inform the public that the employer does not pay “area standards,” i.e. union wages. It can also handbill the public regarding these matters.

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41 That is, assuming that the buyers in the product market will purchase as much, or nearly as much, product when the price goes up.
42 Lande & Zerbe, supra note 15, at 207 n.54 (explaining that in multiemployer bargaining it is possible that unions and employers will conspire to form a cartel and divide rents).
43 Lande & Zerbe, supra note 15, at 207 n.54.
44 29 U.S.C. § 158(c).
45 Id. § 158(b)(7).
46 Id.
construction and apparel industries, through the exceptions to the NLRA’s ban on “hot cargo” agreements, the union can also exert some degree of secondary pressure, such as forbidding association members from subcontracting to nonunion contractors. Because of the union’s “police” presence, this secondary pressure from the union is much more effective for the cartel as a whole than merely expecting an employer to refuse to do business with nonunion, i.e. non-cartel, companies itself. Further, a union in the construction industry can even allow an employer to sign a “prehire agreement” when the employer has no showing of majority support, or indeed has not yet hired any employees. This allows construction industry unions to make their control of a market so well-recognized that the prospective employer joins the cartel without the union having to wage an organizing campaign.

Second, the union can keep labor away from nonunion employers by administering an apprentice program or a closed hiring hall. The union and the association can agree that only apprentice graduates can work for association employers. This has the ancillary benefit of making a higher skilled workforce, and thus raising the price employers can charge as well as raising union employee wages. More importantly it provides an incentive for prospective workers to join the union and work for association members, creating greater scarcity of higher quality workers among nonunion employers. Further, the institution of a closed hiring hall requires all association members to hire new employees through the hiring hall. This not only better polices employers in hiring union employees, but allows the union to better regulate where union members work, keeping them away from nonunion employers.

Third, to prevent association members from cheating, the union can respond to reports of cheating from its employee members and use intra-cartel grievance mechanisms. Although a unionized employee will often have allegiance to his employer over the union, and therefore be reluctant to report violations of the CBA, the cartel can provide protections that give a member some degree of security, such as contractual whistleblower protections and grievance arbitration. The union can also negotiate the right to place stewards in places of employment who, although employed by the employer, are primarily watchdogs for the union. The cartel can also

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47 Id. § 158(e).
48 Id. § 158(f).
49 See Campbell, supra note 43, at 1006 (discussing how unions can restrict the labor supply through apprenticeship requirements).
50 Comment, supra note 23, at 560.
51 See HIGGINS, supra note 14, at 1532 (discussing protections against retaliation and grievance arbitration).
52 See id. at 381-83 (discussing superseniority positions granted to steward placements).
establish joint trade boards to provide for arbitration of not just individual grievances on matters such as wages, but of other contractual violations, such as allowing unreported overtime or not reporting jobs to the union. Joint trade boards are composed of representatives of the union and association employers, so employers can directly affect the punishment enforced against their cheating competitors. These boards can be given the power to not just award damages but fine individual association members for violations. Fines issued by joint trade boards can be quite onerous, and, as with any labor arbitration, are reviewed by courts under an extremely deferential standard.

A fourth set of tactics cartels engage in to protect their rents is to discourage exit from the association. The union and association can negotiate contractual provisions and engage in tactics that make exit difficult, and make business after an exit even harder. These are discussed in detail in Part III. To summarize for present purposes, the association can secure an MFN in its CBA which prevents an exiting member from securing better terms from the union than it would have received had it stayed with the association. The union can then strike the exiting employer who will be left without the protection of an association lockout, and will have no terms it can agree with the union on to stop the strike other than those in the association’s CBA. If the employer survives the strike the union can then still picket for area standards and, in the construction and apparel industries, exert certain secondary pressures.

The cartel can also pressure the exiting employer through control of the Taft-Hartley multiemployer fringe benefit plans that the union and association, through appointed trustees, administer. Although wage rates will likely be the largest labor problem for an employer, the requirements of Taft-Hartley plans and ERISA are also very useful to a cartel’s control of exiting employers.

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53 See id. at 1555; see also SCI Illinois Services, Inc. v. Local 727, 2007 U.S. Dist. LEXIS 47305, at *38-40 (N.D. Ill. 2007) (enforcing joint trade board award despite argument that employer board members were biased against a competitor). SCI is rather remarkable. The court reasons that employer board members will not vote against competitors qua competitors because if they did the union would file repeated charges against different employers until the board members themselves would become targets. This admittedly brief statement in dicta misses the point: the union and employer board members could collude against the employers board members’ competitors, resulting in reciprocal charges and voting in the future. The union board members would understand that the employer members would cease to cooperate if their own companies, or allies, became targets.


55 See Part III, infra.
Before moving on to the antitrust considerations of the above-described cartel, given the power Taft-Hartley plans have over association members a preliminary outline of how these plans operate is in order.

C. Taft-Hartley Plans

“Taft-Hartley” plans are so-called because such collectively-bargained plans must be jointly-managed by representatives of labor and management under Section 302 of the Taft-Hartley Act. A prime goal of a union under multiemployer conditions is to establish health care and pension plans where benefits will be portable when a union member changes employers. This not only benefits the membership, but weakens the power of any one employer over a union member because the member can bring his health care coverage and pension credits with him to another employer.

Section 302(a) of Taft-Hartley prohibits employers from contributing funds to unions and union officials. Section 302(c), however, enumerates a number of exceptions to this ban, including the payment of funds to jointly administered labor-management plans for pension and welfare benefits. Under the Internal Revenue Code these contributions are tax exempt, thus providing the well-understood incentive for employers to contribute to employees’ health insurance and retirement benefits. This also includes other benefits that serve the membership such as apprenticeship programs.

It was only just prior to the Taft-Hartley Act’s passage in 1947 that welfare and pension benefits began to appear in multiemployer CBAs. The first negotiated multiemployer pension benefits were obtained in 1946 through the efforts of the United Mine Workers. Encouraged by the passage of Section 302 of Taft-Hartley the next year, the popularity of multiemployer labor-management fringe benefit plans ballooned

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56 See Harper, supra note 36, at 1681 (describing the how multiemployer bargaining provides for pooling of resources for benefit plans); Comment, supra note 31, at 694 n.23 (listing “pension plans, medical benefits, unemployment compensation, and industry-wide apprenticeship and training programs” as fringe benefits made possible through pooling of employer contributions).
58 29 U.S.C. § 186(c) (enumerating permissible contributions from an employer to a union when made to a trust fund for the benefit of employees).
60 29 U.S.C. § 186(c)(6).
61 Ghillarducci & Reich, supra note 28, at 3. This does not include union-sponsored funds, not created pursuant to collective bargaining, which date back to at least 1867. Weinstein & Wiatrowski, supra note 1, at 20 (naming the cigar makers union as the first union-sponsored benefit fund).
A direct impetus for this growth was the National Labor Relations Board’s (NLRB) ruling that fringe benefits are a mandatory subject of bargaining. This meant that every time a multiemployer association and a union sat down to negotiate a contract they had to discuss whether or not that contract should require welfare and pension benefits, and if so how much and how to fund them. This required a corresponding growth in welfare and pension plan administration, funding procedures, and collection procedures when employers become delinquent in their contributions.

A labor-management fringe benefit plan is a rather odd creature. It is jointly administered by trustees from both labor and participating employers who decide questions such as the level of benefits, where to invest the plan’s assets, and when to pursue collection efforts against delinquent employers. Other than the few mandates provided in the Taft-Hartley Act, the details of how the plans must be structured and the extent of the trustees’ fiduciary obligations are governed by ERISA. One curious feature of the plans is that the employer representatives usually are individuals who in their non-trustee capacities are officers of companies competing with other members of the association (or multiple associations for many larger plans) that participate in the plans. Although employer representatives are not supposed to wear their employer “hat” in making plan decisions in their trustee capacity, just as in grievance joint trade

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62 “From 1948 to 1959, multiemployer plans grew from 750,000 participants to more than 3 million.” Ghilarducci & Reich, supra note 28, at 3. By 1973 the number of participants in defined-benefit multiemployer pension plans reached 7.5 million, and by 1989 10.4 million.” Weinstein & Wiatrowski, supra note 1, at 21.

63 See Inland Steel Co., 77 NLRB 1, 4 (1948) (holding pension benefits are a mandatory subject or bargaining); W.W. Cross & Co., Inc., 77 NLRB 1163, 1163 (1948) (same, health care benefits).


66 See, e.g., Laurence B. Wohl, Fiduciary Duties Under ERISA: A Tale of Multiple Loyalties, 20 DAYTON L. REV. 43, 56 (1994) (“ERISA permits employers to wear “two hats,” and . . . they assume fiduciary status “only when and to the extent” that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA.” Consequently, corporate officials can be ERISA plan fiduciaries—representing both plan participants who are current corporate employees and plan beneficiaries who are former employees—while owing a duty of loyalty to the corporation's stockholders. These two (perhaps three) groups clearly possess conflicting interests.” (quoting Amato v. W. Union Int’l, Inc., 773 F.2d 1402, 1416-17 (2d Cir. 1985)).

67 Trustees, as fiduciaries, must act solely for the benefit of the plan’s participants and beneficiaries. 29 U.S.C. § 1103(c)(1) (“[T]he assets of a plan . . . shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.”); 29 U.S.C. § 1104(a)(1)
boards the potential exists for structuring the plan in a manner favorable to management trustees but unfavorable to other association members, or directing collection efforts against association competitors whom an employer trustee has a special grudge against—whether because that employer outbids the trustee on jobs, has headhunted the trustee’s employees, another financial reason, or simple personal animosity. This includes the potential for structuring the plan in a manner that favors an employer trustee’s business model, but not the model of his competitors.

Even under the structure of ERISA, multiemployer plans, especially health and welfare plans, have a great deal of flexibility in crafting contribution requirements. Generally, contributions are made at a set amount per each hour bargaining unit members work. Sometimes plans use different metrics, such as a flat amount for every day or week worked. Participating employers then generally pay their contributions on a monthly basis, with a set due date in the month following the month when the work was performed. If an employer has not reported the hours worked and

([A] fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries.").

68 See supra, notes 51-54 and accompanying text.

69 Commentators recognize that, as human beings, trustees can never entirely separate their dual sets of duties: “[A] trustee has a legal obligation to ignore the constituency that appointed him or her. This duty imposed on a trustee is inconsistent with economic reality. A union official is going to worry about loss of union jobs regardless of the pronouncements of the Supreme Court. Similarly, the employer representative will worry about the industry and competition.” Ira R. Mitzner, Trustee Pressures When There is an Economic Downturn 519, in EMPLOYEE BENEFIT ISSUES—THE MULTIEMPLOYER PERSPECTIVE (vol. 35, 1993) (emphasis added). See also Carolyn D. Gentile, “The Check is in the Mail” Mastering the Maze of Employer Contribution to ERISA Plans, 72 MARQ. L. REV. 349, 362 n.70 (1989) (“[E]mployer trustees are sometimes influenced to be overly zealous in their pursuit of receivables because the delinquent employer may be their competitor.”).

70 For example, pension plans must compute eligibility on the basis of “hours of service,” although there is flexibility in how those are computed. See, e.g., 26 U.S.C. § 410(a)(3)(A) (defining “year of service” as a year “during which the employee has not less than 1,000 hours of service”). Welfare plans are more free to determine their own eligibility requirements. See, e.g., Harms v. Cavenham Forest Indus., 984 F.2d 686, 690-91 (5th Cir. 1993) (because disability plan was a “welfare-type” benefit and not a “pension-type” variety, plan could cancel coverage).


72 See, e.g., Trustees of the Suburban Teamsters v. Hope Cartage, Inc., 2005 U.S. Dist. LEXIS 27866, at *12 (N.D. Ill. 2005) (interpreting CBA as requiring contributions “to the Pension fund for each regular employee who worked two calendar days in any calendar week.”).

73 See Gentile, supra note 69, at 354 (“[E]mployee benefit funds that arise out of collective bargaining depend in large measure upon the submission of contribution reports from the
deposited with the plan the corresponding amount owed by the due date, the employer is delinquent. At that point the written terms of the collective bargaining agreement, or of the plan’s governing documents, will impose liquidated damages and interest on the employer for missing the due date. If the contributions remain unpaid, the plan may decide to file suit to collect them, plus liquidated damages, interest, and attorneys fees and costs. These liquidated damages, interest, and attorneys fees can be quite punitive, so that even the threat of an ERISA suit to collect unpaid contributions is enough to force an employer to pay what the trustees allege is owed.

Taft-Hartley plans therefore provide another weapon on behalf of the cartel to police the association’s membership. To summarize those weapons, a joint trade board can fine an employer for non-payment of wages or other contractual violations, a union member can inform the union of his employer’s contractual breach, the union can picket an employer who refuses to unionize, and the pension and welfare plans can extract penalties of up to 20%, plus interest and attorneys fees, on employers who fail to pay contributions under the terms set by the trustees. In addition, the trustees can structure the plans to disfavor members of the association who lack lines of credit to ensure such regular payments.

If not for union participation all of this policing of competition would be wildly illegal under the antitrust laws. However, because Congress has sought to protect workers’ rents through the payment of higher wages, labor antitrust exemptions have arisen, both via statute and

employer. These reports contain the basic data essential to the fund’s operation, i.e., the amount of time worked by employees who are covered by the contract, and the sums of money that are due as contributions.”); see also Robbins v. Prosser’s Moving & Storage Co., 700 F.2d 433, 435-36 (8th Cir. 1983) (discussing monthly reports due on the fifteenth of the following month); Flynn v. Angelucci Bros. & Sons, Inc., 448 F. Supp. 2d. 193, 196-97 (D.D.C. 2006) (discussing monthly payments and due dates).


75 Id.


77 Campbell, supra note 43, at 1042.
via the courts, to protect the system.⁷⁸ Although this Article argues that the problems of union-association cartel behavior are better addressed through the labor laws, a brief review of the labor antitrust exemptions is now in order to illustrate both the problem of union-association cartels, and why an antitrust solution to the cartels is not desirable.

II. THE LABOR ANTITRUST EXEMPTIONS

The extent to which antitrust law regulates union activities is one of the oldest legal questions of labor relations. A union that controls the bargaining rights for an employer’s workforce holds monopoly power over the provision of labor to the employer.⁷⁹ Therefore a simple ban on “monopolies” would outlaw unions who successfully organize employers. Thus, if unions are allowed to operate, but if monopolies are also to be banned, or at least regulated, some exemption must be made for union organizing and bargaining.

Striking a balance between these two policies became a federal issue with the passage of the Sherman Act in 1890.⁸⁰ Although it is doubtful that the Sherman Act was originally intended to apply to unions, the Supreme Court interpreted it as doing so early on in the Act’s history.⁸¹ Congress haphazardly reacted against this with language in the Clayton Act, passed in 1914, and the Norris-LaGuardia Act, in 1932, protecting unions to some extent from the Sherman Act’s reach. Initial Supreme Court opinions limited the reach of this “statutory exemption,”⁸⁴ but the labor-friendly New Deal Court later interpreted the exemption to protect unions from most of

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⁷⁸ Lande & Zerbe, supra note 15, at 209 (stating that Congress’ primary goal with labor legislation is to protect workers’ rents).
⁷⁹ See supra, note 41 and accompanying text.
⁸⁰ 26 Stat. 209 (1890) (“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 declared to be illegal.”).
⁸¹ Lande & Zerbe, supra note 15, at 31
⁸² See 15 USC § 17 (“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.”).
⁸³ 29 USC § 101, et seq. (outlawing yellow dog contracts and depriving federal courts of jurisdiction to issue injunctions in labor disputes).
⁸⁴ See, e.g., Coronado Coal Co. v. United Mind Workers (Coronado II), 268 U.S. 295 (1925) (upholding treble damages judgment against union).
the reach of antitrust law when they are engaged in monopolizing the labor market.

The first important New Deal labor antitrust opinion was *Apex Hosiery Co v. Leader* in 1940. There, a union demanded a closed-shop and refused to allow the shipment of goods, including to out-of-state customers. The employer refused these demands, and the union members engaged in a sit down strike. The Court reversed a damages award against the union, ruling that the Sherman Act did not apply to strikes or other disruptions to interstate commerce unless the activity had an effect, or was intended to have an effect, on prices. Because the union was merely trying to organize, and because there was no demonstrated effect on prices in the record, the Court found the union’s actions exempt from the Sherman Act. The Court was less than clear, however, as it also discussed the permissibility of monopolizing labor across an industry whatever the effect on prices. As many labor actions will have an effect, e.g., higher wages often entail higher prices, the rule of the case was thus unclear. However, the Court suggested a clarification the next year in *United States v. Hutcheson*, where it flatly stated that union activity is exempt from the Sherman Act “so long as a union acts in its self-interest and does not combine with non-labor groups.”

This raised the question, however, of what happens when a union “combine” with non-labor groups, as it must whenever it bargains with employers. In 1945 with *Allen-Bradley v. IBEW Local No. 3*, the Court attempted an answer, but ended up confusing labor scholars for the next twenty years. In that case, the New York City electricians union, Local 3, organized both local electrical equipment manufacturers and local electrical contractors. The manufacturers agreed only to sell to local contractors organized by Local 3, and the contractors agreed only to buy from the same local manufacturers. Local 3, in turn, used tradition labor methods of

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85 310 U.S. 469 (1940).
86 Id. at 481-82.
87 Id. at 482.
88 Id. at 499-501; Meltzer, supra note 17, at 666.
89 *Apex Hosiery*, 310 U.S. at 501.
90 See id. at 504 (“[A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.”).
91 312 U.S. 219, 232 (1941).
92 325 U.S. 797 (1945).
93 See, e.g., Meltzer, supra note 17, at 46-49 (discussing how to draw a principled line between exempt and non-exempt labor activities under *Allen-Bradley*).
95 Id. at 799.
boycotting and picketing to keep nonunion firms out of the market.\textsuperscript{96} This allowed the employers to raise prices and the unions to enjoy higher wages and less working hours.\textsuperscript{97} As outlined above,\textsuperscript{98} the employers thus were in control of a classic cartel policed by a labor union.\textsuperscript{99}

The Court determined that Local 3 was not exempted from the antitrust laws because the businesses it contracted with were engaged in a conspiracy and “[a] business monopoly is no less such because a union participates, and such participation is a violation of the Act.”\textsuperscript{100} This could mean all manner of things, however. For example, in a multiemployer bargaining agreement employers, by definition, agree with each other to fix labor prices. If the firms were not unionized this would violate the Sherman Act as a restraint on trade. Under \textit{Allen-Bradley} does it violate the Sherman Act \textit{even if} a union is involved? Hardly, considering the Court’s acceptance of multiemployer bargaining in other contexts.\textsuperscript{101} However, this is a potential implication to take from \textit{Allen-Bradley’s} expansive language.

The confusion over the labor exemption only increased in 1965 with the twin cases of \textit{United Mine Workers v. Pennington}\textsuperscript{102} and \textit{Meat Cutters v. Jewel Tea Co.}\textsuperscript{103} Each case resulted in three opinions on behalf of three justices.\textsuperscript{104} In \textit{Jewel Tea} six justices concluded that the agreement the union and other employers negotiated was exempt from the Sherman Act. The Chicago butchers union and most of its employers had agreed to forbid the selling of meat from 6:00 p.m. to 8:00 a.m.\textsuperscript{105} The opinion of Justice White concluded that the provision properly related to the labor market, and not the product market, as it concerned when butchers could work as well as a task—handling meat—that the butchers could lawfully protect from other bargaining units.\textsuperscript{106} Further, the challenging employer, Jewel, did not allege that the union and the other employers had conspired to hurt Jewel through

\textsuperscript{96} Id.
\textsuperscript{97} Id. at 800 ("Wages went up, hours were shortened, and the New York electrical equipment prices soared, to the decided financial profit of local contractors and manufacturers.").
\textsuperscript{98} See supra, Part I.B.
\textsuperscript{99} See Leslie, supra note 40, at 1202 ("To establish a cartel, competitors can deal directly or they can hire an agent. Local 3 was no less an agent because it was a union.").
\textsuperscript{100} \textit{Allen-Bradley}, 325 U.S. at 811.
\textsuperscript{101} \textit{See, e.g.}, NLRB v. Truck Drivers Local 449, 353 U.S. 87, 95-96 (1957) (recognizing multiemployer bargaining as allowed by labor legislation).
\textsuperscript{102} 381 U.S. 657 (1965).
\textsuperscript{103} 381 U.S. 676 (1965).
\textsuperscript{104} \textit{Pennington} included an “Opinion of the Court” on behalf of six justices, but three separately concurred with a more limited opinion. \textit{Jewel Tea} had no “Opinion of the Court” at all.
\textsuperscript{105} \textit{Jewel Tea}, 381 U.S. at 680.
\textsuperscript{106} Id. at 689-90.
this provision. Justice Goldberg’s concurrence also found no violation, but simply argued that mandatory subjects of bargaining, such as working hours, should be per se immune from the antitrust laws and that a purpose to conspire is irrelevant.

In Pennington, the same trio of justices lead by Justice White in Jewel Tea issued an “Opinion of the Court” that found a union-association contract to not be exempted from the Sherman Act. The trio of justices lead by Justice Douglas wrote separately, but the extent of what both opinions held to be non-exempted behavior is telling. The case concerned the United Mine Workers who negotiated a contract with an association of large employers. The union agreed to allow some automation of the employers’ mining operations, which would lead to lower employment but would also generally raise wages. In return the union agreed to negotiate contracts with certain non-association smaller employers that would effectively drive those smaller employers from the market. Thus, the union and the large employers agreed to suppress competition.

Justice White stated that a multiemployer bargaining agreement does not violate the antitrust laws simply because it levels wages between employers. Thus, if all association employers agree to pay the same wages, there is no antitrust violation. However, the policy underlying an exemption for bargaining between one group of employers and a union does not extend to controlling bargaining between the union and another group of employers. Said Justice White,

[T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. The union’s obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.
Thus, Justice White concluded, because the contract between the large mining employers and the United Mine Workers required the union to seek certain wages from smaller employers the contract was not exempt from the antitrust laws.\(^\text{115}\)

Justice White’s opinion did not require the union and large employers to have any intent to conspire against the smaller employers for the antitrust exemption not to apply. Justice Douglas’s concurrence, however, did require this extra step. He stated that the case should be remanded for a new trial where the jury should be instructed to find prima facie evidence of an antitrust violation if the “employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and if it was made for the purpose of forcing some employers out of business.”\(^\text{116}\)

What is striking about Justice White’s opinion is that based on its language any multiemployer agreement with an MFN would violate the antitrust laws. Only Justice Douglas’ requirement of “intent” to harm other employers saves this conclusion. As will be seen below, this additional piece of potentially messy evidence has allowed MFNs to continue to be used in multiemployer agreements, and has meant that antitrust law is not a practical solution to an individual employer who wants to break free of its association.

The antitrust implications of MFNs were further addressed in 1975 in *Connell Construction Co. v. Plumbers Local 100*.\(^\text{117}\) There, through picketing, a union pressured a general contractor to sign an agreement—not a collective bargaining agreement—that required the general to only subcontract to employers signatory to the union, Local 100.\(^\text{118}\) In a rather incomplete opinion for the Court, Justice Powell stated that the agreement “would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by national labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.”\(^\text{119}\) The agreement did not merely eliminate competition over wages, an acceptable union goal under the labor antitrust exemptions, because it prevented subcontractors who paid Local 100’s wage rates but had not signed with Local 100.\(^\text{120}\) Thus, it protected Local 100 *qua* Local 100, not just Local 100’s goal of eliminating wage competition. The Court also noted that Local 100 had an association

\(^{115}\) Id. at 669.

\(^{116}\) Id. at 672-73 (Douglas, J., concurring).

\(^{117}\) 421 U.S. 616 (1975).

\(^{118}\) Id. at 619-20.

\(^{119}\) Id. at 626.

\(^{120}\) Id. at 623.
The association members and Local 100 would gain from the agreement with the general. The Court recognized that the union’s legitimate goal was to organize other subcontractors, and implied that the MFN itself was therefore legal, but ruled that the union cannot make nonunion subcontractors ineligible for work through direct means such as its agreement with the general. The Court did hint, however, that if the agreement had been a collective bargaining agreement, and thus that Local 100 represented the general’s employees, that it might be allowed. It emphasized that the general did not employ any Local 100 members, and thus the union did not deal with it in a representational capacity, but merely in an economic capacity.

*Connell* therefore both highlighted the anticompetitive effects of MFNs, but further insulated them from antitrust liability when they are wrapped within collective bargaining agreements. *Connell* also reaffirmed that there are two labor antitrust exemptions: the “statutory exemption” of Sections 6 and 20 of the Clayton Act plus the injunction bar of Norris-LaGuardia, and the “nonstatutory exemption” which bars courts from considering the liability of unions and/or employers when they bargain to allegedly restrain trade. This solved some of the worries of *Allen-Bradley*, recognizing that unions regularly do act in concert with employers, and that for collective bargaining agreements to survive under the antitrust laws those actions need some level of antitrust immunity.

The nonstatutory exemption was given further breadth in *Brown v. Pro Football, Inc.* Although not directly relevant to MFNs, the case illustrates a wide-open understanding of the nonstatutory exemption. There, the National Football League’s employers association bargained with the NFL players’ union, and when both sides were unable to reach a CBA the association implemented its final offer. Certain players who under that final offer were paid less than their alleged market wage then sued, arguing that the employers illegally colluded to pay the wages and that the nonstatutory exemption did not apply because the union did not agree to the

\[121\] *Id.* at 619.
\[122\] *Id.* at 623-24.
\[123\] *Id.* at 625 (“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.”).
\[124\] *Id.* at 626.
\[125\] *Id.* at 621-22.
\[126\] See *supra* notes 92-101 and accompanying text.
\[128\] See *id.* at 234.
In a ruling with implications far beyond professional sports, the Court stated that the nonstatutory exemption extends to the members of a multiemployer association when they act in concert regarding the labor market, even when the union does not agree to those actions. Analogizing from the single-employer context, the Court reasoned that post-impasse negotiations are an integral part of collective bargaining, and that in the multiemployer bargaining context not extending the nonstatutory exemption to the post-impasse period would effectively ban post-impasse multiemployer bargaining.

With this understanding of the broad reach of the labor antitrust exemptions in mind, a question arises relevant to this Article: Are unions and association members immune from a conspiracy charge if they know the terms they negotiate will hurt some members of the association, not employers outside of the association, and if they are, how can a disadvantaged member of the association defeat that immunity? In other words, can an association, with a union’s help, be guilty of conspiring against itself?

The combined opinions of Justice White and Justice Douglas in *Pennington* state that a union-association conspiracy can violate the antitrust laws if the complaining employers are outside of the association. Employers technically inside of the association would presumably have a harder claim. Justice White’s implicit ruling against MFN clauses is premised on the fact that employers outside of the association are not involved in union-association bargaining even though such bargaining effectively dictates the non-association employers’ own bargaining terms. However, this reasoning does not apply to an employer in the association because the member *can* bargain. It just might be overruled by its association colleagues. An association member can, however, withdraw from the association and then bargain directly with the union. At such a time it could then raise a *Pennington*-type claim.

Therefore, for a disgruntled association member who feels itself a victim of union-association conspiracy, the antitrust laws offer some measure of protection, but the employer will have to first withdraw from the association, bargain with the union, and then if it finds its bargaining compromised through a conspiracy, file an antitrust action. As outlined below, this could take over three years, from the time the employer feels “outnumbered” by its association colleagues to the time it can technically

129 See id.
130 Id. at 250.
131 See id. at 241-42.
132 See supra, notes 113-115 and accompanying text.
bargain directly with the union but practically cannot do so because of the conspiracy.\footnote{See infra, note 138 and accompanying text. Of course, for an employer without prior association membership the route to an antitrust action would be shorter.}  

How much recourse the employer may actually have under the antitrust laws is a big unknown. As is argued below, even if there may be some cause of action for such cartel behavior, antitrust law will be largely ineffective for an individual employer trying to fight the combined strength of a union and association. A smoking gun demonstrating Justice Douglas’s required intent from \textit{Pennington} will be a rare find. A much more straightforward and speedy resolution, however, is to use the labor laws to assist the employer.

III. \textbf{THE DIFFICULTIES EMPLOYERS FACE IN EXITING MULTIEMPLOYER ASSOCIATIONS}

The most important legal rule governing multiemployer bargaining is that it is voluntary.\footnote{See, e.g., Wial, supra note 19, at 714 (“It is an unfair labor practice for a union to strike or threaten to strike in order to compel an employer to participate in multiemployer bargaining.”); Leslie, supra note 29, at 416 (recognizing the importance of voluntariness in multiemployer bargaining); 
\textit{Higgins}, supra note 14, at 716 (“The formation of the unit must be entirely voluntary, the assent of the union having representative status also being required. The Board will not approve the creation of such a unit over the objection of any party, union or employer.”).} Although an employer \textit{must} bargain collectively with a union once that union has been certified as the employees’ bargaining representative, the employer is free to \textit{either} bargain one-on-one with the union or, if the union also desires, to bargain through an employer representative (the employer association).\footnote{Comment, supra note 31, at 697 (noting that “[b]ecause national labor policy presumptively favors individual bargaining, the Board will certify multi-employer units only if both the association members and the union manifest ‘an unequivocal intention to be bound in collective bargaining by group rather than individual action’” (quoting Joseph McDaniel, 226 NLRB 851, 852 (1976))).} A major exception to this rule is that once bargaining on a new CBA has commenced, an employer who previously assigned its rights to an employer representative cannot withdraw that assignment until the union and association sign a new CBA.\footnote{See \textit{Retail Associates}, 120 NLRB 388 (1958). The exception to this exception is if there exist “unusual circumstances.” This only applies in cases of “bankruptcy, forced plant closure in a single and perhaps a multiple-plan operation, and the loss of an entire uniquely-qualified workforce where no replacements are available.” Richard A. Bock, \textit{Note: Multiemployer Bargaining & Withdrawing from the Association after Bargaining has Begun: 38 Years of ‘Unusual Circumstances’ under Retail Associates}, 13 HOFSTRA LAB. L.J. 519, 542 (1996).} This even includes the time after the association and union have...
reached an impasse and the employers have implemented their final offer.\(^{137}\) Therefore, an employer must weigh whether or not to continue to assign its bargaining rights well ahead, perhaps years ahead, the signing of the final CBA, and before the employers and the union even begin the give-and-take that shapes a labor agreement.\(^{138}\) Thus, whether or not to leave an association is a choice an employer must weigh carefully.

However, although the Board has repeatedly emphasized the importance of the voluntary nature of multiemployer bargaining, this voluntariness is illusionary. Even if an employer carefully decides that it wishes to leave the association and bargain directly with the union it will only be able to obtain the same terms as it could within the association. Such a choice threatens the cartel, and therefore the cartel will do what it can to maintain the status quo. For this the cartel has many options at its disposal. These options were outlined above, but are discussed in detail below.

A. Most Favored Nations Clauses

First and foremost, the union-association CBA may contain an MFN barring the union from agreeing to more favorable terms with other employers, even employers who are not members of the association.\(^{139}\) As the labor antitrust cases make clear, MFNs are common in unionized multiemployer industries.\(^{140}\) They are a cartel’s number one tool against employer exit. In order to protect its product-market premium, an association will insist on an MFN so that any unionized competitors (which, if the union is effective in organizing will mean nearly all competitors), have to pay as high of wages and benefits as association members. When a non-association employer then tries to bargain with the union, the union will be handcuffed to the terms in the association contract. If the union actually does agree to allow the non-association employer to pay a lower wage, all association members will automatically also be allowed to pay that lower wage.\(^{141}\) Given the unpopularity the union’s leadership would suddenly encounter among the membership if this happened, the union will not agree to breach the MFN and will, very rationally, allow an employer to go without a contract rather than agree to lower wages than association employers receive.

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\(^{138}\) See Bock, supra note 136, at 521.
\(^{139}\) See Richmond Electrical Services, Inc., 348 NLRB No. 62 (2006).
\(^{140}\) Winter, supra note 35, at 22.
\(^{141}\) See infra, note 145 and accompanying text.
The following from the NLRB’s *Richmond Electrical Services, Inc.*\(^{142}\) is an example of the effect an MFN can have. In that case, a non-association member bargained with a union whose association contract contained an MFN.\(^{143}\) The employer offered a lower wage than the association paid, and the union would not agree to it.\(^{144}\) The union then alleged the employer’s resulting implementation of its final offer was an unfair labor practice. The Board denied that charge because the employer understood that there was no likelihood the union would accept less than the association wage:

In this case, the Union conceded that the most-favored nation clauses in the Union’s other collective-bargaining agreements effectively precluded it from agreeing with the Respondent on a wage that was lower than the one in the [Association] agreement. If the Union agreed to grant the Respondent a lower wage than the [Association] wage, the Union would have had to offer the lower wage to 64 other electrical contractors with whom it had contractual relations. Thus, a lower contractual wage for the Respondent’s small number of bargaining unit employees would have lowered the wages that hundreds of union members would earn at other local electrical contractors.\(^{145}\)

Because of the threat a lower wage for one employer posed to the entire membership, the Board concluded that the employer and the union were at an impasse when they could not agree on a wage rate.

As *Richmond Electrical Services* illustrates, because wages and fringe benefits rates are the most important labor terms that employers bargain for, an MFN makes any real negotiation between a union and a non-association employer impossible. Instead of taking the typical weeks or months, a bargaining session could only last a matter of minutes. The negotiation might proceed as follows:

Employer Agent: Hi, I’d like to negotiate a collective bargaining agreement between my company and the union.
Union Agent: Great. Well, this year we bargained with the association a $35 per hour economic package of wages and benefits.

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\(^{142}\) 348 NLRB No. 62 (2006).
\(^{143}\) *Id.* at 1001.
\(^{144}\) *Id.*
\(^{145}\) *Id.* at 1002.
Employer Agent: I know, those association wages were too much for my company, that’s why we left. How about we bargain to only pay $30 per hour?
Union Agent: Sorry, I can only give you as good of terms as the association got. $35, take it or leave it.
Employer Agent: Well, I guess we’re at an impasse.

And as along as the employer’s statement regarding what it could afford was made in good faith, the parties truly would be at an impasse. The impasse might not come immediately, as the union might try and give the independent employer a non-economic concession in return for agreeing to the association’s wage rates (although even that might be precluded by the MFN), but if a union holds fast to its MFN any agreement is doomed.\textsuperscript{146} Once an impasse is at hand the employer can implement its final offer, in the above hypothetical $30 per hour, and go ahead and work without a contract. The union might file an unfair labor practice charge with the NLRB, but unless the employer really could afford $35 per hour and its impasse statement was in bad faith, the NLRB would likely refuse to issue a complaint, or its complaint would not stand at a hearing because a true impasse was at hand.\textsuperscript{147} Thus, the employer would be placed in the position of employing its all-union workforce, but without a contract. The union and employer could always come back to the bargaining table, as an impasse does not end a collective bargaining relationship but merely is a pause between negotiations.\textsuperscript{148} However, with the MFN looming above them it is unlikely that bargaining any time in the near future would be fruitful.

Indeed, unions recognize that MFNs impair their ability to bargain with non-association employers, and therefore often resist them in bargaining.\textsuperscript{149} It is likely that such union resistance is stronger the more

\begin{footnotes}
\item[146] See, e.g., \textit{J.D. Lunsford Plumbing, Heating \& Air Conditioning, Inc.}, 254 NLRB 1360, 1371 (1981).
\item[147] See, e.g., \textit{Richmond Electrical Services, Inc.}, 348 NLRB No. 62 (2006); \textit{J.D. Lunsford Plumbing}, 254 NLRB at 1371 (“[I]t was clear that the Union would not permit terms that would undermine the Association contract by application of the most favored nations clause of that contract. It was equally clear that the Company would not meet the terms of the new Association contract. With that basic difference between them there was little point in further discussion and an impasse had been reached.”).
\item[148] HIGGINS, supra note 14, at 925.
\item[149] See, e.g., \textit{California Pie Co., Inc.}, 329 NLRB 968, 974 (1999) (union rejected employer’s proposed MFN); \textit{Atlas Transit Mix Corp.}, 323 NLRB 1144, 1147 (1997) (noting that “the Association’s members expressed vehement insistence on “going to the wall,” on obtaining the same conditions as the” other employers including a most favored nations clause); \textit{Hayward Dodge, Inc.}, 292 NLRB 434, 438 (1989) (stating that the union’s
\end{footnotes}
If “escape” from an association contract were as easy as bargaining to impasse in the face of an MFN, as outline above, associations would not be as powerful as they are today. However, additional obstacles prevent exit. The union will be enlisted to apply its various tools to put pressure on the employer and not let it simply walk away. One tactic, of course, is to strike. A strike in such a situation would not be a “whipsaw” strike as the union would not be applying pressure on one employer and hoping to use it on another next. It would have the same lopsided character, however, because the union could dip into its strike fund, subsidized through dues from members who work for association employers, to assist the striking employees. The union would then picket the employer, hoping other trades obey its picket line and shut down the operation of the employer, encouraging other employers to cease doing business with it.

Of course, the actual employees of the employer might not want to strike. In the above example, if the employer truly cannot afford the $35 economic package the employees might understand this, particularly with a small employer where information is more easily understood and communicated throughout the company. They may understand that a long strike would be useless as they know the union can only agree to a $35 contract and their employer will not.

If the employees refuse their union’s order to strike the union can then put pressure on the employer in other ways, such as Area Standards picketing, or, in the construction and apparel industries, through using the secondary pressure allowed to it under the exceptions to Section 8(e) of the NLRA. The union can also discipline the employees for working. Also, for employers involved in public jobs, especially in construction, federal, state, and local governments have implemented policies that make it very difficult for non-union companies to compete. This includes project-labor agreements on certain public works projects where the public entity agrees to only use union employers. It also includes prevailing wage laws, the

agents testified that the union’s international “had encountered a lot of problems with [MFNs] in the retail food industry” and that “the Union would never agree to it”).

See Winter, supra note 35, at 18 (explaining how multiemployer bargaining is more advantageous for unions and employers in less competitive industries).

See supra, notes 31-34 and accompanying text (describing whipsaw strikes).

See Note, supra note 33, at 510 (discussing strike funds).

Davis-Bacon Act and various state equivalents ("Little Davis-Bacon Acts"),
that in practice require contractors on public works to pay union wages and
benefits. These laws have quite an effect, as "public construction
accounts for between one-fifth and one-quarter of all construction" in the
country. Since these prevailing wages and benefits are often what union
employers pay anyway, non-union employers are effectively unable to
compete according to their own business models. Thus, the employer from
the above hypothetical would be required to pay $35 per hour for public
work just as the collective bargaining agreement already requires even if it
did not negotiate such a collective bargaining agreement.

If an employer is able to survive a strike, picketing, secondary
pressure, and public works favoritism, however, it will then be in a position
where the union can be decertified as its employees' bargaining
representative if its employees are no longer supportive. They might have
wished that the union did something tangible for them, such as bargain for
$32 per hour, but since the union was in an all-or-nothing bargaining
position, it ended up failing to further their interests. If the employees do
not vote to decertify, the employer may also merely wait the three or more
years for the association agreement to be renegotiated, and at that time
assess whether it can agree to the new wage package. Thus, the MFN can
help the cartel—the non-association employer may be put out of business
along the way—but is bad for the employer, and bad for the employer's
union employees, as they may either be out of a job or out of a union.

B. Taft-Hartley Plans

Multiemployer Taft-Hartley plans are extremely valuable to a
union's, and the cartel's, interests. In addition to MFNs, they allow the
cartel to limit association withdrawal. Because the membership of an
employer's workforce, within a bargaining unit, belongs to the same union,
and because multiemployer unions generally demand that their members be
able to participate in the same plans across the various employers they
bargain with, unionized employers will have little, if any, choice to not

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154 See, e.g., Sarah Dunn, John M. Quigley, & Larry A. Rosenthal, The Effects of Prevailing Wage Requirements on the Cost of Low-Income Housing, 59 IND. & LAB. REL. REV. 141, 142 (2005) (stating that the federal Davis-Bacon Act and California’s equivalent “usually result[] in the selection of a negotiated wage rate (under a union collective bargaining agreement”).


156 See Harper, supra note 36, at 1681 (discussing how group benefit programs are possible because of multiemployer bargaining); Comment, supra note 31, at 694 n.23 (discussing unions’ reasons for participating in multiemployer bargaining); Comment, supra note 23, at
participate in the union’s Taft-Hartley plans. The union will not agree to a CBA that does not require the employer to contribute to the plans. This is a large reason for the existence of Taft-Hartley plans in the first place: they allow union members to change employers without losing pension credits and healthcare coverage.\textsuperscript{157} This is especially true for defined benefit pension funds\textsuperscript{158} in industries with an inherently transient workforce, such as the construction industry. Defined benefit plans require years of participation to vest for a pension,\textsuperscript{159} and when that fact is coupled with working in an industry where employees often work for an employer no longer than a particular project, the union’s perceived need for a multiemployer benefit apparatus becomes acute. This can also apply to health and welfare plans, where benefits often accrue on a quarterly basis, because workers often change employers mid-quarter and need hours from each employer to retain eligibility, or need an “hour bank” to keep their coverage intact during a seasonal break in employment.\textsuperscript{160} With their members’ interests in mind, unions in such industries will be very reticent to turn over, through collective bargaining, their members’ benefits to single employer plans or plans that other signatory employers do not participate in. The union and its members will instead demand participation in multiemployer plans, or at least plans that reciprocate coverage with the union’s Taft-Hartley plans, by all signatory employers.


\textsuperscript{158} Although now disfavored amount the non-unionized workforce, and in single employer plans, defined benefit plans are still very popular, and not in numerical decline, among multiemployer unionized workforces. See \textit{id}. at 26 (stating that unlike single employer defined benefit plans, multiemployer defined benefit plans are not declining in popularity, climbing from 8.2 million participating members in 1985 to 9.9 million in 2005); see also Gentile, \textit{supra} note 69, at 354 (“These funds provide benefits to approximately 10 million participants in the United States. When spouses and dependents are included, the number of persons served by multiemployer plans increases to approximately 30 million.”).

\textsuperscript{159} Under ERISA, the maximum number of years a plan can require for vesting for a defined benefit pension is five. 29 U.S.C. § 1053(a)(2)(A)(ii).

\textsuperscript{160} For examples of “hour bank” programs see Sheet Metal Workers’ Int’l Assoc. v. Mahoning & Trumbull County Building Trades Welfare Fund, 541 F.2d 636, 638 n.1 (6th Cir. 1976); McCabe v. Trombley, 867 F. Supp. 120, 122 (N.D.N.Y. 1994).
Furthermore, unless a majority\textsuperscript{161} of an employer association’s members do not want to participate in the multiemployer plans, the association, in addition to the union, will bargain to keep the Taft-Hartley plan apparatus. If an employer chooses to bargain individually, the union will bargain strongly for the employer to continue to participate in the plans. The union then has the full force of tactics discussed above, including a strike.\textsuperscript{162}

Of course, an employer could seek to continue to contribute to the plans, even as it bargains for concessions on wages. Putting MFNs aside for a moment, if it continues to participate in a plan, the employer will still have to abide by that plan’s governing documents in addition to the collective bargaining agreement. This will include all of the same requirements, including the amount of contributions and the rate of liquidated damages assessed on late contributions.\textsuperscript{163} However, an employer may want to negotiate for lower contributions in addition to lower wages. In that case, the employer could seek to negotiate a side-agreement with the plan giving it different terms than the other participating employers, including lower contributions. However, the plan and its trustees would have little, if any, incentive to recognize such an agreement, especially if it at all jeopardized the financial health of the plan. Even if the union allows the employer to negotiate more favorable fringe benefit terms, such as lower contribution rates or lower liquidated damages rates, the trustees of the plan might not allow this as they may, in their actual (or purported) fiduciary judgment, believe it is not in the best interests of the plan’s participants and beneficiaries. As trustees are supposed to administer a plan solely in order to provide benefits for the plan’s participants and beneficiaries, providing an employer better terms than others might very well bump up against the trustees’ fiduciary duties.\textsuperscript{164}

\textsuperscript{161} Whether a mathematical “majority” will be needed or not will be up to the association itself. There is no strict rule on what percentage of an association’s membership must agree to a proposed CBA to effectuate signature. However, what is clear is that 100\% is not required, so a minority of the association can be left with terms they do not agree to, whatever the views of the union.

\textsuperscript{162} See supra Part III.A. (discussing tactics used against withdrawing employers).

\textsuperscript{163} See 29 U.S.C. § 1132(g)(2) (mandatory liquidated damages and interest imposed on late contributions).

\textsuperscript{164} See 29 U.S.C. § 1104(a)(1): “[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of
(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan.”

It is hard to see how allowing a class of participants (the individual employer’s employees) to receive equal benefits for lower contributions would not violate the trustees’ fiduciary duties.
potential fiduciary breach and accompanying personal trustee liability\textsuperscript{165} that a side agreement might create, trustees will be extremely hesitant to grant an employer individually-negotiated terms with the plan. Even if the employer and union bargain for decreased benefits in return for lower contributions, this would require the trustees to craft a two-tiered plan structure—whether for health care or pension—for only one, or perhaps a few other, employers. This is something that the trustees would likely consider not worth their time or the plan’s money. This is especially true if they are keeping the cartel’s interests in mind.

Now, since Taft-Hartley plans are jointly controlled by labor and management, it could be argued that individual employers have a voice in their structure because management, as a whole, can seek to amend the plan to better serve employers, such as keeping contribution levels low or limiting liquidated damages on late contributions. However, structural conditions weigh against this. This possibility is only available if a \textit{majority} of employers in an association want to change the plan and if they then can either convince labor’s representatives to change the plan or win against them in arbitration in the case of a deadlock.\textsuperscript{166} As members of the cartel, employers in control of the association’s trustees will prefer the status quo for the very reason that it punishes a \textit{minority} of employer members, including the trustees’ competitors. Therefore, an individual employer who wishes to change the plan’s terms has little or no power to do so through the association, its bargaining representative, if a majority of its fellow members do not agree with it. Its only option is to withdraw from the association and try its luck against the union directly, and in so doing withdraw from the cartel’s plans altogether.

\subsection*{C. Withdrawal Liability}

One further, and very important, reason that employers will be reluctant to leave multiemployer plans, at least defined benefit pension plans,\textsuperscript{167} once they have participated in one for any lengthy period of time is withdrawal liability. In an effort to protect defined benefit plans from losing anticipated future streams of contributions from the withdrawal of

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\textsuperscript{165} See 29 U.S.C. § 1109(a).
\textsuperscript{166} 29 U.S.C. § 186(c)(5)(B) (providing for arbitration when the equal number of labor and management trustees on a plan cannot agree on an issue). However the association is structured, it could be that a supermajority is needed on aspects of bargaining. In any case, however, there is a significant chance in any round of bargaining that a significant minority of employers will be dissatisfied with terms in the finished CBA that a majority of employers are satisfied with.
\textsuperscript{167} Multiemployer defined benefit pension plans are still very popular, with approximately 9.9 million members as of 2005. See Blumenstein & Routh, \textit{supra} note 157, at 26.
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employers, the Multiemployer Pension Plan Amendments Act of 1980 imposes liability against an employer who permanently ceases to have an obligation to contribute to such a plan.\textsuperscript{168} The amount of the liability is based upon the employer’s share of unfunded vested benefits considering the plan’s overall unfunded liabilities and the share of those attributable to the employer.\textsuperscript{169} Depending on an employer’s past history with a plan, and depending on the plan’s actuarial health, the liability can be quite onerous.\textsuperscript{170} Not only that, but the liability is imposed not just against the signatory employer, but against all trades or businesses under its common control.\textsuperscript{171} Therefore, if the employer is owned by a predominant shareholder, that individual may not be able to shield other businesses he has a controlling interest in from a withdrawal liability action. For example, if an individual is the sole owner of a participating employer in a steelworkers plan, and also is the sole owner of a dry cleaning business, that dry cleaning business’ assets will be subject to a withdrawal liability judgment against the steel company.\textsuperscript{172} This adds an immense incentive for the steel company to not withdraw from a multiemployer defined benefit pension plan.

Thus, an employer has a number of reasons why association withdrawal will be ineffective in bargaining for any terms other than those in the association CBA. These include an MFN clause, union demands to continue participating in its Taft-Hartley plans coupled with Trustee resistance to plan modification, and withdrawal liability. Even if these are not enough, and the employer implements its final offer,\textsuperscript{173} the cartel’s post-impasse tactics will make business very difficult: a strike, picketing, secondary pressure, and public works discrimination, to name a few.

This system makes a mockery of federal labor policy. That policy, first and foremost, is supposed to encourage collective bargaining.\textsuperscript{174} It

\textsuperscript{168} See 29 U.S.C. § 1381, et seq.


\textsuperscript{170} See, e.g., Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993).

\textsuperscript{171} 29 U.S.C. § 1301(b)(1).


\textsuperscript{173} See Craig Becker, \textit{“Better Than a Strike”: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act}, 61 U. CHI. L. REV. 361 (1994) (discussing employer’s right to implement its final offer after bargaining to impasse, as well as the union’s right to strike).

\textsuperscript{174} See 29 U.S.C. § 151 (“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the
also supposedly allows, and protects, voluntary assignment, and withdrawal, of an employer’s bargaining rights. The reality of multiemployer bargaining, at least where MFNs are used, encourages the opposite: it provides no choice between bargaining through an association or bargaining individually, and therefore encourages employers to refrain from using that right or, if they so chose anyway, encourages them to sever their collective bargain relationship entirely. In effect it encourages one of two outcomes: (1) an individual employer successfully escaping its collective bargaining relationship because a union is unable, or unwilling, to bargain with the employer on non-association terms, or (2) an individual employer being forced to remain in an association where the union and its competitors dictates its labor terms.

If the two policies of encouraging collective bargaining and allowing employer choice in bargaining rights are to be protected, and if the anticompetitive cartels of associations and unions acting together are to be tempered, there must be a change in the current law regulating the interaction between the individual employer, the union, and the association.

IV. POSSIBLE SOLUTIONS

A. Antitrust

What solution exists? One recommended in the past has been to read the nonstatutory labor antitrust exemption to not apply to MFNs. MFNs would be a restraint of trade under the Sherman Act. The most straight-forward justification for this is that MFNs are directed toward product-market effects not labor market effects, making them naturally suited for antitrust liability.

One problem with an antitrust approach is that it does not help the union employees of the individual employer. As we have seen, MFNs are troublesome not only because individual employers are unable to bargain with their employees’ unions, but because those employers’ employees are unable to be properly represented. An individual employer could bring an antitrust action against the union and the association, and its members,

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175 See supra, notes 134-135 and accompanying text.
176 Campbell, supra note 43, at 1042-43 (MFNs should be banned because they create product-market effects, not “effects that follow naturally from a labor monopoly”); Winter, supra note 35, at 71 (recommending banning MFNs under antitrust law).
177 Campbell, supra note 43, at 1042-43.
178 See supra, note 153 and accompanying text.
and, a la Pennington, perhaps successfully prove that there was a conspiracy to lower its profits through leaving it with no option but to take the association wage rates.\(^{179}\) However, the individual employer also has the option, if it can survive a strike and other union tactics, to implement its final offer and operate without a contract, on the road to becoming non-union.\(^{180}\) The only other obstacle in its way is withdrawal liability, and if it can afford this, or if it does not contribute to a defined benefit pension plan anyway, then it may succeed. Although difficult, this may be an easier road to go than an expensive antitrust suit against a union-association cartel, notwithstanding potential treble damages. Further, an antitrust suit demands a finding that the union and association actually conspired to put it out of business.\(^{181}\) Given the paucity of successful Pennington-type cases in the case law, it appears the route of “going non-union” is more practical than challenging the entire union-employer apparatus through an antitrust suit, especially for a smaller employer.

In all this employees of the individual employer are those whose interests are least looked after. Although the employees will not receive the association wage if their employer is able to bargain with their union, they might be willing to settle for less-than association wages if they can keep participating in the union’s benefit plans and still receive above-market wages (i.e. above non-union wages), as well as other bargained-for benefits, e.g. overtime pay for Saturday work, vacation pay, etc. However, since their union takes an all-or-nothing approach in what can be bargained for, the employees are left with the options of either using economic leverage, i.e. a strike and picketing, to force their employer to accept the association CBA, and perhaps lose their jobs, or rejecting their employer’s final offer but continuing to work, thus working under worse conditions than if they had tried to meet their employer halfway. Leaving their union altogether as their bargaining unit representative is a plausible option once this occurs because the union has refused to bargain with their employer.\(^{182}\)

Thus, instead of the individual employer’s employees bargaining for the best they can extract out of their employer, the union and the association

\(^{179}\) See supra, note 116 and accompanying text (discussing needed proof for an antitrust claim).

\(^{180}\) This assumes that the individual employer has a good faith argument that it cannot afford the association’s wage package.

\(^{181}\) See supra, note 116 and accompanying text.

\(^{182}\) The employees could, of course, form and have certified their own “micro union” or join another union that wants to take them into their fold (e.g. painters joining the laborers union because of an MFN in the painters’ association CBA), but this will not only impede their flexibility in moving to future employers (e.g. association painting companies) but may also imperil any pension credits they have in their former defined benefit plan if they have not vested.
prevent them from, practically speaking, collectively bargaining with their employer at all. Antitrust law cannot help them. This is partly because it would be difficult for employees to establish standing to sue for antitrust injuries when their employer is also injured (which would be the case in an MFN situation) because the injury is indirect. In addition, even assuming they would have standing, such a suit would have further difficulties. Given that the union would likely not have breached its duty of fair representation regarding these employees—a union is not duty-bound to bargain for the best possible terms for all of its members—it is hard to think how the union’s members would have an antitrust cause of action against their union where none exists under the labor laws. Unions have wide latitude in crafting bargaining agreements and an MFN very much may be a logical decision for the rest of the membership because, as a bargaining chip, it gives them a wage premium from what the association would otherwise pay. Since the same deference under duty of fair representation cases that favor unions similarly favor employers in the same cases, the same deference would likely apply to an antitrust case against an association. Furthermore, even if the members could bring a successful antitrust action, how practical such a suit would be, where the only loss would be the difference in pay between their new wage package and the association scale, at treble damages admittedly, is very questionable.

B. The Labor Laws

Unlike antitrust, the labor laws do offer some promise to partially correct the vitiation of the federal labor policies of encouraging collective bargaining and allowing employers to bargain individually. The following

183 See Antitrust & Labor Relations Law, 4 LAB. L. 410, 411 (1988) (describing case law); Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517, 528 n.5 (1991) (stating, in dicta, that employees have been denied standing to assert antitrust claims); Adams v. Pan Am. World Airways, Inc., 828 F.2d 24, 29 (D.C. Cir. 1987) (“[I]n the absence of special circumstances not present here, the cases provide no support for suit by employees of a firm victimized by antitrust violations.”); N. Am. Energy Sys., LLC v. New Eng. Energy Mgmt., 269 F. Supp. 2d 12, 19 (D. Conn. 2002) (“It is well established that neither employees nor shareholders of a corporation, much less prospective employees and shareholders, have standing to bring claims for antitrust violations affecting the corporation.” (emphasis in original)).


suggests a few mechanisms through how this could work, and it emphasizes that these are only suggestions and by no means the best possible route to better multiemployer bargaining. That result will require further study, including empirical review of multiemployer bargaining practices, of which there is precious little available scholarship. These suggested protections will require some changes to current Board law, but not necessarily changes to the labor statutes. There are additional changes suggested regarding employee benefits, although these would require Congressional amendment. The suggestions would by no means address all of the problems discussed above, such as public works favoritism, but merely serve as partial, yet important, solutions.

The actor which, under current law, defeats the dual federal policies of promoting collective bargaining and of employer choice in selecting a bargaining representative is not the association acting alone, nor the union acting alone. It is the cartel which both of them include. Without the assistance of both parties the maladies of multiemployer bargaining would not be nearly as acute. Therefore, both the union and the association must understand that they have contributed in creating an environment denying an individual employer the chance to bargain individually, and of denying the employees of those employers a chance to realistically bargain with their employer. Both parties “own” the state of affairs. In order to have one or both parties change their behavior, such as not bargaining for an MFN clause or not creating a defined benefit plan that imposes withdrawal liability, they must have an incentive to bargain differently.

Therefore, the union must understand that in acquiescing to the association’s demand for an MFN clause it has created the conditions where employers who want to withdraw from the association will either remain in the association even though they may not economically survive the association CBA’s terms (and thus may lay union members off), or exit the association and risk a strike which may lead, if they survive, to becoming non-union. Given the fact that MFN clauses are widely used, unions are apparently willing to allow some employers to potentially become non-union in return for the trade-offs that associations give in return during collective bargaining. As discussed above, unions will sometimes fight against MFNs, and generally will be more willing to agree to MFNs the less nonunion competition exists.

If the ease of leaving the association, and therefore the union, were made easier, however, unions would be less willing to agree to MFN clauses. Then unions would recover lower concessions from associations, with no MFN to give in return, but would actually bargain with non-

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186 See supra, note 140, and accompanying text.
187 See supra, note 150, and accompanying text.
association employers who could not afford association scale. The unions would therefore fully represent their members employed by those non-association employers.

To make this strategy work it would have to be easier for an employer to make the journey from association member to non-union competitor, or at least a non-association member without a contract. It may sound counterintuitive that the path to making unions more responsive to their members is to make it easier for employers to become non-union, but that is the case given the above-discussed conditions. Giving employers more of a chance to leave the union will give the union an incentive to not agree to an MFN clause, as well as for the Taft-Hartley fund trustees to be less restrictive in their demands on contributing employers.

Readers may object to this “incentivizing” approach and recommend banning MFNs altogether under the labor laws. This perhaps may ultimately be what is needed. However, the hope is that a less drastic approach that still allows for MFNs, but changes how they affect labor relations, will address much of the underlying problem. It will also fit current labor law more comfortably which includes MFNs among mandatory subjects of bargaining.\(^{188}\)

For an individual employer who leaves an association and seeks to negotiate directly with its employees’ union, the employer’s first trouble will be a threatened strike. If the employer’s employees strike to assert economic pressure, the employer may hire replacement workers, including permanent replacements if it chooses.\(^{189}\) In striking the union can picket and seek to assert pressure against replacement workers going to work and against workers in other trades visiting the place of work. This can be a formidable tactic if the employees in other trades refuse to cross the picket line. In the construction industry, for example, when the employer is one of many subcontractors on a job, and the many other trades on the job honor the picket, the general contractor may demand that such a struck employer sign a contract with the union or be thrown off the project. The union must refrain from picketing a “reserve gate” so as to not assert secondary pressure, but the pressure on the general can still be substantial.\(^{190}\)

\(^{188}\) *Dolly Madison Industries, Inc.*, 182 N.L.R.B. 1037 (1970) (holding that an employer has a right to insist on an MFN in bargaining).

\(^{189}\) Although the striking employees have the right to recall. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 346 (1938) (first ruling that employers have a right to permanently replace striking workers, but that those same workers remain employees of the employer).

The union would think twice about picketing, however, if a picket would be considered an unfair labor practice. Making a picket an unfair labor practice seems quite a strong tactic as a union’s right to strike and picket is the most powerful tactic it has. However, without limiting the ability of the union to picket, an employer in such a situation is only left with the option of waiting out the strike and picket and hoping to stay in business in the meantime. This is an employer who has left the association because it cannot afford to pay association wages, i.e. an employer with economic problems greater than those of association members. The strike and picket will only worsen these problems. If it agrees to the association’s wage package in the face of such a strike and picket it will then avert the strike, but now will have to operate with the wage rates that prompted it to leave in the first place. Therefore, a change in the law that would give such an employer greater bargaining power would be to make picketing of the employer an unfair labor practice when the employer will not agree to an association’s wage package where the association has an MFN clause in its contract. This will give the union consequences for agreeing to an MFN.

Note that this would not preclude a strike of such an employer, but only picketing. This way the employees of an employer can assert their own economic pressure on their employer, but they and their union cannot picket to pressure replacement workers or other trades from doing business with the employer. A picket brings the union’s resources into play, subsidized from dues paid by employees of association members. The union can send otherwise unemployed members and union business agents to the picket line, paid to picket out of the union’s coffers.\footnote{See supra note 152 and accompanying text.} This, in effect, is the cartel acting to suppress competition. A ban on such picketing ameliorates this.

An objection to this proposal is that employers will frivolously assert that they cannot afford association wages. After all, most employers are more concerned about what their competitors pay, not the absolute wages paid.\footnote{See Lande & Zerbe, supra note 15, at 207 n.54.} In this sense leaving an association is not escaping a cartel but cheating on one. Employers will have an incentive, goes the objection, to cry poverty and then be shielded from picketing, even as they pay nonunion wages and benefits to replacement workers. However, labor law is already very familiar with an employer’s assertions that it cannot afford wages, and such an assertion, and a derivative impasse assertion, is already an unfair labor practice. If an employer who has left an association claims it cannot afford to pay the association wage package the union can file an

\footnotesize{primary strike or picket, thereby disrupting the business of those firms, the action remains lawful.”}
unfair labor practice charge with the NLRB and if the NLRB finds the employer’s claim was not made in good faith it can issue a complaint and order the employer to bargain. It is already well-established that if an employer cries poverty in bargaining it can be ordered to produce financial records to document why it cannot agree to the union’s demanded wages. 193 Under the scenario advocated here, all of that can still occur except that the union could not also picket the employer if the employer’s claim is made in good faith. It may be how this would occur in practice is that an employer would implement its final offer and the union would file an unfair labor practice charge. If the NLRB then finds no unfair labor practice the union could not begin a picket. If the union did anyway, the picket itself would be an unfair labor practice and the employer could seek damages from the union. 194

C. Adjustment to Withdrawal Liability Assessments

Another remedy that would give individual employers a greater chance to leave an association and bargain with a union is to allow them to continue participating in a multiemployer defined benefit plan even after the union and the employer fail to agree on a new contract and go their separate ways. This would allow the employer to avoid withdrawal liability. If an individual employer cannot agree to a contract because of the union’s MFN clause with the association, or because of some other intractable reason related to the association, and the employer thereafter would cease contributing to the union’s Taft-Hartley plans because no CBA requires it to do so, the employer will permanently cease to have a duty to contribute to the defined benefit pension plan and will likely incur withdrawal liability. 195

193 Winter, supra note 35, at 56; NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Int’l Chem. Workers Union Council v. NLRB, 467 F.3d 742, 750 (9th Cir. 2006) (“An asserted inability to pay, whether made in writing or orally, is the cornerstone of an alleged Truitt violation.”).

194 The statutory hook by which the Board could enforce the rule herein proposed against picketing an individual employer in the context of a multiemployer CBA with an MFN clause with the association, or because of some other intractable reason related to the association, and the employer thereafter would cease contributing to the union’s Taft-Hartley plans because no CBA requires it to do so, the employer will permanently cease to have a duty to contribute to the defined benefit pension plan and will likely incur withdrawal liability. 195

195 See 29 USC § 1383(a) (defining a “complete withdrawal” as “(1) permanently ceas[ing] to have an obligation to contribute under the plan, or (2) permanently ceas[ing] all covered operations under the plan). The “obligation” would, of course, cease once a CBA no longer requires an employer to contribute, even though it still engages in covered operations.
This can amount to hundreds of thousands or millions of dollars.\textsuperscript{196} The amount depends on the actuarial soundness of the plan, through a complicated formula considering the unfunded liabilities of the plan, and not on any malfeasance committed by the employer.\textsuperscript{197}

The statutorily-required permanent cessation to contribute, however, would not occur if the employer were allowed to continue to participate in the defined benefit plan \textit{even though} it had no contract with the union. Then an employer could seek to bargain individually with the union, the union would rebuff its offer due to its MFN clause with the association, then implement its final offer but include in that offer to continue contributing to the defined benefit plan. The plan would then have to take those contributions even though the employer would have no union contract, and no likelihood of one. Such an option would require amendments to ERISA.\textsuperscript{198} It would not give an individual employer the chance to obtain pension benefits for its employees at a lower rate of contributions, as the employer would have to abide by the contribution rate the plan’s trustees set. What the employer would gain is that its wage rates, or the rate it pays other benefits, could be lower than the associations’. It would also, of course, allow the individual employer to escape the potentially onerous withdrawal liability award, and keep its employees in their pension plan and continue building credits toward their retirement.

With these changes made to the law—a ban on picketing of withdrawn employers and an option out of withdrawal liability—how would the union’s and association’s behavior change? If the union and the association made no changes to their contract, and continued using a strong MFN clause, the union would be less able to keep individual employers from continuing operations after bargaining to impasse. Also, if the cartel maintains a defined benefit plan the employer would be able to avoid withdrawal liability and be more likely to leave the association, and thus undercut association wages (but not pension contribution levels).\textsuperscript{199} If the union and association continued to make no changes, more and more employers would be able to leave the association, and therefore the union as well, weakening the market power of the association members as a

\textsuperscript{196} See \textit{supra}, note 170 and accompanying text.
\textsuperscript{197} See 29 USC § 1391 (detailing calculations required to determine withdrawal liability).
\textsuperscript{198} The definition of “complete withdrawal” under 29 USC § 1383(a) would need an exception for employers who do not have an “obligation to contribute” but are allowed to contribute because of a multiemployer CBA with an MFN that prevents meaningful bargaining between the contributing employer and the union.
\textsuperscript{199} In fact, the change in withdrawal liability rules might help the soundness of multiemployer defined benefit plans because the plan would have less employers it would have to go after to collect upon withdrawal liability, and thus less of a chance that such a collection would not result in a full recovery.
percentage of the product and labor markets. The union would be concerned about this trend both because of the lower wages and benefits that many union members would be earning, because those members would likely leave the union altogether leading to lower dues income, and because of the competition that its other members’ employers—association employers—would then face.

The union would be confronted with a dilemma. Either it continues to allow an MFN clause in its contract with the association, and continues to lose employers and members, or it refuses to agree to an MFN clause, trade off something in return (perhaps lower wages or benefits, perhaps another issue), and then bargain directly with individual non-association employers where the two parties can actually compromise on material terms. Given the hemorrhaging that the union may experience if it keeps an MFN clause, it is very possible that the union would bargain away the MFN clause and then have a chance to realistically bargain with the independent employers.

An objection may be raised here that this would lead to lower wages and benefits. That is likely, but in itself is not a valid objection. The union will still have the power to organize employers and gain monopoly control over labor relations. It also will have all of the other rights it currently enjoys in the labor laws. This would even include picketing of an individual employer who refused to sign a contract if the union does not have an MFN clause in its association contract. It would not be as easy for the union to bargain equal wages across a locality’s industry, as is often the case today, \(^{200}\) but it is questionable whether this is a worthy normative goal in the first place. If an employer’s business model or market niche does not allow it to earn as much as its competitors, why should the union nevertheless insist that the employer pay the same wage as the competitors? Indeed, a normatively more justifiable goal would be for each employer to pay the same percentage of its profits, or managers’ salaries, or otherwise, to its bargaining unit employees. Then employers are not proportionally burdened more than their competitors, at least to the same degree, just because they do not make as much money. This metric has other problems, such as inhibiting the employer’s incentive to make higher profits, but is normatively not inferior to the goal of equal wages across an industry.

Another objection to the rule proposed here is that it would be harder for a union to bargain simply because there would be more contracts and therefore more hours of bargaining. This would depend on the circumstances, but, on the contrary, the drudgery of having to bargain will

\(^{200}\) See supra, notes 25-28 and accompanying text (discussing taking wages out of competition as a major union objective).
be felt more by the employers than the union. All but the smallest unions retain full-time business agents, paid by members’ dues, whose job is to bargain contracts, police contracts, and attend to members’ needs. For employers, on the other hand, unless they are very large, they likely will have one or maybe a handful of people who spend all of their time on human resources matters and have the time to meet with union representatives and bargain. Indeed, to the extent that associations will retain power it will be due to the gain that employers receive from banding together for the convenience of having someone else, e.g. association representatives, do their bargaining. This is closer to the original reason employers formed associations—to counteract union power—than the modern trend of forming union-employer cartels.

CONCLUSION

The reader may at this point object to the narrow relief afforded in this Article and ask “why not just ban multiemployer bargaining?” There are two reactions to this. First, it is unclear how much multiemployer bargaining itself helps or hurts individual employers. Perhaps if the institution did not exist at all there would be endless whipsaw strikes. These would still be permissible under the above-proposed changes to the labor laws, as long as an MFN is not involved. Employers not brave enough to weather a strike on their own would still want the shelter of their fellow employers.

Second, there is little empirical work available on multiemployer bargaining, and both unions and employers just do not know what would happen if the method were taken away. This is especially true given that, to paraphrase from another context, multiemployer bargaining has “always been with us.” Unforeseen perverse incentives could arise with a simple shut-down of the ability of employers to band together to deal with their employees’ bargaining representative. What we do know is that multiemployer bargaining is one of the closest things in labor law to a “state of nature” phenomenon. It has perhaps existed as long as unions have organized themselves. Banning the practice entirely would merely push the discussions that employers have among themselves when faced with a united union into the shadows. A better policy is to keep multiemployer bargaining in the open, protected from the antitrust laws, but also regulated

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201 This is contrary to the conventional wisdom outlined above, supra, note 36 and accompanying text.
202 See supra, notes 5-10 and accompanying text (discussing the history of employer associations before passage of the modern labor laws).
through limiting the ability of the cartel it creates to keep employers in its clutches.