An Agricultural Law Research Article

Antitrust, Bargaining, and Cooperatives: ABC's of the National Agricultural Marketing and Bargaining Act of 1971

by

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Originally published in HARVARD JOURNAL ON LEGISLATION
9 HARV. J. ON LEGIS. 498 (1972)

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Introduction

Farmer power, although not yet a slogan, is probably the result of a widely-held view[1] that farmers do not receive a fair return for their production. Although per capita farm income has consistently lagged below that for the average non-farm worker,[2] such a view necessarily incorporates notions of the static pie phenomenon.[3] Be that as it may, legislation[4] currently under consideration in both the House of Representatives and the Senate seeks to augment farmer income by increasing the bargaining power of agricultural cooperatives. Cooperatives, defined here as collections of agricultural producers seeking to increase their bargaining power by selling with one voice, are an important economic institution in the distribution of food and fiber. During the 1969-70 agricultural year, $14.8 billion of farm products were marketed collectively,[5] and in the past the proportion of commodities so marketed has constituted about 20 percent of the total

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1 *Cf.* M. SNODGRASS & L. WALLACE, AGRICULTURE, ECONOMICS AND GROWTH 402 (2d ed. 1970).

2 U.S. DEP'T OF AGRICULTURE, FARM INCOME SITUATION 4 (1971) ("For the past five years, farm people have averaged about three-fourths of the per capita disposable income of nonfarm residents . . . .").

3 The static pie phenomenon is used here to connote analyses which fail to recognize change over time and instead seek comparisons as of a given moment, holding flux parameters constant. With respect to the farm income analysis suggested by the concept of a "fair return," the desirability of current resource allocation to the agricultural sector must be presumed before inquiring as to the fairness *vel non* of the return. This concept of static farm resources characterizes the response of government to the problems of agriculture. *See* R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 94 (2d ed. 1967): "United States farm policy has centered on supporting the market for farm products, setting a price which is too high to permit all the produce to be sold commercially and then buying up the surplus which results at this price. Attempts have been made to restrict supply to demand at these target prices. But these attempts have not aimed at removing resources from agriculture, but only at causing the resources — farmers, their land and machinery — to grow less crops."

4 *E.g.*, H.R. 7597, 92d Cong., 1st Sess. (1971) [hereinafter cited as H.R. 7597]. The important provisions of the bill, the subject of this Note, are set forth in the Appendix.

5 U.S. Dep't of Agriculture, News Release No. 4302-71, at 1 (Dec. 30, 1971).

production sold by American farmers.[6] A coupling of this economic institution with the belief that farmers are underpaid has made collective bargaining "[o]ne of the hottest topics in agricultural circles today."[7] Indeed, the plea for increased bargaining power even found expression in President Johnson's State of the Union message in 1968.[8]

The current legislative medium for increasing the bargaining power of agricultural cooperatives is the proposed National Agricultural Marketing and Bargaining Act, being considered in the House as H.R. 7597 and in the Senate as S. 1775. These bills enjoy the widespread support of the legislators who must consider them; 69 members of the House either cosponsored H.R. 7597 or introduced identical bills, and ten Senators cosponsored S. 1775.

H.R. 7597 attempts to establish the administrative framework, legal obligations, and antitrust exemptions necessary to develop mandatory collective bargaining in agriculture. The bill consists of three titles. Title I, the most important, imposes a "mutual obligation" upon handlers (defined to include all middlemen except for cooperatives)[9] and qualified associations (cooperatives which have been certified to meet the standards set by the bill)[10] to bargain in good faith over price and other contract terms.[11] A handler is so obligated if he has dealt with producers in an association in any two of the prior five years.[12] The bargaining position of the association is bolstered by provisions which (1) authorize full requirements contracts;[13] (2) prevent the handler from negotiating with others while negotiating with the association;[14] and (3) prohibit the handler from giving to other producers terms more favorable than those already negotiated with an association.[15] Title I also sets up a National Agricultural Bargaining

6 M. SNODGRASS & L. WALLACE, *supra* note 1, at 187.

7 Lemon, *Antitrust and Agricultural Cooperatives Collective Bargaining in the Sale of Agricultural Products*, 44 N.D.L. REV. 505, 505 (1968).

8 114 Cong. Rec. 143 (1968) (President's State of the Union Address).

9 H.R. 7597 § 103(d).

10 *Id.* § 103(b).

11 *Id.* § 106(a).

12 *Id.* §§ 106(a), (b).

13 *Id.* § 106(c).

14 *Id.* § 106(d).

15 *Id.* § 106(e).

Board[16] which certifies qualified associations[17] and receives, investigates, and adjudicates complaints concerning refusals to bargain.[18] The Board's orders are to be enforced and reviewed by the federal courts of appeals.[19] Finally, Title I gives an antitrust exemption for the bargaining "activities" of the associations and handlers.[20] Title II authorizes a "check-off" system for the collection of cooperatives' fees and dues through their contracts with handlers. Title III amends the Agricultural Adjustment Act (AAA) of 1933 to expand the use of AAA marketing orders despite previous exceptions if a majority of the affected producers express their approval through a referendum.

Concentrating on H.R. 7597, this Note seeks to analyze the bill's provisions in terms of two previously existing legal contexts: labor and antitrust law. Although this dichotomy is not at all times complete[21] or all-encompassing, the significance of H.R. 7597 lies in its application of labor collective bargaining to agricultural bargaining and in its relaxation of the antitrust law for agricultural cooperatives. The Note concludes that neither pursuit is desirable, thus urging rejection of H.R. 7597 and the statutory scheme embodied therein.

I. NLRA Collective Bargaining As Used In H.R. 7597

Because H.R. 7597 is similar to existing labor legislation, its interpretation can be assisted by an examination of relevant labor law decisions. In general, this examination gives substance to the bill's obligation to bargain in good faith. More importantly, it also suggests unexpected and undesirable meanings for sections 106(c) (which authorizes requirements contracts) and 114 (which exempts bargaining activites from the antitrust laws). A review of these meanings shows H.R. 7597 to be an unwise legislative

16 *Id.* § 104(a).
17 *Id.* § 105(c).
18 *Id.* §§ 106(f),(g),(h),(i).
19 *Id.* § 107(a).
20 *Id.* § 114.
21 For instance, § 114 of H.R. 7597, a section which deals with an antitrust exemption, is discussed within the labor framework since the scope of the exemption depends on the labor comparison and the definition of "good faith bargaining."

vehicle. Section I of this Note goes one step further to demonstate that, even in the absence of problems with sections 106(c) and 114, labor concepts of mandatory collective bargaining could not provide an effective approach to the farm income problem because of basic economic differences betwee laborers and farmers.

A. *The NLRA and H.R. 7597*

H.R. 7597 would establish mandatory collective bargaining in agriculture. Collective bargaining is already possible under the present antitrust exemption.[22] For various reasons[23] the producers are now asking that their option to bargain collectively be augmented by the imposition of an obligation upon the handlers to deal with cooperatives. The National Labor Relations Act[24] (NLRA) gave this recognized status to unions;[25] H.R. 7597 seeks to similarly provide for producer cooperatives.[26] An obvious similarity between H.R. 7597 and the NLRA is the statutory language used in each to define the duty of collective bargaining.[27]

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22 See the text accompanying note 146 *infra*.

23 *See, e.g., Hearings on H.R. 7597 Before the Subcomm. on Domestic Marketing and Consumer Relations of the House Comm. on Agriculture*, 92d Cong., 1st Sess., Ser. 92-M, at 50-51 (1971) [hereinafter cited as *H.R. Hearings*] (remarks of A. Lauterbach, general counsel for Farm Bureau) (alleging discrimination against cooperative organizers).

24 National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.* (1970) [hereinafter cited as NLRA].

25 The 1935 NLRA imposed a bargaining duty only upon employers. 49 Stat. 449 (1935). The 1947 Taft-Hartley amendments extended the duty to unions. 61 Stat. 136 (1947).

26 One difference is that H.R. 7597 extends only to the level of the farm unit, not to the individual farm worker. This is important because agricultural workers are excluded by NLRA § 2(3) from the protection of the NLRA. To insure that any increased farm income resulting from H.R. 7597 will be passed on to the farm families, perhaps the bill should provide for a repeal of the NLRA exclusion. For a discussion of the need for unionization of farm workers see Note, *Unionization of the Agricultural Labor Force: An Inquiry of Job Property Rights*, 44 S. CAL. L. REV. 181 (1971).

27 NLRA § 8(d):

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

H.R. 7597 § 106(a):

Several reasons exist for assuming that the newly-created Agricultural Bargaining Board and the reviewing courts of appeals will look to judicial interpretation of the NLRA to interpret the language of this bill if enacted. First, the legal concept of good faith collective bargaining is unique to the labor field.[28] Judicial bodies prefer to base decisions upon established precedent and they will find little authority to aid in cases interpreting H.R. 7597 outside of labor law. Second, the language similarities between the NLRA and H.R. 7597 would be evidence for an adjudicating body that the bill was patterned after the NLRA and, therefore, that the Congress intended the bill to be given the same interpretation as that given to the NLRA. Third, an adjudicating body, in ascertaining the intended meaning of phrases used in a new act, may correctly attribute to Congress a knowledge of prior judicial construction of those phrases.

B. *Good Faith Collective Bargaining As Used in H.R. 7597*

H.R. 7597 section 106(a) defines "bargaining" as the "mutual obligation of a handler and a qualified association to meet at reasonable times and negotiate in good faith." Creation of the obligation seems to be the main purpose of H.R. 7597.[29] Experi-

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> As used in this title, "bargaining" is the mutual obligation of a handler and a qualified association to meet at reasonable times and negotiate in good faith with respect to the price, terms of sale, compensation for commodities purchased under contract, and the other contract provisions relative to the commodities that such qualified association represents and the execution of a written contract incorporating any agreement reached if requested by either party. . . . Such obligation does not require either party to agree to a proposal or to make a concession.

Also, the language of NLRA §§ 10(e), (f), and (g) concerning judicial enforcement or review of an order by the National Labor Relations Board is nearly identical with H.R. 7597 §§ 107(a), (b) and (c) for an order by the National Agricultural Bargaining Board.

For some reason, perhaps by oversight, H.R. 7597 does not contain a counterpart to NLRA §§ 8(a)(5) and 8(b)(3) (which establish the duty of management and union to bargain as defined in § 8(d)) other than by implication from its procedure (§ 106(f)) and remedy (§ 106(h)) provisions.

28 Research disclosed no non-labor definitions of collective bargaining.

29 "A Bill [t]o create a National Agricultural Bargaining Board, to provide standards for the qualification of associations of producers, to define the mutual obligation of handlers and associations of producers to negotiate regarding agricultural products, and for other purposes." Preamble to H.R. 7597. "This Ad-

ence with good faith bargaining under the NLRA[30] can provide some insight into what this obligation may require.

The duty to bargain in good faith[31] imposed by the NLRA has been defined in several ways.[32] Professor Cox has summarized the principal cases in his comprehensive definition of the duty: "[t]he employer (or union) must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach a common ground, but it need make no concessions and may reject any terms it deems unacceptable."[33] He goes on to comment:

> One can argue that the formulation is too self-contradictory to survive. Either section 8(a)(5) [of the NLRA] must simply require union recognition and the formalities of negotiation, it is said, or else it must require that plus the making of objectively reasonable proposals. But I think that the ambivalent statement has meaning even though it borders on paradox.[34]

Paradoxical or not, in labor law "good faith bargaining" certainly

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ministration is dedicated to the goal of improved farm net income. An important tool in achieving this result can be responsible farm bargaining. We recognize . . . H.R. 7597 as a step in that direction." *H.R. Hearings*, at 19 (remarks of Richard Lyng, Assistant Secretary of the Department of Agriculture).

30 See discussion of the similarities between H.R. 7597 and the NLRA in the text accompanying notes 24-28 *supra*.

31 For thorough discussions of the evolution in labor law of the concept of good faith bargaining see Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941) and Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988, 989-92 (1961).

32 *See, e.g.*, cases cited in note 33 *infra*.

33 *E.g.*, Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1416 (1958). Other statements of the duty are: "These sections [§§ 8(a)(5), 8(b)(3), & 8(d)] obligate the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154 (1956) (concurring in part and dissenting in part); "Collective bargaining is not merely an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." NLRB v. Insurance Agents' Union, 361 U.S. 477, 485 (1959). *See also* NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943); NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 885 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); NLRB v. Western Wirebound Box Co., 356 F.2d 88, 92 (9th Cir. 1966). *Montgomery Ward* and the first *Reed & Prince* case were decided before § 8(d) was added to the NLRA in 1947. For a review of the substituted definition of "bad faith" used by some courts see Cox, *supra* note 33, at 1417 n.57.

34 Cox, *supra* note 33, at 1416.

obligates the parties to do more than merely go through the formalities of negotiation.[35]

The result of applying the labor law definition of good faith bargaining to section 106(a) is that when a handler and a qualified association are obligated by the bill to bargain,[36] they must do more than merely meet and discuss contract terms. The handler, regardless of his own choice of suppliers, must have a sincere desire to reach an agreement with the association.[37] He cannot be willing to agree *only* on his own terms.[38] He may be required to supply data to support any of his arguments based on the market or other economic factors.[39] Some of his actions or inactions may be held to be per se violations[40] of section 106(a).[41] However, the handler will not be prevented from hard bargaining[42] and will not be required to agree to a proposal or to make a concession.[43] Nevertheless, he will be prevented by section 106(d) from negotiating with other producers "while negotiating" with an association able to meet at least most of his needs. The association is not likewise restricted.[44] The handler may be excused from this obligation if negotiations reach a genuine impasse on any subject of mandatory bargaining.[45] However, the difficulty in determining if an impasse has actually occurred may make this an alternative in theory only.[46]

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35 *See* NLRB v. Insurance Agents' Union, 361 U.S. 477, 485 (1960); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154 (1956) (concurring in part and dissenting in part); *cf. id.* at 152-53.

36 A handler is obligated to bargain with a qualified association that represents producers with whom he has dealt in two of the prior five years. H.R. 7597 § 106(a), (b). H.R. 7597 does not specify when, if ever, the association is so obligated.

37 See note 33 *supra.*

38 *Cf.* NLRB v. Insurance Agents' Union, 361 U.S. 477, 487 (1960); Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 265 (1964).

39 *Cf.* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

40 *Cf.* NLRB v. Katz, 369 U.S. 736 (1962). For a discussion of the *per se* doctrine under the NLRA see Duvin, *supra* note 38, at 266-86.

41 "Section 106 explicitly deals with two hardcore instances where negotiations are definitely not in good faith. These are found in subsection (d) and subsection (e) of section 106." *H.R. Hearings*, at 35 (remarks of Ralph B. Bunje).

42 *See, e.g.*, Sign & Pictorial Local 1175 v. NLRB, 419 F.2d 726, 738 (D.C. Cir. 1969).

43 H.R. 7597 § 106(a).

44 In addition, an association of producers, qualified or not, is explicitly excluded from the § 103(d) definition of "handler" so that an association acting as a handler is free from the restriction of § 106(d).

45 *See* NLRB v. Wooster Div. of Borg-Warner, 356 U.S. 342, 349 (1958).

46 *See* Comment, *Unilateral Action as a Legitimate Economic Weapon: Power Bargaining by the Employer Upon Expiration of the Collective Bargaining Agreement*, 37 N.Y.U.L. REV. 666, 673 (1962).

One significant effect of the H.R. 7597 obligation to bargain arises from the differences rather than the similarities between the labor and agricultural bargaining situations. Bargaining in the labor context traditionally includes numerous important subjects other than wages; for example, "holiday and vacation pay, discharges, pensions, bonuses, profit sharing, work loads and work standards, insurance benefits, the . . . union shop, subcontracting, shop rules, work schedules, rest periods, and merit increases."[47] The collective bargaining contract constitutes the "law" of the shop.[48] Negotiation of a contract for the sale of an agricultural product would probably not require many significant terms other than price. Therefore, if the association offered to contract at the predicted market price with reasonable terms of delivery and storage, the handler could not refuse without risking a violation of his obligation under H.R. 7597.[49] In effect, the obligation to bargain may *require* the handler to buy from the association. This result may accomplish the purposes of the bill. However, the approach is not true "good faith bargaining" for it gives the association, which has no corresponding obligation to bargain,[50] the option to force an agreement. This bargaining power may be used initially by associations not to increase prices for their products, but, contrary to the stated purpose of the bill,[51] to gain control of the market outlets and thereby force independent farmers to join the associations.

C. *Can H.R. 7597 Be Used To Force Requirements Contracts?*

H.R. 7597 increases the bargaining power of cooperatives in the following ways: (a) requiring a handler to bargain in good faith with qualified[52] associations (*i.e.*, qualified cooperatives) which

47 Cox & Dunlop, *Regulation of Collective Bargaining By the National Labor Relations Board*, 63 HARV. L. REV. 389, 397-98 (1950).

48 "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960) (citation omitted).

49 Although the courts have repeatedly stated that the NLRA does not authorize a finding of bad faith bargaining solely from the content of bargaining proposals, *e.g.*, NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 408-09 (1952), that content is still used in conjunction with other factors as evidence of bad faith. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

50 See note 36 *supra*.

have members with whom the handler dealt with in any two of the preceding five years;[53] (b) allowing contracts for the full requirements of handlers;[54] (c) making it unlawful for a handler to negotiate with other farmers while negotiating with a qualified association which is able to supply at least a substantial part of the commodity involved;[55] (d) making it unlawful for a handler to purchase a commodity at more favorable terms for the producer than were negotiated with a qualified association;[56] and (e) exempting the bargaining activities from the federal antitrust laws.[57] The full significance of these sections may not become apparent from a reading of the bill; their interrelation magnifies their effects. For example, while H.R. 7597 on its face appears only to increase the bargaining power of cooperatives vis-a-vis handlers, the bill also enables cooperatives to dominate markets at the expense of independent producers. This domination will be made possible by full requirements contracts,[58] which appear only to be authorized by the bill, but which the cooperatives will be able to force upon handlers.

The cooperative's bargaining power begins with the handler's section 106(a) obligation to bargain in good faith. The cooperative can impose that requirement upon numerous handlers because by sections 106(a) and (b) any handler who has dealt with any of the producers[59] of an association in two of the previous five years must bargain with that association. The bill purports to give some protection to the handler because the obligation to bargain "does not require either party to agree to a proposal or to make a con-

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51 H.R. 7597 § 101: "Congress has already found that . . . the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together *voluntarily* in cooperative organizations." (Emphasis added.)

52 H.R. 7597 § 105(a).

53 *Id.* § 106(a),(b).

54 *Id.* § 106(c).

55 *Id.* § 106(d).

56 *Id.* § 106(e).

57 *Id.* § 114.

58 This section discusses full requirements contracts within the context of good faith bargaining. Full requirements contracts within the antitrust context are discussed in the text accompanying notes 150-200 *infra*.

59 The use of "producers" in the plural in § 106(a) may mean, however, that the obligation applies only if the handler has dealt with two or more or possibly a majority of the producers in a qualified association.

cession."[60] This protection is, however, of limited value. By section 106(d) the qualified association can prevent a handler from buying elsewhere as long as it continues negotiations in good faith.[61] The meaning of "good faith" is critical here. If "good faith" is given a liberal construction,[62] a qualified association could tie up many of the important handlers of a commodity in a given geographical area while it negotiates with all of them. Independent farmers would be forced to join the association to have a market for their products.

Even with a more restricted construction of "good faith bargaining,"[63] an association could gain control of a large portion of the market. Section 106(c) allows an association to bargain for full requirements contracts[64] with handlers. To build up its control of outlets an association would conceivably accept terms more favorable to the handler (thereby making the appearance of good faith bargaining) while holding out for requirements contracts. Once most of the available outlets have come under the association's control, it could then restrict new membership, in effect dividing the market between the existing members and eliminating independent farmers. This result would of course be lessened if more than one association were qualified to market each commodity in the area. Nevertheless a high premium would be placed upon winning the race for qualification[65] and then restricting handlers by beginning negotiations.

Section 106(e) adds an unusual element to cooperative-handler

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60 H.R. 7597 § 106(a). This wording was probably adopted from the NLRA; see the discussion of the obligation to bargain in good faith in notes 22-28 *supra* and accompanying text.

61 Section 106(d) prevents the handler from negotiating with "other producers of a product" while bargaining with a qualified cooperative. This may be read to apply only against outside handler-independent producer negotiations. However, the broad definition of "producer" in § 103(f) seems to make § 106(d) apply against outside handler-cooperative negotiations as well, once one cooperative has commenced bargaining with that handler.

62 For example, in NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960), the Supreme Court held that a union had not failed to bargain in good faith even though the union conducted a partial strike during contract negotiations.

63 For example, the Agricultural Bargaining Board conceivably may hold that a cooperative is not sincerely trying to reach an agreement if it bargains concurrently with several handlers.

64 See discussion of the antitrust aspects of § 106(c) in the text accompanying notes 189-200 *infra.*

bargaining.[66] Because of that section, a cooperative can be very lenient about other contract terms when it is seeking full requirements contracts through bargaining. The section prevents a handler from offering outside producers terms more favorable than those in a contract already negotiated with a cooperative. If through his contract with a cooperative a handler does not acquire sufficient products to fulfill his obligations, he will be limited by section 106(e) to those contract terms when making offers to other producers. If the earlier contract terms were unfavorable to the cooperative, the handler will later be unable to buy additional supplies from other producers. In other words, unless a handler agrees to a contract guaranteeing his full requirements when bargaining with a cooperative, he will have his own interest in keeping the contract terms favorable. The handler may be in a similar position even if he does not reach an agreement with the cooperative. If the handler refuses the cooperative's attractive offer because of the full requirements aspect and then pays a higher price to other producers, he may be violating the obligation to bargain in good faith.[67]

Decisions concerning the subjects of good faith bargaining under

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65 The National Agricultural Bargaining Board, established by H.R. 7597 § 104(a), qualifies associations if, after a public hearing, they are found to meet the detailed requirements of H.R. 7597 § 105(c). Only qualified associations receive the benefits of the bill. H.R. 7597 § 105(a).

66 Section 106(e), restricting the handler's future offers to the terms of an existing contract, magnifies the importance to farmers of early qualification of their association and greatly increases their bargaining power thereafter. This result may go beyond the intended purpose of § 106(e). On its face the section appears to be drafted only for the purpose of preventing discrimination by handlers against producers who are bargaining collectively. This was the interpretation given to § 106(e) by Ralph B. Bunje, general manager of the California Canning Peach Association. *H.R. Hearings*, at 36. If that is indeed the only purpose of § 106(e) it is unnecessary and should be deleted because § 2303(b) of the 1967 Unfair Agricultural Trade Practices Act, 7 U.S.C. § 2301 *et seq.* (1970), already prevents such discrimination: "It shall be unlawful for any handler . . . (b) [t]o discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition or other handling of agricultural products because of his membership in or contract with an association of producers . . . ."

But see H.R. Hearings, at 50 (remarks of Allen Lauterbach, general counsel for the Farm Bureau) (discrimination in violation of the Fair Practices Act is next to impossible to prove).

67 Under the NLRA it is a per se violation of the duty to bargain for an employer unilaterally to increase wages by an amount substantially greater than that offered in negotiations with the union. *See* NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949).

the NLRA are instructive[68] in determining that a cooperative could insist upon a full requirements clause in good faith bargaining under H.R. 7597. In *NLRB v. Wooster Division of Borg-Warner Corp.*[69] the Supreme Court held that a party may deadlock negotiations by insistence upon a proposal only if that proposal is "within the scope of mandatory collective bargaining as defined by section 8(d) of the [NLRA]."[70] Borg-Warner Corporation had insisted upon a "ballot" clause and a "recognition" clause, both of which the Supreme Court found were not mandatory subjects of bargaining.[71] The *Borg-Warner* opinion divides the subjects of collective bargaining into three classes: (a) those which are mandatory and within which a party can negotiate and insist upon his proposal as a condition of agreement; (b) those which are permitted but not mandatory and within which a party can negotiate but not insist upon his proposal; and (c) those which are illegal and within which a party can neither negotiate nor insist upon his proposal.[72] The *Borg-Warner* Court held that for the NLRA the mandatory subjects of collective bargaining are "wages, hours, and other terms and conditions of employment."[73]

If the *Borg-Warner* decision is applied to H.R. 7597, then an association of producers could freely propose but not insist upon a full requirements provision to the point of impasse, unless that provision were within the subjects of obligated bargaining. The provision would not be illegal because of section 106(c). By analogy to *Borg-Warner*, H.R. 7597 arguably makes the following areas of mandatory bargaining: "price, terms of sale, compensation for commodities produced under contract and other contract provisions relative to the commodities that such qualified association represents."[74] If this analogy is valid, full requirements contracts may be "other contract provisions relative to the commodities that such qualified association represents" and therefore within an area of mandatory collective bargaining. In the NLRA context the

68 See the text accompanying notes 22-28 *supra*.

69 356 U.S. 342 (1958).

70 *Id.* at 344. For criticism of the *Borg-Warner* rule see H. WELLINGTON, LABOR AND THE LEGAL PROCESS 76-83 (1968), and Fleming, *supra* note 31, at 993-98.

71 356 U.S. 342, 349-50 (1958).

72 *Id.* at 349.

73 *Id.*

74 H.R. 7597 § 106(a).

Supreme Court established three tests in *Fibreboard Paper Products Corp. v. NLRB*[75] to determine if the subject matter of the union-management dispute was a mandatory (statutory) subject of collective bargaining. The tests were (1) whether the subject matter came within the literal meaning of the bargaining subjects of NLRA section 8(d); (2) whether a duty to bargain on the subject effectuated the policy of the NLRA to promote industrial peace;[76] (3) whether collective bargaining on the subject was part of the industrial practice.[77] Applying the *Fibreboard* criteria to the wording of section 106(a), the conclusions follow that requirements contracts are (1) within the literal meaning of "other contract provisions relative to the commodities" and may be (2) within the policy of the bill because requirements contracts are explicitly authorized. However, because they are sometimes illegal,[78] requirements contracts cannot be characterized as (3) within agricultural bargaining practice. Nevertheless, the *Fibreboard* case does not seem to make criterion (3) a necessary condition, and therefore, by satisfying (1) and (2), requirements contracts are probably made a mandatory subject of bargaining under H.R. 7597.

Under this interpretation of H.R. 7597 an association of producers can insist upon a full requirements contract from the handler. The handler is not obligated to accept.[79] However, he would be obligated to negotiate in good faith on a full requirements proposal within the framework of the bargaining advantage which H.R. 7597 gives to the association.[80]

D. *The Antitrust Exemption for Bargaining Activities in H.R. 7597*

Section 114 exempts from antitrust law "[t]he activities of qualified associations and handlers in bargaining with respect to the price, terms of sale, compensation for commodities produced under

75 379 U.S. 203 (1964).

76 *Id.*; *cf.* Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 248 (1964).

77 379 U.S. at 210-11.

78 See the discussion of requirements contracts under existing antitrust law in the text accompanying notes 150-81 *infra*.

79 *Cf.* NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402, 404 (1952).

80 *E.g.*, H.R. 7597 § 106(d), (e).

contract, or other contract terms relative to agricultural commodities produced." This exemption may only be intended to allow collective bargaining by the association of producers. If so, the exemption is unnecessary because existing law already allows that practice.[81] On the other hand, section 114 may expand the cooperatives' bargaining arsenal.

Section 114 as written exempts the "activities . . . in bargaining" of associations and handlers; it does not exempt the "associations," or "handlers," or the actual "bargaining." This particular language, although seemingly of minor importance, may become of more significance when interpreted within the context on the entire bill. Section 106(a)[82] defines the term "bargaining" as it is used in Title I, which includes section 114.[83] An integration of the two sections seems reasonable in order to understand the possible meanings of the word "activities." Of primary concern are the economic pressures which have been held to be activities consistent with good faith bargaining in labor cases and which would arguably be authorized and exempted from antitrust law by H.R. 7597.

The Supreme Court held in *NLRB v. Insurance Agents' International Union*[84] that certain economic-pressure tactics used by a union during contract negotiations were consistent with good faith bargaining. In the *Insurance Agents* case the union and the company had begun negotiations on a new collective bargaining agreement to replace an agreement which was to expire in two months. Negotiations continued for six months before agreement was reached. After the existing contract had expired, the union planned and carried out certain on-the-job harassments to apply economic pressure to the company. This harassment included, among other things, concerted work slowdowns by the employees. The NLRB, following its prior rulings,[85] held that this activity constituted a per se violation[86] of the union's duty[87] to bargain

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81 See discussion of Clayton Act § 6 and Capper-Volstead Act in the text accompanying notes 116-47 *infra*.

82 H.R. 7597 § 106(a).

83 *Id.* § 114.

84 361 U.S. 477 (1960).

85 *E.g.*, Textile Workers Union (Personal Products), 108 N.L.R.B. 743 (1954), *modified*, 227 F.2d 409 (D.C. Cir. 1955).

86 119 N.L.R.B. 768 (1957).

87 *See* NLRA § 8(b)(3).

in good faith. The court of appeals reversed.[88] In the Supreme Court's opinion, Mr. Justice Brennan stated as the issue:

> whether the Board may find that a union, which confers with an employer with the desire of reaching agreement on contract terms, has nevertheless refused to bargain collectively, thus violating that provision, solely and simply because during the negotiations it seeks to put economic pressure on the employer to yield to its bargaining demands by sponsoring on-the-job conduct designed to interfere with the carrying on of the employer's business.[89]

The Court held that the union had not failed to bargain in good faith. The Court explained that "the presence of economic weapons in reserve, and their actual exercise on occasion by the parties is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[90]

The *Insurance Agents* case is a clear statement by the Supreme Court that within the labor law context economic pressures, even if they consist of unprotected activities,[91] are consistent with good faith collective bargaining.[92] This holding may have important consequences for the meaning of the antitrust exemption for bargaining activities as used in H.R. 7597. Certain economic pressures in labor relations, for example strikes or lockouts, do not have any obvious counterparts in agricultural bargaining. But, there are economic pressures (*e.g.*, boycotts, predatory pricing, blacklisting, tying arrangements) which have heretofore been held to violate[93] the antitrust laws but which H.R. 7597 may be construed to authorize.

The preceding argument, that H.R. 7597 as presently written would legalize previously illegal forms of economic pressure, can be summarized as follows: (a) section 114 exempts bargaining activities from the antitrust laws; (b) the section 106(a) meaning of "bargaining" will probably be interpreted by reference to labor

88 260 F.2d 736 (D.C. Cir. 1958).

89 NLRB v. Insurance Agents' Union, 361 U.S. 477, 479 (1960).

90 *Id.* at 489.

91 *Id.* at 494.

92 *Id.* at 489. The *Insurance Agents* doctrine also applies to a lockout by the employer. American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965).

93 *E.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (boycott); International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangements).

cases; (c) good faith collective bargaining under the NLRA has been held to include the use of economic weapons, whether or not protected;[94] (d) therefore, H.R. 7597 exempts from the antitrust laws economic pressures which are used during section 106(a) bargaining. This argument, of course, is not conclusive.[95] Nevertheless, before acting on H.R. 7597 Congress should consider all reasonable constructions of its terms to determine if the bill effects any unintended changes in existing law.

E. *The Labor Law Concepts of H.R. 7597*

Before the labor law statutory scheme is adopted for agriculture, a comparison of the economics of farmers and laborers is necessary to determine if the labor scheme is a feasible solution to the farm income problem. Assuming *arguendo* that mandatory collective bargaining is working within the labor context,[96] its success within the agricultural context does not necessarily follow. Two differences between labor and agriculture would cause the labor scheme to fail for agriculture: (a) farmers, unlike laborers, can expand production by capital assets, and (b) farmers have no automatic supply controls to prevent surplus.

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94 NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

95 If the wording of § 114 is retained and H.R. 7597 is enacted, the preceding argument about the expanded meaning of the antitrust exemption would certainly not be conclusive on that issue. First, courts traditionally have given a narrow construction to exemptions from the antitrust laws. *See* United States v. Borden Co., 308 U.S. 188, 198-200, 206 (1939). Second, unlike NLRA §§ 7 and 13, H.R. 7597 does not explicitly establish a right to use economic pressures. Courts should therefore be more reluctant to hold that the bill authorizes otherwise illegal economic pressures. Further, in NLRB v. Insurance Agents' Union, 361 U.S. 477, 494-95 (1960), the Court said:

> The reason why the ordinary strike is not evidence of a failure to bargain in good faith is not that it constitutes a protected activity but that, as we have developed, there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining.

Therefore, *Insurance Agents* arguably does not expand the range of economic pressures available to participants in labor disputes; it only holds that economic pressures, protected or not, are not inconsistent with collective bargaining. This reading of *Insurance Agents* would make more difficult the argument that the case could be used to authorize the exercise of economic weapons within the collective bargaining scheme of H.R. 7597.

For a somewhat stronger reading of *Insurance Agents* see Duvin, *supra* note 76, at 284.

96 *But see, e.g.*, Comment, *Collective Bargaining — Is it Working*, 4 LOYOLA U. (LA) L. REV. 361 (1971).

Among other relevant differences[97] between agriculture and labor, of primary significance is that farmers sell combinations of capital and labor while laborers, for the most part,[98] sell only their labor.[99] This combination of capital assets with labor would enable farmers to increase production significantly in response to any price increases gained by collective bargaining.[100] The result would be a surplus which would erode the price advantage.

The capital per farm worker in agriculture is surprisingly large with its greatest increase occurring in recent years. The production assets per farm worker were $3,326 in 1940; $9,529 in 1950; $21,304 in 1960; and $41,307 in 1967.[101] Land constitutes a portion of these assets. Average farm size has shown comparable increases since 1940: 174 acres in 1940; 215 acres in 1950; and 303 acres in 1959.[102] Also, the increased mechanization of farm operations has increased farmer productivity[103] on these larger farm acreages. Moreover, the farm owner makes production decisions not only as a capitalist, but also as an employer of labor.[104] Therefore, the average farmer can consider shifting or increasing farm equipment and other farm materials, acreage, and farm employees in making production decisions. He can multiply production resources in response to a favorable price increase in any commodity which he is capable of producing.

The preceding discussion perhaps pertains only to large farms; small farms frequently have few capital assets other than land and utilize no labor other than that of the farm owner and his family. Nevertheless, the discussion seems applicable to an analysis of the H.R. 7597 bargaining scheme because the true concern in this context is not the number of farms but rather the total farm production involved. For 1966 the 1.03 million farms (32 percent of all farms) that had annual gross sales above $10,000 produced over

97 Lemon, *supra* note 7, at 523-24.

98 *See* S. RICE, FARMERS AND WORKERS IN AMERICAN POLITICS 40-41 (1924).

99 *See H.R. Hearings*, at 241 (remarks of F. T. Heffelfinger on behalf of the National Grain and Feed Association).

100 *See* Lemon, *supra* note 7, at 524.

101 M. SNODGRASS & L. WALLACE, *supra* note 1, at 104.

102 ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, LOW INCOMES IN AGRICULTURE 500 (1964).

103 Barton, *Increased Productivity of the Farm Worker*, 1 IND. & LABOR REL. REV. 264, 269 (1948).

104 *See id.* 265; Rice, *supra* note 98, at 68-69.

85 percent of all farm sales. Of the 2.2 million farms which produced the remaining 14.6 percent, the numerous 1.4 million small farms with gross sales below $2500 produced a mere 3.5 percent of farm sales.[105] In other words, if agriculture is viewed in terms of total production, the large farms, which usually have high capital investments and also employ non-family workers, are responsible for nearly all of this nation's agricultural production. In evaluating the effects of H.R. 7597, therefore, only a negligible error enters the analysis by the assumption that all of the agricultural producers involved will be farm owners who make production decisions as capitalists and employers.

The flexibility in production decisions of agricultural producers stands in sharp contrast to the "production decisions" of laborers. The modern laborer does not own "a perceptible portion of the capital in connection with which [his] labor has been employed."[106] His response to increased wages in an industry can only be through a shift in his employment or perhaps, within limits, through his working overtime hours. In sum, the effect of wage level changes upon the labor supply is quite small in comparison to that of price changes upon agricultural supply.

Agriculture also lacks the automatic supply controls of the labor context which are necessary to provide and maintain a higher than competive price or wage. If the NLRA has been effective for labor, it is because a collective bargaining agreement can be insulated from increases in supply from external or internal sources. This result has been effectuated by the section[107] of the NLRA which provides that the collective bargaining agreement applies to all employees within the bargaining unit. As a result, the employer must pay the increased wage to new employees as well as to those who did the bargaining, so that he will not hire the numerous outsiders who may have been willing to work for a reduced wage. The employer will also control internal supply because of his interest in limiting employees' overtime hours. The unions have perpetuated this preferred inside position of existing employees

105 Comment, *Farm Fiasco: The Inappropriate Federal Response to the Problems of the Rural Poor*, 42 S. CAL. L. REV. 701, 705-06 (1969).

106 Rice, *supra* note 98, at 40-41. As workers obtain capital stock in their corporation-employers, they obtain a share of the ownership. *Id.* 41.

107 NLRA § 9(a).

by bargaining to protect them from discharge. In sum, laborers have the ability under the NLRA to attain higher wages than would be possible without mandatory bargaining because the economic factors of employment keep an automatic control on supply. Of course, the employees can attain wage gains only within the limits created by the employer's financial ability to pay and the costs of available substitutes for labor, such as automation.

In the agricultural context the pressure for surplus production caused by a higher-than-competitive price would not be automatically handled. The bargaining association must first meet the problem of new entrants. Unlike the bargaining unit concept in labor, the bargaining scheme in H.R. 7597 does not prevent outside producers from selling below the negotiated price. Section 106(e) prohibits only higher, not lower, prices to outsiders. The bill's authorization of full requirements contracts may be an attempt to alleviate this surplus problem.[108] Also, even assuming that associations could solve the problem of outside supply, the problem of internal surplus due to the artifically-high price must be faced. Somehow the association must put artificial controls on production to restrict the total supply of the commodity involved. The possibility of success is uncertain.[109] Possible price increases are also very limited by substitution of other agricultural, non-agricultural or imported commodities. Moreover, even if the association could restrict non-member and member supply while avoiding substitution, the nation's economy as a whole would sustain a loss, because the more modern and efficient producers would not be able to increase their percentage of the market. In short, the differences between labor and agriculture will be certain to frustrate the H.R. 7597 goal of raising farm income by utilizing the labor law system of mandatory collective bargaining.

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108 This Note concludes that the anticompetitive effects of full requirements contracts are so significant that authorizing them would be a costly mistake. See the text accompanying notes 189-200 *infra*.

109 At present, the legality of production control imposed by cooperatives on their members is questioned. Saunders, *The Status of Agricultural Cooperatives Under the Antitrust Laws*, 20 FED. B.J. 35, 51-52 (1960), and commentators caution cooperatives in their use of such programs to limit supply. *Agricultural Cooperatives and the Antitrust Law*, 43 NEB. L. REV. 73, 101-02 (1963); *see* Lemon, *supra* note 7, at 515-16.

II. The Antitrust Laws and H.R. 7597

H.R. 7597 is presently construed as granting agricultural cooperatives the privilege of utilizing full requirements contracts without fear of violating the antitrust laws. To understand the ramifications of the privilege, this discussion separately examines the antitrust status of agricultural cooperatives and full requirement contracts, and then considers the two in combination as presented in the bill. The point of entry is the beginning of federal antitrust law itself.

A. *The Antitrust Exemption for Agricultural Cooperatives*

In 1890, Congress enacted the Sherman Act,[110] the fountainhead of trade regulation legislation. Although specific exemption was sought for agricultural and labor organizations,[111] language to that effect was not included. Therefore, the operation of the Sherman Act logically reaches agricultural cooperatives[112] and has been so construed in dictum by the Supreme Court.[113] That Congress

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110 15 U.S.C. §§ 1-7 (1970). The act provides, *inter alia:*

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .
>
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .
>
> § 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia . . . is hereby declared illegal.

111 21 Cong. Rec. 2611, 2731 (1890). This amendment was offered by the author of the Act, Senator Sherman, and provided:

> this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of labor or of increasing their wages; nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products.

112 *See* Saunders, *supra* note 109, at 36 ("Technically, because farmers are independent entrepreneurs engaged in agricultural production for their own account and profit, their joint pricing and marketing of farm commodities does involve elimination of competition.").

113 In Loewe v. Lawlor, 208 U.S. 274, 301 (1908), the Court stated that "[t]he records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the [Sherman Act]

intended such a result has been questioned;[114] however, agricultural cooperatives feared they would be held combinations and conspiracies in restraint of trade and hence in violation of the Sherman Act.[115] The resulting tension was evidenced in the enactment of the Clayton Act[116] in 1914. Section 6 of that Act provides, in part:

> 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.[117]

The scope of the exemption granted in the phrase "lawfully carrying out the legitimate objects thereof" was subject to varying interpretations by the members of Congress,[118] but probably was intended to permit application of the antitrust laws to the activities of farmers in forming organizations for pecuniary gain or in attempting to monopolize or restrain trade.[119] In its first judicial interpretation,[120] the section was so read, although that construction has not been uniformly applied.[121]

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and that all these efforts failed, so that the act remained as we have it before us." There the Court applied the Sherman Act to the members of a union.

114 *E.g.*, Lemon, *supra* note 7, at 506; Note, *Agricultural Cooperatives*, 27 Ind. L.J. 353, 434 (1952); 51 Cong. Rec. 9246-47 (1914) (remarks of Rep. MacDonald).

115 *Agricultural Cooperatives, supra* note 114, at 434-35.

116 38 Stat. 730 (1914), *as amended*, 15 U.S.C. § 12 *et seq.* (1970).

117 15 U.S.C. § 17 (1970).

118 *Compare* 51 Cong. Rec. 9571 (1914) (remarks of Rep. Webb) *with id.* 13848 (remarks of Sen. Thompson).

119 *Agricultural Cooperatives and the Antitrust Laws, supra* note 109, at 77 & n.14.

120 United States v. King, 250 F. 908, 910 (D. Mass. 1916) ("[O]rganizations such as [the Clayton Act] describes are not to be dissolved and broken up as illegal, nor held to be combinations or conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations.").

121 *E.g.*, United States v. Dairy Co-op. Ass'n, 49 F. Supp. 475 (D. Ore. 1943), where the court, in allowing a motion for a finding of not guilty of defendants indicted for violation of the antitrust laws, held that an agricultural cooperative, acting alone cannot be punished under the antitrust laws — even though the acts complained of were monopolistic. In reaching this conclusion, the court considered judicial treatment of labor under § 6 of the Clayton Act:

The exemption created for agricultural cooperatives was expanded[122] in 1922 with the passage of the Capper-Volstead Act.[123] Hailed by one writer as the "Magna Charta of Agriculture,"[124] the Act provides in section 1:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes.[125]

Section 2[126] permits the Secretary of Agriculture, after a show-cause hearing, to issue cease and desist orders to associations monopolizing or restraining trade. Like section 6 of the Clayton Act,

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> An older generation of judges interpreted the Clayton Act . . . to defeat the plain intent of law, and, almost perversely, it seemed, sought to impose their economic views on the American scene in the controversial field of capital and labor. The result was the enactment of the Norris-LaGuardia Act . . . , and it may be said . . . the Wagner Act . . . .
>
> . . . .
>
> The nation is paying a severe penalty in this time of peril for reactionary judicial thought and decision of twenty or more years ago.

49 F. Supp. at 475. The case was a criminal one not subject to appeal by the government. Saunders, *supra* note 109, at 43 n.36. One commentator has advised cooperatives to completely ignore the decision. Note, *Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense*, 44 VA. L. REV. 63, 82 (1958).

122 The degree of the expansion has been debated by both courts and commentators. *Compare* Jensen, *The Bill of Rights of U.S. Cooperative Agriculture*, 20 ROCKY MT. L. REV. 181, 190 (1948) *and* Mischler, *Agricultural Cooperative Law*, 30 ROCKY MT. L. REV. 381, 393 (1958) *with* Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 465-66 (1960) *and* Lemon, *The Capper-Volstead Act — Will It Ever Grow Up*, 22 AD. LAW REV. 443, 445 (1970).

123 42 Stat. 388 (1922), 7 U.S.C. §§ 291-92 (1970).

124 Jensen, *supra* note 122, at 190.

125 7 U.S.C. § 291 (1970). The section is qualified in three ways: (1) the association must be operated for the mutual benefit of its members as producers; (2) the association must allow each member no more than one vote because of the amount of stock or membership capital he may own therein, or limit its payment on stock or membership capital to 8 percent per annum; or meet both requirements; and (3) the association must not deal in the products of non-members to an amount greater in value than such that are handled by it for members.

126 7 U.S.C. § 292 (1970).

the Capper-Volstead Act lacks a definitive legislative history,[127] leading courts to construe its exemption in varying ways.[128] The language of the exemption is not the "indisputably exempting language of the type used by Congress in other statutes conferring antitrust immunity" where Congress typically declares that " 'the antitrust laws shall not apply' " or that persons are " 'relieved from the operation of the antitrust laws.' "[129] Therefore, the antitrust exemption created by the Capper-Volstead Act and section 6 of the Clayton Act has rarely been seen as absolute.[130]

The limits of the privilege granted agricultural cooperatives with regard to the antitrust laws have been considered in four Supreme Court cases, two of which have particular importance for the discussion here.[131] In *United States v. Borden Co.*[132] the government alleged a combination and conspiracy in violation of section 1 of the Sherman Act between parties involved in the transportation and marketing of fluid milk within the Chicago area, including a cooperative association of milk producers in Illinois. The four counts of the charge involved a price-fixing scheme to impose uniform prices on all distributors of milk bound for the Chicago area; an enforced system of uniform, fixed prices for the sale of milk in Chicago; a concentrated effort to curtail new independents through coercive devices; and an attempt to limit the supply of milk moving into Chicago by use of a base surplus plan. The lower court[133] held, *inter alia*, that the agricultural cooperative and its officers were exempted from prosecution

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127 For an excellent discussion of the legislative history quagmire involved in the enactment of Capper-Volstead see Saunders, *supra* note 109, at 37-40.

128 *Compare* April v. National Cranberry Ass'n, 168 F. Supp. 919, 923 (D. Mass. 1958) and Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 466-67 (1960) *with* United States v. Maryland Cooperative Milk Producers, Inc., 145 F. Supp. 151, 155 (D.D.C. 1956).

129 Saunders, *supra* note 109, at 37.

130 *E.g.*, REPORT OF U.S. ATT'Y GEN.'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 307 (1955) [hereinafter cited as ATT'Y GEN.'S REP.]; Lemon, *supra* note 7, at 512-13; Hufstedler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 AD. LAW REV. 455, 459 (1970); Saunders, *supra* note 109, at 45. *But see* United States v. Dairy Co-op Ass'n, 49 F. Supp. 475 (D. Ore. 1943).

131 The two cases not considered herein are Sunkist Growers, Inc. v. Winckler & Smith Co., 370 U.S. 19 (1962), and Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967).

132 308 U.S. 188 (1939).

133 United States v. Borden Co., 28 F. Supp. 177 (N.D. Ill. 1939).

under section 1 of the Sherman Act by sections 1 and 2 of the Capper-Volstead Act. The Supreme Court, in an opinion by Mr. Chief Justice Hughes, reversed both holdings, reasoning:

> the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk . . . and thus in effect . . . "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago."[134]

No justification, the Court concluded, could be found in section 1 of the Capper-Volstead Act for "[s]uch a combined attempt of all the defendants, producers, distributors, and their allies, to control the market."[135] Neither would the Supreme Court accept the lower court's view of section 2 of the Capper-Volstead Act that "under § 2 an exclusive jurisdiction with respect to the described cooperative associations is vested, in the first instance, in the Secretary of Agriculture, and that, until the Secretary acts, the judicial power to entertain a prosecution under the Sherman Act cannot be invoked."[136] Rather, the Court concluded that "the procedure under § 2 of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to the cooperative agricultural producers by § 1 . . . ."[137]

In *Maryland & Virginia Milk Producers Association, Inc. v. United States*,[138] the Supreme Court again considered the antitrust exemption of agricultural cooperatives. There, in a civil action, the government charged, *inter alia*, that the defendant milk producer association had (1) attempted to monopolize and had monopolized in violation of section 2 of the Sherman Act; and (2) through contracts and agreements, combined and conspired to eliminate and foreclose competition in violation of sec-

134 308 U.S. at 205 (citing United States v. Borden Co., 28 F. Supp. 177, 180-82 (N.D. Ill. 1939)).
135 *Id.*
136 *Id.*
137 *Id.* at 206.
138 362 U.S. 458 (1960).

tion 3 of the Sherman Act. Holding that an agricultural cooperative acting only in conjunction with agricultural producers was entirely exempt from the antitrust laws, the district court[139] dismissed the charge brought under section 2 of the Sherman Act. Consequently, the Supreme Court, in reviewing the dismissal, considered the allegations made in the complaint:

> The complaint . . . alleged that the Association had "[t]hreatened and undertaken diverse actions to induce or compel dealers to purchase milk from the defendant [Association], and induced and assisted others to acquire dealer outlets" which were not purchasing milk from the Association. It also alleged that the Association "[e]xcluded, eliminated, and attempted to eliminate others, including producer and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers."[140]

After reaffirming the auxiliary jurisdiction holding of *Borden*, the *Milk Producers* Court went beyond the earlier decision and considered the immunity of agricultural cooperatives from the reach of section 2 of the Sherman Act.[141] Having previously held

139 167 F. Supp. 45 (D.D.C. 1958).

140 362 U.S. at 468. Further:

> Supporting this charge the statement of particulars listed a number of instances in which the Association attempted to interfere with truck shipments of nonmembers' milk, and an attempt during 1939-1942 to induce a Washington dairy to switch its non-Association producers to the Baltimore market. The statement of particulars also included charges that the Association engaged in a boycott of a feed and farm supply store to compel its owner, who also owned an Alexandria dairy, to purchase milk from the Association, and that it compelled a dairy to buy its milk by using the leverage of that dairy's indebtedness to the Association.

Id.

141 The second and third charges dealt with the cooperative's acquisition of Embassy Dairy, the largest dealer in the area competing with the cooperative's dealers. The second charge alleged a violation of § 7 of the Clayton Act, relating to acquisitions which tend to create monopolies or substantially lessen competition, while the third, alleging a violation of § 3 of the Sherman Act, involved the terms by, and setting in which, the cooperative acquired Embassy. The Court noted in the contract of sale an agreement by Embassy not to compete for ten years and to attempt to have former producers either join the cooperative or ship to another market. Moreover, the Court considered a history of rivalry between Embassy and the cooperative, the "disruptive" competitive practices of Embassy, and the overvalued price paid for the acquisition. The cooperative defended this charge by pointing to the "necessary contracts and agreements" clause of the Capper-Volstead Act, therefore claiming exemption from the Sherman Act. The trial court, maintaining its distinction between activities of agricultural cooperatives alone and the activities of cooperatives and non-producers, held the conduct unlawful. Affirming,

that cooperatives could be liable for "competition-stiffling practices" under section 1 of the Sherman Act,[142] the Court, in reversing the dismissal of the section 2 charge, refused to find that Congress intended immunity from section 2. Moreover, having already held that section 6 of the Clayton Act does not manifest an intention to exempt completely labor unions from the antitrust laws,[143] the Court found no congressional purpose to grant broader immunity to agricultural cooperatives. Rather, the effect of section 6 was stated to be that "a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carrying out *the legitimate objects* thereof,' but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will."[144] The Court viewed the Capper-Volstead Act as both an extension of section 6 to capital stock agricultural cooperatives and an inclusion within section 6's "legitimate objects" of " 'collectively processing, processing, preparing for market, handling, marketing' products through common marketing agencies and the making of 'necessary contracts and agreements to effect such purposes.' "[145] The philosophy of the Acts was said to be "that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage — and responsibility — available to businessmen acting through corporations as entities."[146] Thus, while a purpose was found in the Capper-Volstead Act "to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws,"[147] the Court did not see "a congressional desire to vest

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the Supreme Court held "that the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors." 362 U.S. at 472.

142 *Id.* at 463 (citing United States v. Borden Co., 308 U.S. 188 (1939)).

143 *Id.* at 464-65 (citing Allen Bradley Co. v. Local Union No. 3, I.B.E.W., 325 U.S. 797 (1945), Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), and United States v. Hutcheson, 312 U.S. 219 (1941)).

144 362 U.S. at 465-66 (emphasis in original).

145 *Id.* at 466.

146 *Id.*

147 *Id.*

cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers."[148]

Judicial interpretation of section 6 of the Clayton Act and sections 1 and 2 of the Capper-Volstead Act leaves no doubt that the antitrust exemption for agricultural cooperatives is not absolute. Rather, those acts are construed as only allowing farmers — themselves individual businessmen — to join together in selling their produce. Without the Clayton and Capper-Volstead Acts, such collective activity would be prohibited as a conspiracy in restraint of trade. Beyond the exercise of its "legitimate objects," however, an agricultural cooperative presently may not act without violating the antitrust laws; necessarily forbidden are predatory and "competition-stifflling practices." As previously noted,[149] H.R. 7597 may be construed as legitimating predatory practices such as boycotting and blacklisting — activities which pervert and destroy competition on the merits. Further, the bill is interpreted as authorizing the use of full requirements contracts — themselves a possible means of stiffling competition. Unlike predatory practices, however, full requirements contracts may benefit an economic system and therefore suffer no per se rule of antitrust prohibition. Such ambivalence in economic characterization requires further examination of the ramifications of the bill's use of these contracts in light of the antitrust laws.

B. *Full Requirements Contracts*

Section 3 of the Clayton Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.[150]

148 *Id.* at 466-67.
149 See text accompanying notes 81-95, *supra.*
150 15 U.S.C. § 14 (1970).

The reach of this prohibition includes full requirements contracts because they necessarily prevent buyers from purchasing the goods of the seller's competitors.[151] Unlike the usual "tying" arrangement,[152] requirements contracts may have value for sellers other than the limitation of competition through exercise of market power.[153] In *Standard Oil Co. v. United States* the Court recited the potential benefits:

> In the case of the buyer, [requirements contracts] may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and — of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified — offer the possibility of a predictable market . . . . They may be useful, moreover, to a seller trying to establish a foothold against the counter-attacks of entrenched competitors.[154]

These possible benefits are countered by potential harms to competition, however, leading in part to the enactment of section 3.[155] The injurious effects have been expressed in terms of a "clog [on] competition in the channels of distribution"[156] and as increased "barriers to entry."[157] Although empirical data is lacking, the nature of the injury to competition can be understood "by applying rudimentary logic":[158]

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151 Standard Oil Co. v. United States, 337 U.S. 293, 297 (1949); United Shoe Machinery Corp. v. United States, 258 U.S. 451, 457 (1922); ATT'Y GEN.'s REP., *supra* note 130, at 139; Lockhart and Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 914 (1952); Kessler and Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 24 (1959).

152 A definitive explanation of tying arrangements is found in Turner, *The Validity of Tying Arrangements*, 72 HARV. L. REV. 50 (1958).

153 Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949); ATT'Y GEN.'s REP., *supra* note 130, at 145.

154 Standard Oil Co. v. United States, 337 U.S. 293, 306-07 (1949).

155 ATT'Y GEN.'s REP., *supra* note 130, at 138-39.

156 *Id.* at 145; *see* Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949).

157 Kessler and Stern, *supra* note 151, at 18.

158 Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, 1961 SUP. CT. REV. 267, 272 (1961).

> To the extent that a supplier blankets the market with outright exclusive arrangements or requirement contracts of excessive duration, the opportunity of rivals to compete in sales to the public is jeopardized. Whenever a seller through preempting access to consuming markets unduly restricts his rivals' opportunities to compete, the potential impairment of the competitive process or tendency to monopoly readily appears.[159]

Moreover, the effect of requirements contracts will not be felt just by those in actual competition with the supplier. Preclusion of the existing channels of distribution through use of full requirements contracts creates barriers to the entry of additional suppliers in the market:

> Barriers to entry can also be raised by forward integration which raises the distribution costs of potential competitors. Preemption of the choice outlets imposes on the prospective entrant the high cost of developing his own outlets — a fixed outlay — or else the choice of using inferior outlets which entail higher variable costs.[160]

A further consequence of requirements contracts, subverting a seller's competitors' ability to compete, is a result of the benefits said to accrue from such contracts. To the extent that full requirements contracts give market stability and protection against price fluctuations to those so contracting,[161] the fluctuations and unpreditacability faced by competitors are increased. In other words, "[i]f total industry sales fluctuate widely, reserving the stable customers for [those sellers party to requirements contracts] tends to aggravate the instability confronting [their] rivals."[162] This proportionate increase in fluctuating demand increases the risks faced by the remainder of the industry, thereby increasing the barriers to new entry.[163]

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159 ATT'Y GEN.'s REP., *supra* note 130, at 145-46.

160 Kessler and Stern, *supra* note 151, at 18; *see* Lockhart and Sacks, *supra* note 151, at 922.

161 These market factors were viewed as benefits of full requirements contracts by the Court in Standard Oil Co. v. United States, 337 U.S. 293, 306-07 (1949).

162 P. AREEDA, ANTITRUST ANALYSIS 488 (1967).

163 Faced with an increase in risk and with all other factors remaining constant, a new entrant, before entering the market, will require the presence of greater profits than would be required in the absence of this additional risk.

Because full requirements contracts may give rise to both economic benefit and competitive harm, section 3 of the Clayton Act only prohibits those arrangements where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[164] Cases involving section 3 have therefore focused, in part, on the portion of the relevant market foreclosed by operation of these contracts.[165]

The harm to competition resulting from foreclosure of substantial portions of a particular market through requirements contracts is reflected in the cases involving agricultural cooperatives. In *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*[166] plaintiff sought both damages for and an injunction against the activities of a milk producer cooperative alleged to be in violation of the Sherman and Robinson-Patman Acts. The activities included an attempt to force the use of a full requirements provision in contracts between the producer cooperative and milk processors in the St. Louis area. Controlling 55 to 60 percent of the raw milk supply in the area, the cooperative pressured the dairies through discriminatory and predatory pricing tactics and acquisitions of competing processing plants. Looking to *United States v. Aluminum Co. of America*,[167] the court stated that "when a firm holds monopoly power, any use of that monopoly power to increase and further its power, or to maintain it, when those actions are not inevitable but are consciously done to increase or preserve the power constitutes monopolizing."[168] Noting that "[t]he Capper-Volstead exemption from the antitrust laws does not apply to actions of an agricultural cooperative with respect to non-cooperative corporations or individuals,"[169] the court granted both an award of damages and an injunction. Whether the injunction included the use of full requirements contracts is un-

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164 *See* ATT'Y GEN.'s REP., *supra* note 130, at 138.

165 *E.g.*, Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-29 (1961); Standard Oil Co. v. United States, 337 U.S. 293, 308, 314 (1949).

166 241 F. Supp. 476 (E.D. Mo. 1965).

167 148 F.2d 416 (2d Cir. 1945) (decided under a certificate from the Supreme Court).

168 241 F. Supp. at 485.

169 *Id.* at 486 (citing Maryland & Virginia Milk Producers Ass'n, 362 U.S. 458 (1960)).

clear;[170] however, the language used in discussing *Alcoa* logically reaches such use by a cooperative already controlling a substantial share of the market.

North Texas Producers Association v. Metzger Dairies, Inc.[171] is a similar case. There plaintiff sought treble damages for injury allegedly caused by a milk cooperative's violations of section 2 of the Sherman Act. The cooperative, already controlling 85 to 90 percent of the raw milk marketed in the Dallas-Fort Worth area, sought contractually to require plaintiff to agree not to purchase milk from non-cooperative producers without the approval of the cooperative. When plaintiff refused to agree to the contract, the cooperative boycotted grocers handling the plaintiff's milk. The court, finding it a settled principle that "farmers may act together in a cooperative association and the *legitimate objects* of mutual help may be carried out by the association without contravening the antitrust laws, but that otherwise, the association acts as an entity with the same responsibility under section 2 of the Sherman Act as if it were a private business corporation,"[172] affirmed the jury finding of a section 2 violation and the treble damage award of $1,095,000. As in *Bergjans*, the holding does not specifically address full requirements contracts but rather reaches the means used to coerce their use.

A clearer statement of the prohibition of full requirements contracts is found, however, in the cases arising out of the Fishermen's Collective Marketing Act.[173] In *Manaka v. Monterey Sardine Industries, Inc.*,[174] plaintiff sued to recover treble damages

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170 The court's opinion did not include the language of the injunction sought.

171 348 F.2d 189 (5th Cir. 1965).

172 *Id.* at 194 (emphasis of the court) (citing Maryland & Virginia Milk Producers Ass'n, 362 U.S. 458 (1960)).

173 48 Stat. 1213 (1934); 15 U.S.C. 521 (1970). The act is almost identical to the Capper-Volstead Act, an identification explained by the House report for the Fisheries Act:

> [The purpose of the Fisheries Act is] to provide for the fishery industry cooperative associations such as are provided for farmers by the Capper-Volstead Act . . . . This bill is identical with that act except that this bill applies to producers of aquatic products and not to farmers.

H.R. REP. No. 1504, 73d Cong., 2d Sess. 1 (1934). This similarity has been noted by the courts. *E.g.*, Hinton v. Columbia River Packers Ass'n, 131 F.2d 88 (9th Cir. 1942).

174 41 F. Supp. 531 (N.D. Cal. 1941).

for his preclusion from fulfilling a fishing contract. Defendant was a cooperative association of fishermen who had contracted with the area's canneries to supply all of their requirements of sardines. Allocation of fish to the canneries was accomplished by the cooperative's assignment of the catch of both members and non-members. Without this assignment, the canneries were contractually prohibited from buying sardines from non-members of the cooperative. The court found that "[t]he evidence indicated that by virtue of these contracts and its relations with the unions, the organization does exercise effective monopolistic control over the business and over all fish caught . . . in the vicinity."[175] Although noting the inclusion of the cooperative as a marketing agency within the terms of the Fishermen's Collective Marketing Act, the district court concluded that plaintiff had been prevented from fishing and marketing his fish; therefore the court granted the recovery.

A more recent case is *Gulf Coast Shrimpers and Oysterman's Association v. United States.*[176] There appellants sought reversal of their conviction for engaging in a combination or conspiracy in restraint of trade in violation of the Sherman Act. Appellants were an association of shrimp and oyster fishermen and several of its officers. The cooperative had contracts with twenty-two shrimp and oyster packers and canners which required the packers to purchase all catches tendered by Association fishermen. Appellants asserted that "the district court erred in refusing to submit to the jury the question of whether the actual activities of the Association and its members were within legal obligations permitted by Sec. 1 of the Fishermen's Collective Marketing Act. . . ."[177] The Fifth Circuit responded by stating that "[i]n its price-fixing, the Association exceeded any possible privilege or exemption granted by the Fishermen's Collective Marketing Act when it undertook not simply to fix the prices demanded by its members, but also to exclude from the market all persons not buying and selling in accordance with its fixed prices."[178] The conviction was affirmed.

175 *Id.* at 534.
176 236 F.2d 658 (5th Cir. 1956).
177 *Id.* at 664.
178 *Id.* at 665.

A third case considering full requirements contracts is *Hinton v. Columbia River Packers Association, Inc.*[179] Appellants were members of an association of fishermen which had sought to require the appellee processing corporation to purchase its full supply of fish from the association. The court, in affirming the lower court's injunction, found that *United States v. Borden Co.* controlled the question of whether the association was exempt from the antitrust laws. Further, "[a]ppellants, by their combination, have acquired the power to fix the prices of fish and control of the production thereof which deprives consumers of the advantages which accrue to them from free competition in the market."[180] The court saw this situation as a violation of the Sherman Act.

On the other hand, some cases[181] do not condemn agricultural cooperatives' use of full requirements contracts. In *Maryland & Virginia Milk Producers Association v. United States*,[182] convictions were sought against a milk producer cooperative, one of its officers, and seven dairies-distributors for violation of section 3 of the Sherman Act. The indictments charged that the dairies had contracted to buy their full requirements of raw milk from the cooperative to the extent that the cooperative could supply them. The use of full requirements contracts and the classification of milk into various price categories according to its use was said to create "a rigid and artificial pricing structure in the sale of fluid milk without regard for the normal forces of competition."[183] The cooperative supplied 80 percent of the milk sold in the Washington area but because of the district court's acquittal of five of the seven dairies, the court of appeals only considered contracts

179 131 F.2d 88 (9th Cir. 1942).

180 *Id.* at 89.

181 In addition to the case discussed in the text, the Federal Trade Commission, in an action under section 5 of the Federal Trade Commission Act, has stated without elaboration that the practice of restricting the handlers with whom a cooperative has contracts in the handling and processing of fruit grown by nonmembers is within the immunity granted citrus fruit growers by the Capper-Volstead Act. Florida Citrus Mutual, 53 F.T.C. 973, 1010 (1957).

182 193 F.2d 907 (D.C. Cir. 1951).

183 *Id.* at 911. These two elements of the alleged violation — the full supply contracts and the utilization-classification pricing arrangements — were combined in the court's consideration.

which involved 13.8 percent of the area's milk.[184] The court noted that the full requirements contract contained no prohibition against purchases from non-cooperative producers in the event the cooperative could not supply the requirements of the dairies. Also, in the face of war-created excess demand, the cooperative serviced the area by seeking outside milk and obtaining it for the distributors.[185] Working from the principles "that 'full supply contracts' are illegal when made for the purpose of eliminating and suppressing competition" and that "a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of milk is . . . illegal,"[186] the court found that the record did not contain the proof necessary to convince the trier beyond a reasonable doubt of the illegality of the contracts. Because the holding depends on the failure of proof, cooperatives do not view the case as strong support for the legality of full supply contracts.[187]

In summary, the cases arising under both the Capper-Volstead and Fishermen's Collective Marketing Acts allow cooperatives the same use of full requirements contracts as is granted other business entities. Application of the antitrust laws to agricultural cooperatives in order to preclude full requirements contracts which may "substantially lessen competition or tend to create a monopoly" is therefore consistent with the Supreme Court's interpretation of the scope of the cooperatives' antitrust exemption. The remaining consideration is the effect of H.R. 7597 on this limited antitrust exemption.

C. *Full Requirements Contracts as Used in H.R. 7597*

H.R. 7597 places full requirements contracts between qualified bargaining associations and handlers beyond the reach of the antitrust laws. The language seeking this result is not explicit, however, and, as previously noted,[188] the operation of the bill can only

184 At the time of the indictment, full supply contracts between the cooperative and the dairies in the Washington area involved 22 percent of the milk and milk products sold there. *Id.* at 917 n.1 (Fahy, J., dissenting).

185 A service, the court points out, performed without charge. *Id.* at 912.

186 193 F.2d at 915.

187 *See* Lemon, *supra* note 7, at 520.

188 See text accompanying notes 52-67, *supra.*

be understood by juxtaposing several of its sections. One such construction was made by Professor Turner, former head of the Antitrust Division of the Department of Justice: "[the bill] would appear to validate exclusive requirements contracts on a much wider scale than existing law would permit."[189] Implicitly recognizing the reach of the bill, its proponents reply:

> H.R. 7597 recognizes the established practice of negotiating full supply contracts between qualified associations and handlers. It does not require such contracts. Only when an association can supply the full needs of a handler and the handler wishes to have such a contract would one be negotiated.[190]

That the bill only grants the full requirements contract exemption to associations which can supply the full needs of the handlers does nothing, of course, to mitigate the anti-competitive effects.

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189 Professor Turner's construction is as follows:

> [Section 106(c)] obviously does not by its terms provide an additional exemption beyond that given by existing legislation. However, it may be taken to imply a further exemption: While put negatively, it seems to express a favorable view of exclusive requirements contracts; moreover, the provision would otherwise seem wholly pointless, since nothing in the bill in any way suggests a prohibition of such contracts.
>
> [S]imilarly, Section 106(e), making it unlawful for a handler to purchase a product [from] other producers under terms more favorable than those negotiated with a qualified bargaining association, does not by its terms grant a broader antitrust exemption, as prohibiting purchase under terms less favorable would clearly do. But other provisions of the proposed bill clearly point in the direction of broadening the right of farm bargaining cooperatives to obtain exclusive requirements contracts.
>
> Section 106(d) makes it unlawful for any handler to negotiate with other producers so long as it is negotiating with a qualified bargaining association able to supply all or a substantial proportion of the requirements of such handlers for such products. This provision not only seems to validate requirements contracts, but it also quite clearly would put nonmembers at a serious economic disadvantage at the outset, and thus tend to force them into the association.
>
> Finally, Section 114 . . . . [t]aken in conjunction with the other provisions I have described . . . would appear to validate exclusive requirements contracts on a much wider scale than existing laws would permit.

Hearings on S. 1775 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry, 92d Cong., 1st Sess. (1971), at 306-07 (remarks of Prof. Turner).

190 Lauterbach, *supra* note 66, at 53. For a discussion of the extent to which such contracts are required by H.R. 7597, contrary to the assertions of Lauterbach, see text accompanying notes 52-80, *supra*.

The bill provides, in other words, that full requirements contracts can only be used when they are most effective in precluding other producers. Here then is the anti-competitive crunch of the proposal. In order to be accorded the antitrust exemption created by H.R. 7597, an association of producers must be qualified — a status requiring that the association represent a sufficient number of producers and a sufficient volume of an agricultural commodity to make it an effective agent in bargaining with handlers. No percentage of market control is stipulated in the bill; however, one spokesman for agricultural cooperatives has looked to a figure of 60 to 70 percent of the product market as necessary to be able to effectively bargain.[191] Therefore, a qualified association, representing 60 to 70 percent of the product market, will be permitted to negotiate full requirements contracts with handlers buying from that market — a condition almost certainly in violation of the present application of the antitrust laws.[192]

The policy reasons for the present prohibition of full requirements contracts which foreclose substantial portions of relevant markets are evidenced by the possible ramifications of H.R. 7597. Production of agricultural commodities is characterized by its surplus supply.[193] Given that supply exceeds demand, qualified bargaining associations, insofar as they can force use of full requirements contracts, can foreclose non-members' opportunities to sell. The foreclosure will be significant. Further, in foreclosing the opportunity to sell in the relevant market to buyers with predictable demand, H.R. 7597's allowance of full requirements contracts may greatly increase the instability of market conditions faced by non-member producers, thereby increasing their risks. To escape these deleterious effects, independent producers will have to join the producer associations.[194] However, this result may

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191 Lemon, *supra* note 7, at 511 n.40.

192 Turner, *supra* note 189, at 305 ("A farm bargaining cooperative's right to enter into exclusive requirements contracts with handlers is no greater than the right of any private business corporation: while the law on requirements contracts is somewhat uncertain, it would almost certainly be unlawful for a bargaining cooperative accounting for a large portion of supply to foreclose its competitors from a large share of the market.")

193 R. CAVES, *supra* note 3, at 82.

194 For an example of an instance where exemption from the antitrust laws has been used to force membership in the exempted organization, see 2 L. LOSS, SE-

be the lesser evil faced by a producer wishing to remain independent. Professor Wallace Barr points out:

> The production response elicited by a substantial increase in farmers' prices and income could prove a troublesome pitfall . . . . Where a production response erodes the original price gains, a need would arise for mechanisms by which to store or divert short-term surpluses, and possibly to control output and/or limit entry for the longer run. The quotas, allotments, and other features of production control would influence the level and distribution of income among present producers and determine entry requirements for new producers.[195]

Faced with chronic surplus, the agricultural cooperatives may decide to limit their membership to those producers representing produce sufficient to meet demand, therefore severely restricting independent producers' ability to compete.[196] Thus, this grant of antitrust exemption for cooperatives is not consistent with the repeated assertions[197] that under H.R. 7597 producers need only

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CURITIES REGULATION 1369-70 (2d ed. 1961) ("[Sections 15A(i),(n) of the Securities Exchange Act of 1934] afford the [National Association of Securities Dealers, Inc.] an exemption from the antitrust laws . . . [and] according to the Commission, make it 'virtually impossible for a dealer who is not a member of the NASD to participate in a distribution of important size.' ") The importance of the NASD (and thus the reason for the coercion) lies in the governmental reliance on the organization to provide regulation of the ethics of the securities dealers industry. *See id.* at 1361.

195 W. Barr, *Bargaining in Perspective — A Summary*, in BARGAINING IN AGRICULTURE 45 (1971).

196 The presence of independent producers who are willing to underprice the cooperatives may cause economic dislocation and major reorganization in the handling industry as handlers attempt to avoid the restrictions of H.R. 7597. For example, because handlers have a section 106(a) bargaining duty only if they have dealt with producers of a cooperative in two of the previous five years, outsiders will have an incentive to begin handling the independents' products. The new entrants would have no bargaining obligations until some of their sources joined cooperatives. These handlers would be free to purchase the competitively-priced products of independent producers, thereby undercutting the established dealers and processors. Of course, the costs of relocating capital and of reorganizing existing businesses would mitigate this effect.

197 This expression of voluntariness is found in the preamble of the bill and has been repeated by proponents of the legislation. *E.g.*, Bunje, *supra* note 41, at 38 ("The so-called 'independent producer' will go totally unaffected unless he wants to join a cooperative bargaining association. If he desires, he is perfectly free to continue to deal with the handler on his own."); Lauterbach, *supra* note 66, at 55 (". . . Farm Bureau seeks only equity in bargaining — not politically imposed compulsion. [H.R. 7597] is no radical proposal to abrogate or destroy the individual rights of any farmer or handler.").

join a cooperative voluntarily. With membership in a cooperative as the exclusive determinant of a producer's continued ability to market his produce, no consideration is given to efficiency or equity. To the extent that power over terms of sale are concentrated in one bargaining unit rather than in many and that substantial portions of the market are foreclosed by full requirements contracts, thereby providing insulation from the competition of independent producers, monopoly power is achieved by the qualified bargaining associations. Monopoly power means the ability to raise prices above those which would result in a competitive market; therefore general misallocation of resources will result.[198] Such a consequence runs squarely in the face of the policy of section 3 of the Clayton Act and the antitrust laws generally. Given that augmentation of farmer income is the primary goal of H.R. 7597,[199] the results of granting antitrust exemption for full requirements contracts indicate that the legislation is an excessively costly vehicle to achieve that goal. Hopefully, those considering this legislation will heed the urgings of Assistant Secretary of Agriculture Lyng to give serious attention to the antitrust exemption of the bill:

> Agricultural cooperatives already have antitrust exemption for their legitimate cooperative activities. To broaden this for bargaining cooperatives raises important questions which may, in the long run, adversely affect producers, handlers, and consumers alike.[200]

The focus of Lyng's first sentence is particularly important in considering the proposed agricultural bargaining bill. Insofar as agricultural cooperatives seek "legitimate objects," they do not presently violate the antitrust laws. Full requirements contracts may, in some instances, be expressive of legitimate objects for all business entities; this is the teaching of *Tampa Electric*.[201] Agricultural cooperatives, under the present antitrust laws, are able to use full requirements contracts to achieve the legitimate benefits of such usage. Therefore, the only effect of H.R. 7597 with

198 R. CAVES, *supra* note 3, at 114.
199 Lyng, *supra* note 29, at 19.
200 *Id.* at 21.
201 365 U.S. 320 (1961).

regard to full requirements contracts is the authorization of their usage to obtain a heretofore illegitimate objective — the substantial lessening of competition. Given this ascertainable purpose and the likely effects of allowing antitrust exemption for the use of full requirements contracts by agricultural cooperatives, Congress should reject the statutory scheme expressed in H.R. 7597.

III. The Economic Justification of H.R. 7597

Even if H.R. 7597 did not have the objectionable features which have been exposed in the preceding two sections (*i.e.*, the misuse of collective bargaining and the violation of antitrust policy), it would still be a poor statute because its basic premises have no economic justification. For agricultural collective bargaining to be successful in raising farm income, at least one of the following economic results must occur: (a) associations of farmers increase the efficiency of marketing or processing, (b) farmers acquire "excess" profits from the handlers and processors, or (c) consumers pay higher prices for agricultural products.[202] Of these three, proposition (a) is defensible under an economic system based on competition. An economic structure benefits more from its available resources if they are efficiently used. Results (b) and (c) require separate social policy decisions. Result (b) involves an income redistribution from handlers to farmers and result (c) involves a transfer from consumers to farmers.

If cost-saving efficiencies are possible from marketing or processing[203] by associations of producers, that result would benefit both farmers and the nation as a whole.[204] However, the attainability of an increase in efficiencies is not certain.[205] The rising marketing costs of farm products in recent years are not caused

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202 M. Snodgrass & L. Wallace, *supra* note 1, at 474.

203 Cooperative marketing may stimulate the development of new products with resulting marketing advantages. For example, the formation of Sunkist Growers association allowed growers to process fresh citrus fruits for juices and other secondary uses, thereby giving them the ability to withhold otherwise-perishable products from the market if there was a surplus of fresh fruit. See *Agricultural Cooperatives, supra* note 114, at 374.

204 *See* M. Snodgrass & L. Wallace, *supra* note 1, at 475.

205 *See* G. Hallett, The Economics of Agricultural Policy 7, 169 (1968); M. Snodgrass & L. Wallace, *supra* note 1, at 173.

by inefficiency; they are due primarily to increased consumer demand for services in connection with agricultural production.[206] Efficiencies from combined marketing or processing of the products of individual farmers are already possible under existing agricultural cooperative law. If cost-savings can be made by combined marketing or processing, then presumably existing cooperatives should be able to attract members without new legislation.

To the extent that transferring the operations of middlemen to cooperatives fails to create cost-saving efficiencies, farmers would not be benefitted by conducting those operations unless handlers have profits in excess of normal equity return.[207] The existence of excess handlers' profits has long been alleged by proponents of agricultural collective bargaining legislation.[208] That such profits exist, however, is not clear.[209] In any event, excess profits of some handlers are not a sufficient justification for giving all associations of farmers monopoly power which is exempt from the antitrust laws.[210]

To the extent that agricultural collective bargaining increases farmers' returns over the reduction of any excess profits of handlers or attainment of efficiencies, prices to consumers must increase.[211] Any price increase may cause a decline in consumer purchases.[212]

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206 *See* M. SNODGRASS & L. WALLACE, *supra* note 1, at 174-75.

207 "What does this normal return amount to in practice? . . . Although we cannot identify *one* long-term interest rate in the complex of capital markets, for the private sector of the economy the range of 5 to 6 percent would seem appropriate." R. CAVES, *supra* note 3, at 106.

208 "We take judicial knowledge of the history of the country and of current events, and from that source we know that conditions at the time of the enactment of the Bingham [Co-operative Marketing] Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the purchasing price of the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the farmer obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and final consumer injuriously operated upon both classes and fattened and flourished at their expense." Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Ass'n, 208 Ky. 643, 649, 271 S.W. 695, 698 (1925), *aff'd*, 276 U.S. 71 (1928); *cf.* Note, *Cooperatives — A Privileged Restraint of Trade*, 23 NOTRE DAME LAW. 110, 118-19 (1947).

209 *See* Moore, *Bargaining Power Potential in Agriculture*, 50 AM. J. OF AGRIC. ECON. 1051 (1968); *cf.* G. HALLET, THE ECONOMICS OF AGRICULTURAL POLICY 161-62 (1968).

210 *But see Agricultural Cooperatives*, *supra* note 114, at 430 n.1.

211 See note 202 *supra* and accompanying text.

212 *Cf.* M. SNODGRASS & L. WALLACE, *supra* note 1, at 268.

The amount of this decline will depend upon the consumers' readiness to forego the product and upon the availability of substitute products. Any artificial increase in return to farmers, however, will cause them to increase production of that product,[213] either by shifting resources from other production or by investing new resources. The combined effect of a decrease in demand but increase in supply would create a commodity surplus. Therefore, if the political decision is made that the social benefits of an increase in farmers' income outweigh the economic losses from misallocation of demand and supply, then the problem of commodity surplus must still be met at the public or private level.[214]

IV. Conclusion

Those individuals wise in the lessons of Greek mythology may view the present task of solving the farm problem as similar to that faced by Sisyphus; the would-be problem solver both climbs the mountain of surplus commodities and pushes the rock of excessive resources in agriculture. This Note, while recognizing the problem, concludes that H.R. 7597, rather than solving the plight of the modern day Sisyphus, will instead increase the misallocation of resources within the farm sector. Three objections to H.R. 7597 are posited here. First, use of labor law concepts in establishing agricultural bargaining legislation begs the question of the suitability *vel non* of such a statutory transplant. Since farmers are capitalists rather than laborers, the bill's objective of greater farmer income will not be realized. Further, the use of the labor scheme in the agricultural bargaining context may visit coercive power in the hands of the cooperatives — power which can be directed against the independent producers as well as the purchasing handler. Second, grant of further antitrust exemption to cooperatives for heretofore illegal practices will create an agricultural marketing system based on monopoly power rather than efficiency or equity. Particularly, this Note criticizes the bill's authorization of full requirements contracts. And third, the foun-

213 *Id.* 292.

214 "To exercise a large degree of bargaining power will require effective control over a major portion of the supply, which is difficult for nearly all agricultural products." *Id.* 476.

dation of H.R. 7597 must be the belief that consumers should pay more for their food than the price otherwise dictated by a competitive market. Such a policy of robbing Paul to pay Peter will fail because of the supply elasticities faced by farmers. In summary, this Note urges rejection of H.R. 7597 and its legislative progeny. Sisyphus suffers enough under the present load of agriculutral problems — any greater burden would be intolerable.

*Dale H. Oliver**
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APPENDIX

H.R. 7597

TITLE I AGRICULTURAL MARKETING AND BARGAINING

SECTION 101. LEGISLATIVE FINDINGS AND PURPOSE

Congress has already found that because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Congress hereby finds, further, that membership by a farmer in a cooperative organization can only be meaningful if a handler of agricultural products is required to bargain in good faith with an agricultural cooperative organization as the representative of the members of such organization who have had a previous course of dealing with such handler. The purpose of this title, therefore, is to provide standards for the qualification of agricultural cooperative organizations for bargaining purposes, to define the mutual obligation of handlers and agricultural cooperative organizations to bargain with respect to the production, sale, and marketing of agricultural products and to provide for the enforcement of such obligation.

SECTION 102. SHORT TITLE

This title shall be known and may be cited as the "National Agricultural Marketing and Bargaining Act of 1971."

SECTION 103. DEFINITIONS

When used in this title—

(a) "Qualified association" means an association of producers accredited in accordance with section 105 of this title.

(b) "Association of producers" means any association of producers of agricultural products engaged in marketing, bargaining, shipping, or processing as defined in section 15(a) of the Agricultural Marketing Act of 1929, as amended (49 Stat. 317; 12 U.S.C. 1141(a)), or in section 1 of the Act entitled "An Act to authorize association of agricultural producers" approved February 18, 1922 (42 Stat. 388; 7 U.S.C. 291).

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*Members of the Class of 1972 at the Harvard Law School.

(c) "Board" means the National Agricultural Bargaining Board provided for in this title.

(d) "Handler" means any person other than an association of producers engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in (1), (2), or (3) above.

(e) "Person" includes one or more individuals, partnerships, corporations, and associations.

(f) "Producer" means a person engaged in the production of agricultural products as a farmer, planter, rancher, poultryman, dairyman, fruit, vegetable, or nut grower.

SECTION 104. NATIONAL AGRICULTURAL BARGAINING BOARD

(a) There is hereby established in the Department of Agriculture a National Agricultural Bargaining Board, which shall administer the provisions of this title.

(b) The Board shall consist of three members who shall be appointed by the President with the advice and consent of the Senate.

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(f) The Board shall have authority from time to time to adopt, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary or appropriate to carry out the provisions of this title.

SECTION 105. QUALIFICATION OF ASSOCIATION OF PRODUCERS

(a) Only those associations of producers that have been qualified in accordance with this section shall be entitled to the benefits provided by this title.

(b) An association of producers desiring qualification shall file with the Board a petition for qualification. The petition shall contain such information and be accompanied by such documents as shall be required by the regulations of the Board.

(c) The Board shall provide for a public hearing upon such petition. The Board shall qualify such association if based upon the evidence at such hearing the Board finds:

(1) that under the charter documents or the bylaws of the association, the association is directly or indirectly producer owned and controlled;

(2) the association has contracts with its members that are binding under State law;

(3) the association is financially sound and has sufficient resources and management to carry out the purposes for which it was organized;

(4) the association represents a sufficient number of producers and/or a sufficient quantity of agricultural products to make it an effective agent for producers in bargaining with handlers; and

(5) the association has as one of its functions acting as principal or agent for its producer-members in negotiations with handlers for prices and other terms of contracts with respect to the production, sale, and marketing of their product.

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(f) If a qualified association ceases to maintain the standards for qualification set forth in paragraph (c) of this section the Board shall, after notice and hearing, revoke the qualification of such association.

SECTION 106. BARGAINING

(a) As used in this title, "bargaining" is the mutual obligation of a handler and a qualified association to meet at reasonable times and negotiate in good faith with respect to the price, terms of sale, compensation for commodities produced under contract, and other contract provisions relative to the commodities that such qualified association represents and the excution of a written contract incorporating any agreement reached if requested by either party. Such obligation on the part of any handler shall extend only to a qualified association that represents producers with whom such handler has had a prior course of dealing. Such obligation does not require either party to agree to a proposal or to make a concession.

(b) A handler shall be deemed to have had a prior course of dealing with a producer if such handler has purchased commodities produced by such producer in any two of the preceding five years.

(c) Nothing in this Act shall be deemed to prohibit a qualified bargaining association from entering into contracts with handlers to supply the full agricultural production requirements of such handlers.

(d) It shall be unlawful for a handler to negotiate with other producers of a product with respect to the price, terms of sale, compensation for commodities produced under contract, and other contract provisions relative to such product while negotiating with a qualified bargaining association able to supply all or a substantial portion of the requirements of such handler for such product.

(e) It shall be unlawful for a handler to purchase a product from other producers under terms more favorable to such producers than those terms negotiated with a qualified bargaining association for such product.

(f) Whenever it is charged that a qualified association or handler refuses to bargain as that terms is defined in paragraph (a) of this section, the Board shall investigate such charges. If, upon such investigation, the Board considers that there is reasonable cause to believe that the person charged has refused to bargain, in violation of this Act, that Board shall issue and cause to be served a complaint upon such person. The complaint shall summon the named person to a hearing before the Board or a member thereof at the time and place therein fixed.

(g) The person complained of shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise at the hearing and give testimony. In the discretion of the Board, or the member conducting the hearing, any person may be allowed to intervene to present testimony. Any hearing shall, insofar as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States.

(h) If, upon a preponderance of the evidence, the Board determines that the person complained of has refused to bargain, in violation of this title, it shall state its findings of fact and shall issue and cause to be served on such person an order requiring him to bargain as that term is defined in paragraph (a) of this section and shall order such further affirmative action, including an award of damages, as will effectuate the policies of this title.

(i) If, upon a preponderance of the evidence, the Board is of the opinion that the person complained of has not refused to bargain, in violation of this title, it shall make its findings of fact and issue an order dismissing the complaint.

(j) Until the record in a case has been filed in a court, as hereinafter provided in section 106, the Board may at any time, upon reasonable notice and in such manner as it deems proper, modify or set aside, in a whole or in part, any finding or order made or issued by it.

SECTION 107. ENFORCEMENT OF ORDERS AND JUDICIAL REVIEW

(a) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in

vacation, any district court of the United States, within any circuit or district, respectively, wherein the refusal to bargain occurred or wherein the person who engaged in such refusal resides or transacts business, for the enforcement of its orders made under section 105 and for appropriate temporary relief or restraining order. . . .

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(b) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the refusal to bargain was alleged to have occurred or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.

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SECTION 113. SEVERABILITY

The provisions of this title are severable and if any provision shall be held unconstitutional or invalid by a court of competent jurisdiction the decision of such court shall not affect or impair any of the remaining provisions.

SECTION 114. ANTITRUST VIOLATIONS

The activities of qualified associations and handlers in bargaining with respect to the price, terms of sale, compensation for commodities produced under contract, or other contract terms relative to agricultural commodities produced by the members of such qualified associations shall be deemed not to violate any antitrust law of the United States. Nothing in this title, however, shall be construed to permit handlers to contract, combine, or conspire with one another in bargaining with qualified associations.

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