

## Antitrust Alert: Paving the Intersection of Antitrust and Labor Law

3/14/2008

"Anyone who travels on the interstate system in northern states understands the force of the dictum that on the interstate highways in those states there are only two seasons: winter and construction"

-Hon. Richard A. Posner

It has long been true that, in order to avoid too sharp a clash between labor and antitrust policies, collective bargaining agreements do not run afoul of the antitrust laws. But what about certain provisions within collective bargaining agreements between a union and employer that seek to exclude other employers who do not have a collective bargaining agreement with the union? These types of provisions are called "hot cargo" provisions and are the subject of a recent Seventh Circuit opinion written by Judge Posner.

United Rentals is a construction subcontractor who provides traffic control for various construction projects in Indiana. In Indiana, the majority of construction contractors belong to a trade association called Indiana Contractors, which negotiates collective bargaining agreements for its members with the Laborers International Union. The collective bargaining agreement in place contains a hot cargo provision that forbids association members from subcontracting work at a construction site to any firm that had not signed a collective bargaining agreement with the Laborers Union. This was to the detriment of United Rentals because they have a collective bargaining agreement with another union.

After concluding that the hot cargo provision did not violate the National Labor Relations Act (NLRA) based on what is known as the construction industry exception, Judge Posner turned to the question of whether such a provision violates the Sherman Act. On its face, Judge Posner wrote, a hot cargo provision appears to be an exclusionary practice, which can be challenged under the Sherman Act. In addition, it may make no sense for contractors to agree with a union to squeeze out a low-cost subcontractor from the market. But, as Judge Posner reminds us, an antitrust claim that simply doesn't make sense is not, by itself, unlawful. But what if the contractors' association was being forced to enforce a cartel with the union, as was the case in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Then, according to Judge Posner, United Rentals "would be home free."

The court found several distinguishing facts between the hot cargo provision at issue and the facts of the Connell case. First, there was no collective bargaining agreement in place in Connell. Second, there was no contention in Connell that the contractor or union was trying to protect employees at the construction site from working "cheek by jow!" with nonunion workers. According to the court, United Rentals provided no evidence that the consequences of the hot cargo clause were any more dire from an antitrust standpoint than any other hot cargo clause on the construction industry. Instead, United Rentals argued that the union was trying to represent traffic control workers without having to elect the union as their collective bargaining representatives, which the court stated was related to a goal of the NLRA but outside the purview of the Sherman Act.

Finally, the court refused to find a blanket rejection of all hot cargo provisions. "Given the absence of traditional antitrust concerns, a decision in United Rentals' favor would be tantamount to holding that all hot cargo clauses in the construction industry violate the Sherman Act...[a] type of agreement affirmatively sanctioned by Congress cannot be deemed a per se violation of the Sherman Act." As Judge Posner concluded, "[t]o rule otherwise would be to make the Sherman Act, enacted in 1890, repeal a statutory provision enacted in 1959, reversing the arrow of time."

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Please feel free to contact us if you wish a copy of the decision or would care to discuss its implications for your business.

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