UNITED STATES OF AMERICA
Federal Trade Commission

"Aiming at Dollars, Not Men"

Prepared Remarks of Commissioner Alvaro M. Bedoya
Federal Trade Commission

"Whither the Consumer Welfare Standard?
How Antitrust Can Promote Worker Interests"

Hosted by the Utah Project on Antitrust and Consumer Protection
The University of Utah S.J. Quinney College of Law

April 10, 2023

> "We are aiming at the gigantic trusts and combinations of capital and not at associations of men for the betterment of their condition. We are aiming at the dollars and not at men . . . Let us put the man above the dollar and exempt all associations of men for the betterment of their condition."
>
> Representative Thomas F. Konop (D., Wisconsin), June 1, 1914

Thank you for that kind introduction. I'm grateful to the Utah Project, the University of Utah, and the organizers of this convening. Today, I'm speaking for myself, not the Commission or my fellow commissioners. I want to recognize my paralegal Bryce Tuttle, who was my intellectual partner in preparing these remarks. And I'm deeply grateful to our law clerk, Kate Conlow, whose research has been indispensable.

I. John D. Rockefeller and Robert Bates

At the time of its incorporation in Ohio in 1870, Standard Oil was already the wealthiest company in America, with one million dollars in assets and ten percent of the country's oil refining capacity. That rose to twenty-five percent just two years later. In 1882, the company's stock was combined with the assets of three dozen other companies to form the Standard Oil *Trust*.[1] By 1890, it controlled ninety percent of U.S. oil refining.[2]

[1] GREGORY J. W

The fundamental idea behind John D. Rockefeller and his partners' success was that they could make more money by *not* competing.[3] That idea made them rich. Rockefeller would become the first billionaire this country has ever seen.[4]

Copycats followed. The American Cotton Seed Oil Trust, with seventy-five percent of the country's production capacity. The Sugar Trust, with eighty-five percent capacity in the

maintenance for their truck on the weekend," said Mr. Bates. Some days, all they'd see would be two to three trailers a day. "How do you live on that?" Mr. Bates asked.

But it wasn't like on slow days, the truckers could just do something else. *The truckers didn't control their own time*. The ports they worked forced them to haul equipment for repairs, for free. They forced them to load the containers, for free. Every hour the truckers spent on call for another trailer? Also free.[8]

Yet every time the truckers in one port got organized to ask for an increase on those $35, the shipping companies would just divert their ships one port over.

So Mr. Bates called up truckers in Baltimore, Charleston, Galveston, Jacksonville, Los Angeles, Long Beach, and Seattle and organized what he described as the first gathering of its kind: a meeting to try to get the port truckers a union contract.[9]

Then, ten days before the meeting, and two days before Thanksgiving, Mr. Bates and his colleagues were issued subpoenas to testify before the FTC. According to press reports, the subpoenas explained that the Commission was investigating whether the truckers "are engaging in unfair methods of competitive pricing."

Speaking a year later, Mr. Bates explained that he didn't think they'd be able to get that union contract, "[b]ecause we have to abide by the anti-trust [sic] laws in America, according to the FTC, because each of us, as they say, is an *independent business*, because we're *independent contractors*."[10]

Truckers used to earn "

independent contractors organize, they are often accused of breaking our nation's antitrust laws.[14]

In other words, *because of antitrust*, the people most vulnerable to mistreatment are the ones least capable of organizing to stop it.

We need to ask ourselves: Is this really what Congress intended?

We are here to talk about anti*trust*: A body of law born to rein in John D. Rockefeller and the oil trust, the beef trust, the sugar trust.[15] Did Congress really mean for that law to target Robert Bates? Did it really mean to target uninsured truck drivers barely making the minimum wage? And did it really aim to block their union contract?

And if not, what do we do about that? That is what I'd like to discuss with you today.

II. Three wins in Congress, three losses in the courts

The need to protect worker organizing was at the center of congressional antitrust debates for forty years. In 1890, 1914, and 1932, Congress amended the law to make sure it wasn't used to stop worker organizing. But courts turned each effort on its head.

Let's talk about that back and forth.

As early as February 1889, during a debate around the predecessor bill to the Sherman Act, Senator James George of Mississippi warned that, as written, the bill could be turned against "farmers and laborers." Language in the original bill banned any combination that raised prices to consumers. Senator George thought that this language could be turned against "workingmen" organizing for better wages since increased wages may increase the price of goods.[16]

And it wasn't just Senator George who issued this warning. The same warning also came from

person strike.[23] Federal prosecutors indicted the organizers under the Sherman Act.[24] A federal judge saw that the law was focused on "the evils of massed capital" – and then upheld the injunction anyway.[25]

The Act was used against people working sixteen hours a day for the Pullman Palace Car Company in Illinois. In 1894, their wages were cut by twenty-five percent. They started running out of food. They asked to meet George Pullman. He fired them instead. So they went on strike.[26] Prosecutors used the Sherman Act against the union for organizing a boycott of Pullman cars.

Mr. Loewe won a settlement of

One of the union miners, Frank Ingham, would later testify before the Senate about the tricks the coal company used to keep their wages low. The men were paid by the carload of coal – but they weren't paid in cash; they were paid in scrip redeemable only at the company store.[40] When the men asked for a ten-cent increase over their rate of sixty-six cents per car, the company gave them nine cents. But then, the next time the men came out of the mines, every item in the company store had been marked up by five to twenty-five cents.[41]

The men called a strike. The company sued under the Sherman Act. The Fourth Circuit said the union leaders involved in the dispute "are neither ex-employees nor seeking employment," and that therefore the labor exemption in the Clayton Act did not apply.[42]

Yet again, Congress was outraged. Congressman Fiorello LaGuardia denounced the "few . . . Federal judges" who had "willfully disobeyed the law." He continued: "[T]hey emasculated it; they took out its meaning as intended by Congress; they made the law absolutely destructive of the very intent of Congress."[43] So Congress passed the Norris-LaGuardia Act of 1932.

Now, the *Red Jacket* opinion had relied on a Supreme Court case called *Duplex Printing*, where the Court had said that the Clayton Act labor exemption did not protect people who weren't "standing in [the] proximate relation" of employer and employee.[44] So Congress liter o lywook outheed t

Like in the Clayton Act, Congress also broadly declared as policy that the Norris-LaGuardia Act aimed to restore "actual liberty of contract" to the "individual unorganized worker."[46]

In contrast to what happened after the Clayton Act, here the courts were more restrained; the *Lochner* era was coming to an end. But the narrow readings still followed.

In *Columbia River Packers*, the Court excluded from the protections of the labor exemption a group of fishermen on the grounds that they were "*independent businessmen*" selling commodities, not their labor.[47] That decision would be used to exclude from the exemption a range of other workers classified as independent contractors, some of whom did *not* sell commodities. In at least two circuit courts, this allowed for antitrust suits against people like the port truckers and Mr. Bates.[48]

But I'm not here to critique a twenty-three-year-old agency decision, nor am I here to critique FTC staff. As I hope is clear from my remarks today, my critique is of the courts who interpreted the labor exemption so narrowly that its language was repeatedly used to stop worker organizing, rather than to protect it.

I suspect that, today, a lot of people like Mr. Bates may be technically classified as contractors, but they are not independent. Fifty years ago, "owner-operators" were much more likely to haul for multiple clients, with multiple trucks, and multiple employees. By the late '90s, the vast majority of them had

The Court declined to protect them because they were "independent businessmen, *free from such control as an employer might exercise*."[51]

III. Thirty-seven jockeys in Canóvanas

I want to end on one last case that offers a different way of approaching these questions. It takes place at a horse track about an hour outside of San Juan, Puerto Rico.

Like hat-making, horse racing may seem harmless. Consider that racehorses can weigh almost 1,500 pounds, sprint at 55 miles an hour, and hit the ground with as much as 3,000 pounds of force. The average jockey is sidelined by injuries multiple times a year.[52]

If you want to work as a jockey in Puerto Rico, there is one place you can do it: the Camarero racetrack in Canóvanas. And when you race, unless you finish in the top five, you only get paid what's called a "mount fee." In Puerto Rico, it's $20, a fifth of what jockeys are paid in the U.S. – and that hasn't changed since 1987.[53] These rates keep most jockeys in poverty.[54] For years, the jockeys' association had demanded "pay and benefits that do justice to their dangerous profession."[55]

In June 2016, the jockeys threatened a strike and demanded higher pay.[56] The horse owners wrote the jockeys a letter informing them that "they are independent contractors and as such, they are not a union and therefore they cannot go on strike as that would violate antitrust laws, in particular the Sherman Antitrust Act."[57]

Thirty-seven jockeys went on strike for three days. The horse owners and the racetrack sued under the Sherman Act. The jockeys lost in district court. The judge awarded the horse and racetrack owners treble damages of well over one million dollars.[58] Like with the Hatters one hundred years earlier, however, the owners didn't just hold the jockeys liable. They also sued each jockey's spouse or domestic partner – ”(ue)4 (d -)]TJ-0.015.T2j0 Tc 0Id 350.04 Tm(57F)Tj6/TT1 1 TT5/T.0

On appeal before the First Circuit, Judge Sandra Lynch didn't dwell on whether the jockeys were correctly classified as independent contractors, pointing to language in Norris-LaGuardia saying that this did not matter. She focused instead on what she saw as the core question in *Columbia River Packers*: Whether what's at issue is compensation for labor – not commodities.[60] She and her colleagues nullified the judgement and dismissed the case, and, in my view, followed the letter *and spirit* of the labor exemption. The jockeys and their families won.

I'll ask it again: Anti*trust*. A law written to rein in the oil trust, the sugar trust, the beef trust. A law aimed at "the gigantic trusts and combinations of capital," a law aimed at "dollars, and not at men." Did Congress really mean for that law to target twenty-year-old hatters with mercury poisoning? Coal miners paid in worthless scrip? Three dozen jockeys risking their lives for $20 a ride? Is that really what Congress intended?

I think the answer to that question is a very obvious "No." And I think Congress answered that question not once, not twice, but three times, each time in a louder and clearer voice.

Now for those of you itching to cite Justice Scalia's famous aversion to legislative history, I see your Scalia and raise you a Holmes – then-Judge Oliver Wendell Holmes Jr., whom the Supreme Court quoted in 1941 for the very question of how broadly they should read the labor exemptions in Clayton and Norris-LaGuardia:

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you're driving at, but you have not said it, and therefore we shall go on as before.[61]

When it comes to antitrust and the labor exemption, we know the history. We know what Congress was "driving at." Congress meant to strengthen labor's hand when it fought the trusts, not weaken it. And so we cannot "go on as before." Congress has made it clear that worker organizing and collective bargaining are not violations of the antitrust laws. When I vote, when I consider investigations and policy matters, that history will guide me.

Thank you.

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[60] *Confed. Hípica*, 30 F.4th at 314-15.
[61] United States v. Hutcheson, 312 U.S. 219, 235 (1941) (citing Johnson v. United States, 163 F. 30 (1st Cir. 1908)).