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United Mine Workers of America v. James M. Pennington et al., 85 Sup. Ct. 1585 (1965)

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LABOR AND ANTITRUST LAW: UNION COMBINATIONS WITH NON-LABOR GROUPS.—Small mine operators claimed a violation of the antitrust laws by a coal miners union on the basis of an industry-wide collective bargaining agreement, whereby employers and union agreed on a wage scale exceeding the financial ability of some operators to pay. The wage demands necessitated plant automation in order to continue competition. Only the larger plants had the resources to finance automation and smaller plants were forced out of business. The district court awarded damages. The court of appeals affirmed and certiorari was granted. The Supreme Court, although reversing on other grounds held that union combinations with non-labor groups were not exempt from the provisions of the antitrust laws. The minority said that since the conduct was within the area of mandatory collective bargaining, it should not come within the courts jurisdiction under the antitrust laws. *United Mine Workers of America v. James M. Pennington et al.* 85 Sup. Ct. 1585 (1965).

Operators of a chain of retail stores in the Chicago area brought action against defendant labor union and the association of food retailers representing independent food stores, alleging violation of the Sherman Antitrust Act. The United States District Court entered judgment in favor of the defendants, the court of appeals reversed, and the union petitioned for certiorari to the United States Supreme Court. *Held,* multi-employer agreement with unions were within the labor exemption to the Sherman Antitrust Act since the agreement concerned traditional areas of collective bargaining. The minority said that the case should be decided in accord with the *Pennington* case. *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO et. al. v. Jewel Tea Company Inc.* 85 Sup. Ct. 1596 (1965).

Union activity is usually exempted from operation of the antitrust laws.[1] However, as indicated by *Pennington* and *Jewel Tea,* when unions combine with non-union groups to restrain trade, antitrust laws may be applied. The fundamental policy underlying both the antitrust laws and labor legislation is promotion of the free flow of commerce and the elimination of restraints on the product market.[2] Although collective bargaining may result in the imposition of such restraint, it nevertheless has been recognized to be in the public interest.[3]

More than fifty years after the enactment of the Sherman Act, an interpretation of existing law was given in *Apex Hosiery Co. v. Leader.*[4]

[1]For further discussion of labor's exemption see Cox, *Labor and the Antitrust Laws—A Preliminary Analysis,* 104 U. PA. L. REV. 252 (1955); Frank, *The Myth of the Conflict between Antitrust Laws and Labor Law in the Application of the Antitrust Laws to Union Activity,* 69 DICK. L. REV. 1 (1964); Winter, *Collective Bargaining and Competition, The Application of Antitrust Standards to Union Activity,* 73 YALE L. J. 14 (1963).

[2]See, National Labor Relations Act (Wagner Act) § 1, 49 Stat. 449-457 (1935), 29 U.S.C. § 151-61 (1959); Labor Management Relations Act (Taft-Hartley Act) § 1, 61 Stat. 136 (1947), 29 U.S.C. § 141-59 (1958); Labor—Management Reporting and Disclosure Act of 1959 (Landrum Griffin Act) § 2, 73 Stat. 519, 29 U.S.C. § 151-68 (1959).

[3]FORKOSCH, A TREATISE ON LABOR LAW 280 (2d ed. 1965).

[4]Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

In that case a union, by violence, took control of a factory in an attempt to achieve a closed shop. This action limited the interstate commerce shipment of the hosiery produced at the plant. The Court, after analyzing the history of antitrust legislation, said that the end sought by the Sherman Act "was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services."[5] The Court concluded that the activity of the union had no substantial effect on the market price, was not intended to have such effect, and did not come within the Court's jurisdiction under the Sherman Act.

The next year the Court took a dofferent approach in *United States v. Hutcheson*,[6] which announced a sweeping exemption of unions from the antitrust laws. This case involved an alleged antitrust violation arising out of a peaceful strike and secondary boycott by a union in controversy with another union over jobs. Mr. Justice Frankfurter construed the provisions of the Sherman, Clayton and Norris-LaGuardia acts together to arrive at the majority position.[7] According to Mr. Justice Frankfurter, the Norris-LaGuardia Act removed the fetter upon trade union activities left virtually untouched by the Clayton Act. This was accomplished by narrowing further the circumstances under which the federal court could grant injunctions in labor disputes. More specifically, the Norris-LaGuardia Act explicitly formulated the "public policy of the United States" in regard to industrial conflict, and established that the allowable area of union activity was not to be restricted to the immediate employer-employee relation.[8] The majority read the Clayton Act as exempting from antitrust action the following subjects of labor disputes:

> [A]ny controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating. . .terms or conditions of employment, regardless of whether or not the disputants stand in proximate relations of employer and employee.[9]

The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act, but which was frustrated, so Congress believed, by unduly restrictive judicial construction.[10] The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it specific allowable trade union activities. Under section twenty of the Clayton Act no such allowable conduct may be held to be a "violation of any law of the United States,"[11] including the Sherman Act.[12] Mr. Justice Stone's con-

[5] *Id.* at 493.
[6] United States v. Hutcheson, 312 U.S. 219 (1941).
[7] *Id.* at 231.
[8] *Ibid.*
[9] *Id.* at 234.
[10] *Id.* at 236.
[11] 38 Stat. 738 (1914), 29 U.S.C. 52 (1955). Section 20 provides:

> That no restraining order or injunction shall be granted. . .in any case between employer and employees. . .involving. . .a dispute concerning terms or conditions of

curring opinion in *Hutcheson* reaffirmed his position in the *Apex* case, where he held that the Sherman Act applied when restraint did or could operate to suppress the competition in the market.[13] Mr. Justice Stone and the other concurring justices felt that the application of the Norris-LaGuardia Act in the case was doubtful.[14]

A limitation to the sweeping decision in the *Hutcheson* case was announced in *Allen Bradley Company v. International Brotherhood of Electrical Workers.*[15] This case arose out of a conspiracy between union, contractors, and manufacturers in the city of New York. Unions through picketing and boycotts prevented non-union sales of electrical equipment. Manufacturers raised prices; and contractors set bids at high levels. The activity was directed toward, and resulted in, control of the market price of the goods.[16] The Court, after a review of the antitrust acts and the Norris-LaGuardia Act, as interpreted by *Apex* and *Hutcheson,* found two declared congressional policies which necessitated reconciliation. One sought to preserve a competitive business economy, and the other sought to preserve the right of labor to better its conditions through the agency of collective bargaining.[17] The acts by the union were held to violate the Sherman Act, although they were not unlawful under the Clayton Act. The Court went on to assert that if such activity had been performed alone, it would not have been wrongful. Further, the Court indicated "A business monopoly is no less such because a union participates, and such participation is a violation of the Act."[18]

The three cases summarized above were decided at a time when the unions had great freedom to act and were strongly supported by the government. The National Labor Relations Act of 1935 constituted a clear statement of a national policy in support of union activity and objectives.[19] The employers under the National Labor Relations Act were restricted by an enumerations of unfair labor practices, which related only to employer conduct.[20] The current policy approach to labor organization and activity is not as favorable to the union. The Taft-Hartley

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employment. . . .And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do. . . .

[13]*United States v. Hutcheson, supra* note 6, at 236.

[14]*Id.* at 240.

[15]*Id.* at 237, "an application of the Norris-LaGuardia Act which is not free from doubt and which some of my brethren sharply challenge."

[15]Allen Bradley Company v. International Brotherhood of Electrical Workers, 325 U.S. 797 (1945).

[16]*Id.* at 800.

[17]*Id.* at 806.

[18]*Id.* at 811.

[19]National Labor Relations Act, *supra* note 2.

[20]The following unfair Labor practices of employers were set forth by the Act:
1. Interference, restraint, or coercion of employees;
2. Domination or interference with formation or administration of labor organization;
3. Discrimination due to membership in labor organization;
4. Discharging or otherwise discriminating against an employee for filing charges or giving testimony under this act;
5. Refusal to bargain collectively.

amendments to the National Labor Relations Act attempted to equalize the imbalance created by the original act, by defining unfair practices on the part of labor unions.[21] The Landrum-Griffin Act enumerated other activities of unions which were considered unfair by Congress.[22] Therefore, although labor legislation has maintained a consistent policy of promoting the free flow of commerce, successive labor enactments have modified the scope of allowable employer-employee activity.[23]

By the *Pennington* and *Jewel Tea* cases, the Court has attempted to interpret the existing cases and legislation. The three positions of the *Pennington* case and the three position in the *Jewel Tea* case indicate some confusion in this interpretation. The majority position in *Pennington*, written by Mr. Justice White, cites *Apex, Hutcheson,* and *Allen Bradley* with favor, recognizing that the exemption of unions from the operation of the antitrust laws was modified by the later case.[24] Mr. Justice White also recognized that labor statutes have been established to control union activities. The majority position, however, provides for a degree of judicial control by means of the antitrust laws alone, without regard to the labor statutes. The majority limits the allowable activities of a union or an employer in a wage dispute. The court held that collective bargaining agreements may restrain trade or eliminate competition among employers within a bargaining unit, without antitrust sanctions. However, the union is subject to antitrust restrictions when it agrees to impose a certain wage scale on other bargaining unit. The majority emphasized the necessity of good faith and candidness for effective collective bargaining.[25]

The concurring opinion by Mr. Justice Douglas in the *Pennington* case reaffirms the language of the *Allen Bradley* decision, holding that the combination of union, contractors, and manufacturers is a business monopoly. Labor should be subject to the same sanctions as a business group when it joins such a monopoly.[26]

The majority opinion in the *Jewel Tea* case, also written by Mr. Justice White, indicates that there must be a weighing of the interests involved. It is necessary to balance the "apparent and real" effect on competition against the "immediate and direct" concern of the union members.[27] In the *Jewel Tea* case, the agreement limited marketing to between the hours of 9:00 A. M. and 6:00 P. M. The Court held that the interest of the union should control and this agreement should be allowed.[28] According to the dissent, written by Mr. Justice Douglas, the *Allen Bradley* doctrine should apply, making the agreement a violation of

[21]Labor Management Relations Act, *supra* note 2.

[22]Labor—Management Reporting and Disclosure Act of 1959, *supra* note 2.

[23]See *supra* note 2.

[24]85 Sup. Ct. 1591-92.

[25]*Id.* at 1591.

[26]*Id.* at 1595.

[27]85 Sup. Ct. 1603.

[28]*Ibid.*

the Sherman Act since the contract was aimed at prohibiting the marketing of goods and services.[29]

Mr. Justice Goldberg, joined by Justices Harlan and Stewart, dissented from the *Pennington* opinion, but concurred in the judgment of the *Jewel Tea* case.[30] The rationale of Mr. Justice Goldberg's dissent in *Pennington* was that *Hutcheson* and *Apex* gave a broad exemption to labor activities, and that current labor laws use an approach different from the antitrust laws in dealing with the questions involved. Justice Goldberg's opinion states that to completely protect mandatory collective bargaining from judicial interference, would effectuate the congressional policy of encouraging free collective bargaining subject only to specific restrictions contained in the labor laws. To allow intervention under the Sherman Act would place on judges and juries the determination of "what public policy in regard to industrial struggle demands."[31]

The question to be resolved is whether the Court in the present decision has interpreted antitrust and labor laws in accord with the needs of contemporary society. The rules set forth should be applicable to activity in the market place and should set guidelines for future litigation. The opinions by Justices Douglas and Goldberg represent divergent positions. One would give a blanket freedom to the activities of labor unions under the Sherman Act. The other would regard the *Allen Bradley* decision as bringing any collective bargaining agreement within the scrutiny of the Court as a possible violation of the Sherman Act.[32] Mr. Justice White bridges these positions by setting definite limitations upon the application of *Allen Bradley*. Not all collective bargaining agreements would come within its coverage, but only those in which an agreement is made by the union to impose restraints outside the bargaining unit.[33] By this approach, the agreements within the bargaining unit are left to the regulations of labor statutes. When an agreement is made to go outside the bargaining unit, the Court would be allowed to examine it with reference to the antitrust laws and the interest of the unions. Mr. Justice White's approach might be called a joint judicial and administrative approach.

Justice Goldberg's dissent in *Pennington*, however, does merit discussion. The National Labor Relations Act and the amending Taft-Hartley and Landrum-Griffin Acts could be interpreted as labor antitrust laws, since the provisions of these acts are in line with the policy aproach to the area. These acts, by creating the National Labor Relations Board, utilize an administrative approach to labor controversies.[34] In an area as highly volatile as that of labor law, perhaps the administrative approach is the most satisfactory. The structure of the National Labor Re-

[29] *Id.* at 1606.
[30] *Id.* at 1607-28.
[31] *Id.* at 1615.
[32] These positions are also discussed in the articles in note 1, *supra*.
[33] *Allen Bradley Company v. International Brotherhood of Electrical Workers, supra* note 1, at 811.
[34] FORKOSCH, *op. cit. supra* note 3, at 295.

lations Board enables it to maintain a close supervision of labor activity. The power of subpoena allows the board to look at the market place and its demands in light of the underlying policy favoring a free flow of commerce.[35] Specific abuses are and can be outlined by Congress in order to prevent general interference with the institution of collective bargaining. The Board has the quasi-judicial power to interpret and apply legislative provisions. However, in the area of collective bargaining the union power may be combined with that of management. This necessitates greater supervision than provided for by the labor statutes. As indicated by the decisions in the principal cases, the Supreme Court will recognize the power of the National Labor Relations Board, but will take jurisdiction under the antitrust laws in certain cases.

It is submitted that adherence to the tests announced in the *Pennington* and *Jewel Tea* cases sufficiently limits the *Allen Bradley* doctrine.[36] The limitation brings within the Court's jurisdiction only those cases in which agreements imposing restraints extend beyond the bargaining unit. However, the collective bargaining agreements falling within a bargaining unit are to be controlled by the administrative method set up by the National Labor Relations Act and its amendments. This approach will best promote the policies of the Sherman Act and of the labor statutes. A joint judicial and administrative approach to union antitrust activity would allow flexibility in reflecting the demands of the market place. Such joint effort is at the heart of our constitutional system and would promote effective government and a sound economy.

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WATER RIGHTS: UTAH ADJUDICATION EMPHASIZES FEDERAL-STATE CONFLICT.—The Utah state engineer joined the United States as a necessary party defendant in a water adjudication of the Green River. Although the lower court recognized the claim of the United States to water rights purchased from private individuals, it refused to recognize claims to additional unspecified water rights. The United States appealed to the Utah Supreme Court contending that the adjudicated water rights of individuals should be subject to the right of the United States to use all the water necessary for national forest reservations. *Held,* affirmed. The United States is bound by the decree to the same extent as any other party. "Therefore, any water rights which have been or could have been claimed within this adjudication are now concluded by it." *Green River Adjudication v. United States,* 404 P.2d 251 (Utah 1965).

The states claim control of all water rights within their boundaries.[1]

[35] *Id.* at 305, 394.

[36] For a discussion of the lengths to which the Court might have gone with the *Allen Bradley* decision see Sovern, *Some Ruminations on Labor, the Antitrust Laws and Allen Bradley,* 13 LAB. L. J. 957 (1962).

[1] Fed. Power Comm'n. v. Oregon, 349 U.S. 435, 448 (1955).