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United Mine Workers v. Pennington,[1] *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,[2] and *Connell Construction Co. v. Plumbers & Steamfitters Local 100*,[3] establish that labor/management agreements may be protected by an exemption that derives from a subjective balancing of labor and antitrust policy. Once the statutory and non-statutory exemptions are found to be unavailable to protect an agreement from antitrust scrutiny, the courts must still determine the appropriate analysis under which the labor/management agreements are to be reviewed.

Under traditional antitrust analysis an agreement that affects trade is analyzed under one of two approaches to determine if it is an unreasonable restraint and therefore violative of the antitrust laws. The first of these is the "rule of reason" analysis in which all of the circumstances of the case, including the competitive consequences of the restraint and any justifications for it are assessed by the court.[4] The second is the "per se" analysis. Under this approach, certain types of agreements, because of their "pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[5] These agreements include such activities as concerted refusals to deal (or "group boycotts") and price-fixing arrangements.

The Supreme Court has never addressed directly the issue of

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1. 381 U.S. 657 (1965).
2. 381 U.S. 676 (1965).
3. 421 U.S. 616 (1975).
4. *See* Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).
5. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

what standard of analysis should be employed in the labor/antitrust cases where labor's exemptions to the antitrust laws are found to be unavailable. The lack of guidance from the Supreme Court on this issue has created much debate and confusion among the lower courts.

It is not yet clear whether non-exempt labor conduct is always to be evaluated under the rule of reason standard or whether either standard may apply depending on the nature of the violation alleged and the degree of judicial experience with the particular type of restraint. It is clear, however, that the courts are at least uncomfortable in subjecting labor/management agreements to the strict antitrust per se standards. The majority of cases that address this issue do not appear to apply traditional antitrust analysis. A notable exception however is the recent Fourth Circuit opinion handed down May 17th, 1982, *National Electrical Contractors Association v. National Constructors Association.*[6]

In the area of professional sports several courts have refused to apply the per se analysis to agreements arising in collective bargaining settings where the statutory and non-statutory exemptions did not protect the agreement. For example, in *Mackey v. National Football League,*[7] and *Smith v. Pro Football, Inc.,*[8] the courts considered the "unique characteristics" of the professional football industry and concluded that the challenged agreements should be analyzed not under a per se rule but under the rule of reason.

The per se approach was also considered in the collective bargaining area in a non-sports context by the Ninth Circuit in *Ackerman-Chillingworth v. Pacific Electrical Constructors Association.*[9] In that case, the court considered the appropriateness of applying the per se rule to collective bargaining agreements requiring all employers to provide negotiated insurance benefits through a designated insurance carrier. The court did not reach the issue of whether the non-statutory exemption protected the agreement from antitrust scrutiny but concluded that the alleged conduct did not constitute a per se violation of the Sherman Act.[10]

It is unclear from these opinions whether the per se analysis is inappropriate in all labor cases. In *Smith, Mackey,* and *Ackerman-*

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6. 678 F.2d 492 (4th Cir. 1982).
7. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977).
8. 593 F.2d 1173 (D.C. Cir. 1978).
9. 579 F.2d 484 (9th Cir. 1978), *cert. denied,* 439 U.S. 1089 (1979).
10. 15 U.S.C. §§ 1-7 (1976).

Chillingworth, the courts emphasized that the per se approach was inappropriate not only because of the unique nature of the markets but also because of the types of agreements considered in the cases. Specifically, the courts distinguished the challenged agreements from the "typical" concerted refusal to deal or group boycott arrangements that have been classified as per se illegal, and indicated approval of the antitrust precept that a per se rule should only be applied where the courts have sufficient experience with the arrangement in question to merit the conclusion that "the rule of reason — the normal mode of analysis — can be dispensed with."[11]

Whether these decisions are further evidence of judicial deference to the labor laws when collective agreements are challenged under the antitrust laws, or simply an application of traditional antitrust concepts is unclear. While these decisions indicate that a per se analysis will not necessarily be applied to non-exempt labor conduct, they do not compel the conclusion that the rule of reason approach should always be applied.

One resolution of these cases may be that the rule of reason standard may be applicable where the alleged restraint on competition cannot be readily characterized as a traditional type of per se restraint but that where arguably more traditional restraints are involved, such as group boycotts and price fixing, the courts may be willing to apply the traditional antitrust principles in a labor setting, even if it means the application of the more stringent per se rule.

The Second Circuit has suggested, however, that the rule of reason is the appropriate analysis although the court did not address directly the issue of whether a per se approach or rule of reason analysis should be applied in a collective bargaining setting. In *Commerce Tankers Corp. v. National Maritime Union,*[12] the court considered the limited question of whether the district court erred in finding that plaintiffs' damages were proximately caused by a wrongful injunction action, and not by an unlawful section 8(e) agreement which plaintiffs had alleged as being violative of the Sherman Act. Although the court found that the district court should have considered the antitrust claim on the merits, it rejected plaintiffs' contention that the court should find the unlawful section 8(e) arrangement non-exempt and that defendants' group

11. Smith v. Pro Football, Inc., 593 F.2d at 1181.
12. 553 F.2d 793 (2d Cir.), *cert. denied,* 434 U.S. 923 (1977).

boycott arrangement embodied in that agreement was a per se violation of the antitrust laws. The Circuit Court stated that its prior finding that the agreement violated section 8(e) did not dispose of the non-statutory exemption issue and that "even if the 'nonstatutory' exemption does not apply, there is at least a substantial question whether a per se approach under the antitrust laws is applicable in the case of a non-exempt labor activity."[13]

The court remanded the case for further consideration of these issues and indicated its preference for the rule of reason approach, quoting Professor Handler:

> This brings us to the question of antitrust liability when union activity is held to be non-exempt. The principal danger of these recent rulings is that a finding of antitrust liability will automatically be made whenever the challenged conduct is held to be non-exempt. This would be a *per se* approach with a vengeance. Arrangements may fall outside the scope of mandatory bargaining and yet have no adverse effect on competition. We still must find whether the agreement restrains trade and whether the restraint is unreasonable. A fair reading of *Jewel Tea* . . . satisfies me that the Court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust.[14]

The Second Circuit noted again without discussion or explanation its apparent preference for applying the rule of reason in *Berman Enterprises v. Local 333, United Marine Division, International Longshoremen's Association.*[15] *Berman* involved a challenge to a collective bargaining agreement between a longshoremen's union representing harbor vessel employees and a multi-employer bargaining unit which barred the towing of any vegetable oil barge of designated capacity having less than two crewmen and required affiliates of member companies to comply with the terms of the agreement. Affiliated non-member employees charged that the agreement violated section 1 of the Sherman Act. On appeal, the court stated that "even if the vegetable oil and the affiliates clauses do not fall within the labor exemption, there was no proof of an antitrust violation under the rule of reason which would be applicable here."[16]

The Third Circuit, however, has expressly rejected Professor Handler's view that there be a full-scale rule of reason inquiry in

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13. *Id.* at 802.

14. *Id.* at 802 n.8 (quoting Handler, *Labor and Antitrust: A Bit of History,* 40 ANTITRUST L.J. 233, 239-240 (1971)).

15. 644 F.2d 930 (2d Cir.), *cert. denied,* 454 U.S. 965 (1981).

16. *Id.* at 936.

every instance in which a non-exempt activity is claimed to be in violation of the antitrust laws. In *Consolidated Express Inc. v. New York Shipping Association (Conex),*[17] and *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council (Muko II),*[18] the court held that the proper method of analysis is to determine the availability of the non-statutory labor exemption separately and then to proceed with conventional antitrust scrutiny of the complaint, which may include application of the per se rule where the facts warrant its application.

Conex involved an agreement between the International Longshoremen's Association (ILA) and a group of shippers in the New York area, New York Shipper's Association (NYSA), that required that the work of consolidating cargo for container shipment be done at dockside by Longshoremen. Two employers who had been engaged in the off-dock consolidation of freight filed charges with the NLRB which found a section 8(e) violation.

On the basis of that finding, plaintiffs argued successfully that the agreement constituted a "group boycott" and was not protected by antitrust scrutiny by any labor exemption. Accordingly, the court found the arrangement unlawful per se under the antitrust statutes. The court stated that:

> The justification offered for application of the rule of reason is the need to recognize, in the antitrust context, labor's legitimate interest in the collective bargaining process. That interest, however, is precisely the same one that must be taken into account in determining the scope of the nonstatutory labor exemption. A holding that the exemption does not apply embodies a judgment that considerations of labor policy are outweighed by the anticompetitive dangers posed by the challenged restraint. The proposed use of the rule of reason would, therefore, simply be an invitation to the court or jury to reweigh under a different label the question of the nonstatutory exemption.[19]

The court in *Conex* relying on the Supreme Court's opinion in *National Society of Professional Engineers v. United States*[20] held that there was no justification for affording labor agreements special treatment once it has been found that they are non-exempt from antitrust scrutiny. In *Professional Engineers,* the Supreme Court rejected the defendant's argument that the social benefits

17. 602 F.2d 494 (3rd Cir. 1979), *vacated and remanded on other grounds,* 448 U.S. 902 (1980), *on remand,* 641 F.2d 90 (3d Cir. 1980).

18. 670 F.2d 421 (3rd. Cir.), *cert. denied,* 103 S. Ct. 229-30 (1982).

19. 602 F.2d at 523-24.

20. 435 U.S. 679 (1978).

supposedly derived from a price-fixing arrangement could be considered by the court in a rule of reason analysis as a counterbalance to the anti-competitive effect of the agreement. In *Conex* the Third Circuit reasoned that labor policy considerations could not be reviewed in determining the applicability of the per se rule once the exemption issue has been decided because, according to the court, these considerations are social or public interest considerations and do not relate to the competitive balance contemplated by the rule of reason.

The court, while applying a per se analysis, fashioned a new defense to treble damages to accommodate special labor policy considerations. The court determined that treble damage awards should not be imposed if defendants can affirmatively show that they meet the requirements of a "good faith" defense. The court reasoned that the imposition of the full range of antitrust remedies because of an unlawful agreement, but one reached in good faith and on the reasonable belief that it was lawful, was unfair and too disruptive of the goals of the national labor policy.

Thus, despite its statement that a rule of reason approach would be redundant where the court has already considered the affected labor policies in its non-statutory analysis, the Third Circuit's treble damages defense appears to be an attempt by the court to temper the results it felt compelled to reach under the dictates of *Professional Engineers* and ensure that proper consideration would be given to labor policy. Viewed in this matter, the Third Circuit's approach appears to be another attempt by the courts to accommodate the conflicting national labor and antitrust policies.[21]

In *Muko II*, the Third Circuit explicitly reaffirmed its holding in *Conex* that the proper method of analysis is to determine the issue of non-statutory labor exemption separately and then to proceed with conventional antitrust scrutiny of the complaint, including the application of the per se rule where the facts justify its application. The court acknowledged again the Supreme Court's position that "public interest" considerations, such as the advancement of labor policy, are not proper subjects for examination under the rule of reason. According to the court it is unnecessary, if not improper, to weigh "labor's legitimate interest in the collective bargaining process" twice—once in determining the labor exemption

21. The court in Feather v. United Mine Workers, 494 F. Supp. 701 (W.D. Pa. 1980), following *Conex*, denied treble damage liability where an agreement preventing coal companies from subcontracting certain work was found to violate § 8(e).

and again in deciding the antitrust liability question. The court, however, after reaffirming its adoption of this mode of analysis in the labor antitrust area, proceeded to interpret the facts before it in a manner understandable only, as the dissent candidly stated, in an approach that "must stem from its discomfort with the application of traditional antitrust rules in the labor context."[22]

In *Muko II*, Long John Silver's, Inc., (Silver's) which operates fast-food restaurants in several markets contracted with Muko, a non-union general contractor, to build its first outlet in Pittsburgh. During construction of the restaurant, two labor organizations picketed the site and urged customers of the restaurant not to patronize it because the chain used contractors who paid substandard wages. Silver's arranged a meeting with the Building Trades Councils and according to the jury's findings, entered into an agreement with the Councils to use only union contractors certified by the Councils. Thereafter, Silver's employed only unionized general contractors to build its Pittsburgh-area restaurants.

Muko filed suit against Silver's and the Councils alleging that the defendants had entered into an agreement to award the contracts for the construction of Silver's restaurants in the Pittsburgh area only to union contractors. Muko alleged that this constituted an unreasonable restraint of trade in violation of section 1 of the Sherman Act[23] and sections 4 and 16 of the Clayton Act.[24]

Following a jury trial the district court granted the defendants' motion for a directed verdict. On appeal, the Third Circuit reversed and remanded the case for a new trial in which the jury found that the defendants had reached an agreement, outside the labor exemption, to exclude Muko as a competitor for Silver's construction work. The jury concluded, however, that the agreement was not an unreasonable restraint of trade and the court entered judgment for the defendants. On appeal, the court considered whether the trial judge erred as a matter of law in instructing the jury to apply the rule of reason, rather than the per se standard, to the agreement at issue.

The principal reason relied upon by the majority for applying a rule of reason analysis is its view that the circumstances before it did not constitute a "classic" group boycott typically held to be unreasonable per se. The majority stated that *Muko* was not a case

22. 670 F.2d at 439 (Sloviter, J., dissenting).
23. 15 U.S.C. § 1 (1976).
24. 15 U.S.C. §§ 15, 26 (1976 & Supp. IV 1980).

in which a competitor, through concerted action with a supplier or customer, attempts to cut another, horizontal competitor out of the marketplace.

As noted by the dissent, the agreement in *Muko* is indistinguishable from similar agreements which have been placed in the per se category. In the trial below the jury found that Silver's had entered into an agreement with the Trades Councils to exclude Muko (and other non-union contractors) from a market. The Trades Councils are representatives of union labor and Muko, a non-union contractor, must be viewed as the representative of non-union labor, the object of the agreement not to deal.

Accordingly, as stated in the dissent, the majority's analysis is inconsistent with its own recognition that traditional antitrust principles must apply once the non-statutory labor exemption is found to be inapplicable and is inconsistent with the court's holding in *Conex*. As stated candidly by the dissent, the only explanation for this analysis is the court's discomfort with the application of traditional antitrust rules in the labor context.

In the recent case of *James R. Snyder Co. v. Associated General Contractors*,[25] the Sixth Circuit struggled with the proper accommodation between labor law and antitrust laws. *Snyder* involved allegations that a group of large employers had agreed with unions to impose a collective bargaining agreement's wage scale upon smaller non-signatory employers in an attempt to drive them out of business. The court acknowledged that if defendants had agreed with the unions to impose a wage scale upon plaintiffs, the agreement would not be exempt from the antitrust laws. The court noted, however, that denying the exemption does not mean that there is an antitrust violation. The court stated further that in order to establish an antitrust violation arising from a union's commitment to employers to establish an industry-wide wage scale, it must be shown not only that defendants and unions had agreed to impose wages upon plaintiffs, but also that defendants had entered into this agreement with the intent to injure plaintiffs' businesses, i.e., with predatory intent. Accordingly, the Sixth Circuit upheld the trial court's grant of a motion for a directed verdict because of plaintiffs' failure to establish either an agreement or predatory intent. Thus, it appears that the courts continue to incorporate labor policy considerations both in determining the exemption issue and

25. 677 F.2d 1111 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3175-76 (U.S. Sept. 21, 1982) (No. 82-148).

in establishing the prima facie elements of certain antitrust violations.

Last month the Fourth Circuit, in *National Electrical Contractors Association v. National Constructors Association (NECA)*[26] applied the traditional per se antitrust analysis to find illegal an agreement in the collective bargaining area. *NECA* involved a fund established purportedly to defray the cost that the National Electrical Contractors Association (NECA) incurred in the negotiation of area agreements that formed the basis of most electrical contracts in the construction industry. In addition, the fund was intended to be used for the general promotion of the industry. The National Constructors Association (NCA), another multi-employer association engaged in electrical industry collective bargaining, challenged the fund under the antitrust laws. The plaintiffs' complaint alleged that NECA and the International Brotherhood of Electrical Workers (IBEW) had agreed to impose the fund on all employers (whether they were NECA members or not) as a precondition of obtaining a labor agreement with the IBEW. This, the plaintiffs argued, constituted an unlawful price-fixing arrangement that had the purpose and effect of eliminating NCA members' competitive advantage over NECA employers.

The Court of Appeals held that the agreement which adds a one percent charge to all IBEW construction contracts falls within the definition of price-fixing. The court stated that taking the additional percentage of labor costs from non-NECA contractors removes a competitive advantage beneficial to the public and interferes with the market forces that set the price of electrical construction contracts, a practice illegal per se under the Sherman Act. Relying on traditional per se concepts the court held that the mere existence of a price-fixing agreement establishes the defendant's illegal purpose because "the aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition."[27] Accordingly, the court dispensed with a specific finding of anticompetive purpose and effect.

The dissent argued that the "blind" application of the per se rule against price-fixing ignores the realities of the case and constitutes an extension of the per se rule. The dissent would follow the approach in *Smitty Baker Coal Co. v. United Mine Workers*[28] and

26. 678 F.2d 492 (4th Cir. 1982).
27. *Id.* at 501 (quoting United States v. Trenton Potteries, 273 U.S. 392, 397 (1927)).
28. 620 F.2d 416 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980).

Snyder which requires that:

> To amount to an antitrust violation the agreement must be rooted in an anti-competitive purpose, and must effect an anti-competitive result, as evidenced by action 'ruining' a competitor's business or driving him 'out of business.' Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the antitrust laws.[29]

It is still unclear whether non-exempt labor conduct will be analyzed under the rule of reason or whether the courts will utilize traditional antitrust analysis including the application of the more stringent per se rule where the facts justify its application. The Supreme Court's decision in *Professional Engineers* may make it more difficult for the courts to openly consider labor policy justifications in applying rule of reason analysis to non-exempt labor conduct. Although the courts have acknowledged the limitations imposed by *Professional Engineers,* it appears that the courts are still struggling to integrate labor policy considerations in their application of the antitrust laws to non-exempt labor conduct.

POSTSCRIPT

Subsequent to the Seminar, the text of the Supreme Court's recent decision in *Arizona v. Maricopa County Medical Society*[30] became available wherein the Supreme Court rejected the notion that the per se rule must be rejustified for every industry that has not been subjected to significant antitrust scrutiny. Although courts may continue to struggle to integrate labor policy considerations in their application of the antitrust laws to non-exempt labor conduct, this decision along with the Supreme Court's decision in *Professional Engineers* will make it more difficult for those courts to do so openly.

29. *Id.* at 431-32.
30. 102 S. Ct. 2466 (1982).