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Panel Discussion

Moderator: The Honorable Ruggero J. Aldisert

Panelists: Daniel I. Booker

William C. Zifchak

Robert A. King

Harold J. Datz

Judge Aldisert: We have quite a distinguished panel. Bob King, a partner in Buchanan, Ingersoll, Rodewald, Kyle & Buerger, was a successful counsel in the first *Muko* case before our court. He is the co-author of an article, *Muko and Conex: The Third Circuit Responds to Connell*. We also have Bill Zifchak, a partner in Kaye, Scholer, Fierman, Hays & Handler, who, in addition to being a very fine practitioner, is a very fine writer. Whether one is a fine writer depends on whether one agrees with his bottom line. Next, we have Daniel Booker, a partner in Reed Smith Shaw and McClay specializing in antitrust litigation, formerly a trial lawyer of the United States Department of Justice, Antitrust Division. He was counsel to the defendant Long John Silver's and was active and co-counsel of Leonard Scheinholtz in our repeated saga that comes up every ten years in the *Fraternal Association of Steel-haulers* cases, which cases happen to get the same panel all the time. So much for life appointments on the federal judiciary. Finally, I suppose that our distinguished guest from the NLRB, Harold Datz, will act as a referee. Dan Booker will answer the first question:

You have been active for some years in your local Bar Association but have now for the first time been consulted by its Executive Director, Knute Corona, for legal advice on behalf of the Association. Corona tells you that he had arranged to hold a seminar on labor antitrust problems at a meeting room in the Hotel Independence downtown. After arranging the meeting, he realized that the Hotel Independence was non-union and he recalled that the Hotel and Restaurant Workers' Union had been handbilling the Hotel Independence. Corona is certain that many would-be participants, including some faculty, for the seminar

would not attend the program if it were held at the Independence. Since his booking at the Independence was only preliminary, Corona would like to back out and schedule the program elsewhere. He asks if there are any legal problems in doing so. What is your advice?

Mr. Booker: The problem is not entirely hypothetical. It is just the type of thing that we thought of in scheduling this seminar. The question does not give you all of the facts that you might like to have. It does not tell you anything about what those handbills that the union are distributing say. On the face of it, we have nothing but handbilling. If the handbills say what they commonly do say, namely that the Hotel Independence is not paying prevailing wages to its workers and even if they say a number of other things, in all likelihood that handbilling as a matter of labor law is likely to be legal. I think that, although it would be nice to know the facts of what the handbills say, for purposes of where you come out in this part of the problem, it does not make a lot of difference. There simply, in my view, is no proof here on which, whether or not this handbilling is legal under the labor laws, you could properly infer a "contract combination or conspiracy," which is one of the elements of liability under section 1 of the Sherman Act. Corona knows about the handbilling. He has had no contact with the union. He is making a decision purely unilaterally based upon his knowledge of all the circumstances and I think the outcome in this case would be that, as a matter of law, no conspiracy could be inferred, and no antitrust liability could exist. Whether or not there might be any remedy in the NLRB, Bill Zifchak or Harold Datz could advise you better than I.

Judge Aldisert: The problem then goes on as follows:

Corona asks you whether it makes any difference that a member of the Bar Association's Labor Law Section who happens to be counsel to the Hotel and Restaurant Workers' Union had called to complain about the proposed location of this seminar and to demand that it be held elsewhere. He said he would organize a boycott of the seminar by his fellow labor lawyers if the site were not changed. Does this make any difference?

Mr. Booker: These facts present more of a problem than the first situation as to whether they could support an inference of a conspiracy—an agreement between the union that is doing the handbilling, operating through its lawyer and possibly other labor lawyers, and the Bar Association, that the Bar Association will not do business with the Hotel Independence. The law of conspiracy in

antitrust cases, what Judge Aldisert called orthodox antitrust law, is such that I do not think there is an easy answer regarding whether there is a conspiracy on these facts. I am inclined to think that there is not. The Third Circuit and some other circuits, in some decisions that I find rather surprising over the last few years, have indicated that there may be less expansiveness to the idea of a conspiracy than had been thought to be the case even ten years ago. I am thinking, in the Third Circuit of *Friedman v. Kroger*, *Sweeney v. Texaco*, and the *Brown & Williamson* case, all of which indicate that perhaps conspiracy law is not as broad as one once might have thought. The first issue raised by the problem then, is whether one could infer a conspiracy or agreement. The word "conspiracy" in antitrust parlance, as far as I am concerned, is co-extensive with "agreement." Assume that a jury infers that there was an agreement between the union and the Bar Association not to use the hotel for its seminar.

The next question that you reach is the question that Miles Kirkpatrick addressed in his paper, that the Third Circuit addressed in *Muko*, and that has been addressed in a number of decisions in the Second Circuit and elsewhere. What is the rule of liability? Is such an agreement a group boycott subject to the per se rule within the meaning of the Supreme Court decisions in the *General Motors* case, in *Klor's v. Broadway-Hale* and in similar boycott cases? Or is there something different about this boycott that indicates that before condemning it on its face it should be considered by the court and jury. What are the real competitive consequences of it? Does this really have a competitive significance, before imposing treble damage liability, or injunctive remedies? In my view, the agreement that one might infer from this ought not be considered under a per se rule. I think that is roughly consistent with where the majority came out in the *Muko* case in the Third Circuit.

Judge Aldisert: Let us turn to the third part of the question. Without going into the ramifications of whether it be per se or rule of reason, let us add another ingredient:

Several weeks later you receive a second visit from Corona. He tells you that the Executive Committee of the Bar Association is considering adopting a policy of scheduling seminars and other Bar Association meetings only at union-organized locations. This proposal is being advanced vigorously by one member of the Executive Committee, Samuel Gompers III, Dean of the local Labor Bar. What is your advice to Corona?

Mr. Booker: That policy, if unilaterally adopted by the Bar Association and not in agreement with the union, I think is fully within the discretion of a Bar Association to do.

Judge Aldisert: How about the other members of the panel?

Mr. Zifchak: I think the Bar Association would be acting in the case as a single entity, and would not be combining with anyone. The Sherman Act would not apply. So I agree with Dan.

Mr. King: I also agree with Dan. I would mention, though, regarding the second part of the question, that if there is sufficient evidence of agreement, which I agree with Dan that there is not upon the factual situation found here, I would analyze it a little differently than Dan. I do not think I would skip directly to the question of under what standards you would judge the agreement. Instead, I would first ask whether that agreement might not be exempt from the antitrust laws. It may well be, and we do not have all the facts, as Dan pointed out. The union, in fact, has a labor dispute with the Hotel Independence in that it is attempting to organize the employees. In this case there may be a primary dispute, and an agreement in that context may well be exempt and may not be outside the exemption, so you resolve that point before worrying about what standard by which you would judge that agreement.

Mr. Datz: I would just like to raise a point with respect to part two of the question. There is a possible violation of section (8)(b)(4)(B) of the secondary boycott section of the NLRA. Assuming that the lawyer was acting as an agent of the union, the union was in effect threatening economic harm. If you view the Bar as a person separate from the hotel, and I think you would, the hotel is a primary disputant and the Bar is neutral to that dispute. Perhaps one could weave an argument that the union has threatened some sort of sanction against the Bar to force the Bar to cease doing business with the primary hotel.

Judge Aldisert: Let's proceed to the second question. Mr. Zifchak has volunteered:

You are counsel to the Independence Hotel. Its manager has contacted you about some trouble he has been having with the Hotel and Restaurant Workers' Union. He tells you that one year ago the hotel employees voted to reject any union as a collective bargaining representative. Recently, members of the Hotel and Restaurant Workers' Union have been appearing at the entrances of the hotel to distribute handbills urging persons leaving or about to enter the hotel not to patronize the hotel. The handbills

recite that the Hotel Independence pays less than prevailing wages to its workers. The handbillers talk with prospective customers who "agree" not to patronize the hotel. The manager also believes that the handbilling has had the effect of discouraging various groups, such as the Bar Association, from scheduling functions in rooms at the hotel. Can you suggest any remedies to the hotel manager?

Mr. Zifchak: Well, being a pragmatic labor lawyer, the first thing I would explore with the client would be whether or not he can work out his differences with the union, whether or not it would pay to consider negotiating a contract. Failing that, I might talk to the union's lawyer and see, if you can't work it out practically, whether or not the threat of Labor Board or antitrust litigation might make the union walk away. From a legal point of view, I think that the handbilling would be lawful primary activity, and as such clearly protected unilateral conduct under the statutory antitrust exemption. The hotel would not be entitled to an injunction by virtue of the Norris-LaGuardia Act. There would be no labor law remedy and therefore no Sherman Act remedy.

Just consider for a moment a slight twist of the facts. Suppose that the union was engaging in organizational and recognitional picketing rather than handbilling. That conduct would be regulated under section 8(b)(7) of the NLRA. By a quirk in the history of the statute similar to the hot cargo prohibition contained in section 8(e), section 8(b)(7) was added by the Landrum-Griffin Amendments in 1959. The legislative history of Landrum-Griffin is as silent as to the prospect of an exemption for organizational and recognitional picketing as it is for hot cargo agreements. It is not out of the realm of possibility to suggest that organizational and recognitional picketing are not exempt under the antitrust laws.

The only hope for a remedy in the hypothetical as written, at least under the antitrust laws, would be to construe some form of agreement between the union and the customers to boycott the hotel; because, while one could criticize the line of cases which suggest that this form of boycott is subject to the antitrust laws, those cases teach that consumer boycotts may not be exempt and indeed may even be subject to a per se rule. To me this is a perversion of the antitrust laws. But it might be possible to survive a motion to dismiss on that kind of argument.

The facts change in the second part of the question:

Is your advice any different if the hotel manager tells you that the union trying to organize the employees of the hotel's linen

supplier has been handbilling hotel patrons asking that they not patronize the hotel because it uses the services of a non-union linen supplier? Some of the hotel's prospective guests have decided in view of this handbilling to register elsewhere.

Mr. Zifchak: Harold Datz may correct me if I'm wrong, but I believe that even though you now have a secondary situation, that handbilling in question would be protected activity under the labor laws. The only other question raised, then, is whether or not the action by the hotel's prospective guests rises to the level of a concerted boycott or whether it is just consumers who are acting in parallel but without concerted action.

Mr. Datz: I don't disagree with you on the second part of the question. I think that the handbilling would be protected under the publicity proviso. As a matter of labor law however, I think that there is an interesting issue presented by the first part of the question. Let us assume that the union reached an agreement with prospective customers, for those prospective customers not to do business with the hotel. In the language of section 8(e), has the union agreed with a person for that person to cease doing business with the primary hotel? There is an interesting history behind that question. Those of you who know your section 8(b)(4)(B) law know that the word "employer" was changed to "person" in 1959 so that a union is forbidden to pressure not only neutral employers, but neutral *persons* to force them to cease doing business with a primary. However, section 8(e) reads in terms of "employer" and the Board's most recent pronouncement on the issue is that section 8(e) proscribes agreements between unions and employers whereby those employers agreed to cease doing business with primary employers. Here, the union and a *person*, a prospective customer, have reached the agreement. Thus, it would appear there would be no violation of section 8(e).

Judge Aldisert: Let me throw one to you. You mentioned the Norris-LaGuardia Act and I think that there are interesting constitutional issues abroad in the land today. We know that no one will challenge the constitutionality of the Norris-LaGuardia Act, which is a jurisdictional statute saying that the federal courts do not have the jurisdiction to issue an injunction in a labor dispute. A person can go into a state court and request an injunction and the state courts are not divested of jurisdiction. But, under the supremacy clause, the case can immediately be removed to the federal court. So, to all intents and purposes, the Norris-LaGuardia Act divorces the federal courts of jurisdiction on a very important legal ground.

With that as a background we now have before us the question of whether the federal court would be divested of jurisdiction in bus-ing cases. If Norris-LaGuardia is constitutional, why wouldn't a statute divesting jurisdiction in busing cases from federal courts be constitutional? Have you labor lawyers thought about that?

Mr. Zifchak: Not today.

Judge Aldisert: I found it interesting that some of the scholars that have commented on anti-busing are also labor scholars and I am just wondering what hat they wear.

Mr. Booker: The first part of question number two, as Harold pointed out, raises the question of application of section 8(e) to consumer boycotts. A consumer is not an employer and therefore section 8(e) does not apply. Independently under the antitrust laws, of course, there is a question about the extent to which consumer boycotts are illegal. And I think generally speaking the law is that a consumer boycott will not be considered to be per se illegal.

Judge Aldisert: Let's proceed to problem three. Bob King has volunteered for this one:

In downtown Pittsburgh, a number of shoeshine men, formerly typically employed in barbershops, have begun to circulate in major office buildings, traveling from office to office to shine shoes. They have charged anywhere from a quarter to a dollar for a shoeshine. You now read in an inside page of the local paper a short story reciting that problems have arisen among the shoeshine men, who find that several men may be covering the same building and charging different prices. The story recites that these men have now formed themselves into a group known as the Pittsburgh Brotherhood of Shoeshiners. The Brotherhood will establish specific buildings or floors to be covered by each member and has announced that "each member will expect a wage of fifty cents for each shine." Over lunch, one of your colleagues mentions the story and asks whether the PBS is legal. What do you think?

Mr. King: The PBS is legal but I think the question is, what is the effect of their agreeing to expect this wage of fifty cents? In analyzing the problem from an antitrust standpoint, the first thing you have to look at, if you remember section 1 of the Sherman Act, is that every contract combination in the form of a trust or otherwise or conspiracy in restraint of trade or commerce among several states is illegal. Commerce among several states is one of the predicates for a cause of action under the Sherman Act. I think you

would have to analyze the problem first to find out if this activity is local in nature, and whether interstate commerce is involved. It must be determined how much shoe polish these guys buy from out of state and whose shoes they shine at the airport.

Assuming you can find that interstate commerce is involved, I would analyze the problem from the standpoint of whether these shoeshine boys are independent businessmen or whether they are employees. Some of the factors that you should consider would include the *Milkwagon Drivers* case as well as *United States v. Meat and Provision Driver's Union*. In this regard I think you could find a distinction as to whether these shoeshiners have any supervision imposed upon them by their employers. In the factual situation they are no longer employed by the barber shops. Whether they are in competition with any unionized employees who also belong to this particular brotherhood of shoeshiners must be determined in order to come to a conclusion one way or another. I think that from the factual situation you would find that they are independent businessmen, in which case there are no labor considerations involved and the agreement is merely an agreement or conspiracy to fix the price of a shoeshine in Pittsburgh. As such, the agreement would be subject to and violative of the antitrust laws. You wouldn't have to worry about the labor exemption.

Assuming you had the requisite interstate commerce question involved and one of these fellows was cut out of the U.S. Steel Building and got put down across the street in the Porter Building and he did not like that very much and brought suit, he would have standing for his suit. That would be the way that I would analyze this problem since there were prices being fixed, that is, the price of shining shoes. I think that the Supreme Court would find that a per se violation.

Judge Aldisert: I have been trying to think for some years of a situation in which a court in this circuit would not find that the interstate commerce requirement had been satisfied. This may be it. The Third Circuit is hawkish, in terms of the scope of the interstate commerce element of the Sherman Act and it is extremely difficult to think of a situation in which it might not apply. I think it comes down to, you breathe the air and that air goes over state lines and that is an effect on interstate commerce. Read my dissent in the ABSCAM case on this. One point that I think this raises is that there is no Pennsylvania state antitrust law statute. Pennsylvania is the only, or one of two, of the states in the union that does not have a general antitrust provision. If there is no interstate

commerce, you are out of luck.

Let me add on to this another personal experience. I was in Poland at the time the star of Solidarity was on the rise, and you may recall that Lech Walesa applied for a charter for Solidarity, his own labor union. Under the statutes and Constitution of Poland, a labor organization had to be approved by the Supreme Court of Poland, and the union eventually was approved. Three months later, shortly before I got into Poland, the farmers had attempted to organize but the farmer's application for a labor charter was turned down by the Supreme Court on the grounds that farmers are individual proprietors. Farmers are excepted from the general rule of the Polish Socialist economy and are permitted to own their own farms. Two months later, the farmers applied for another charter on the theory that they were an association of independent proprietors and the Supreme Court gave them a charter. I say this in the context of the Polish People's Republic prior to the invocation of martial law in December of 1981. This whole Solidarity movement, in addition to the blue collar aspects of organizing the labor people, was a countrywide movement to get the rule of law. The lawyers who were supporting Solidarity were very brave men, and they were supported by academia. They were insisting that the high sounding platitudes of the Polish Constitution and the statutes regulating organized labor be respected. Unfortunately the whole thing is not only on hold but it's pushed back, perhaps a complete decade.

Let's turn to the Ironworkers Union question:

The Ironworkers' Union in Erie demands in collective bargaining with employers of its members that the employers refuse to bid upon or to accept a contract for jobs for which the general contractor is a firm that has refused to sign a wage agreement with the Ironworkers. You are consulted by an association of general contractors who have never employed ironworkers. What advice do you give?

Mr. Booker: As I read it, it occurs to me that maybe the problem as written is a little bit dense. See if I can say it another way. The Ironworkers Union has contracts with ironworking subcontractors. It has demanded and extracted from those subcontractors agreements that they will not accept contracts from general contractors who have refused to enter into an agreement with the ironworkers. Some of these general contractors have contracts with the ironworkers, because they employ ironworkers, and some of them, like the employer in *Connell*, had no possible collective bar-

gaining relationship with the union because they never employ ironworkers. This is the opposite of *Connell*, or a variation of the *Connell* question. My conclusion is, and it is a little easier to reach since the Supreme Court decided *Woelke & Romero Framing, Inc. v. NLRB* several weeks ago, that the exemption from antitrust laws for labor activity precludes the imposition of any antitrust laws to this agreement. It does that because the agreement is secured within a labor context, when it is within a collective bargaining context. I am not entirely comfortable with that conclusion, notwithstanding the safe harbor rule that I mentioned in the introduction. It seems to me at least possible, regarding the general contractors who have no collective bargaining relationship with the ironworkers, that this agreement might, and I raise that as a question for Mr. Zifchak and Mr. Datz, be illegal under the labor laws. If it is, then perhaps there is some room for antitrust liability.

But it seems to me, a lesson of this problem is that in all likelihood there is no antitrust liability, yet you have precisely the same types of competitive effects resulting from this agreement as you had in the *Connell* case. It is illustrative of Bill Zifchak's point that it does not make sense in some important ways to make the determination of whether or not the labor exemption from the antitrust laws applies turn upon whether the agreement is legal or illegal under the labor laws, because the competitive effects of the conduct are precisely the same.

Mr. Zifchak: I agree with everything Dan said. I think that making distinctions in the labor exemption based upon the technical niceties of section 8(e) does not get you anywhere from an antitrust perspective, because the market impact of hot cargo agreements is the same. Although on the one hand, a work preservation agreement might be considered fair and lawful under national labor policy, whereas a work acquisition agreement would be considered unfair and hence unlawful, the market effect of each agreement is identical. One of the problems I had with Mr. Lipsky's earlier talk, was his suggestion that in the *Consolidated Express* litigation the union was getting involved in direct market restraints, that is, trying to foreclose non-union consolidators from working with the longshore industry, performing stuffing and stripping. While the union was gaining in a traditional sense from these market restraints, it seemed to Mr. Lipsky that this should be contrary to antitrust policy. I made the point to him after his talk, that it seemed to me that whenever a union is trying to organize any employer and trying to spread its membership and jurisdic-

tion, it is doing precisely that, imposing market restraints, and if you assume that the goal of organization is lawful, then any fallout from union conduct that indirectly or directly affects commercial competition is one of the prices we have to pay for our national labor policy. The union's tactics, if at all, should be regulated under labor law.

Mr. Datz: I do agree with Dan. However, I would like to make one point. I don't think that *Woelke & Romero* answers the question. In *Woelke & Romero*, the Court's opinion dealt with legislative history of the section 8(e) amendment of 1959. In that legislative history, certain Senators said that whatever was legal prior to 1959, they intended to continue to make legal in the construction industry by virtue of the construction industry proviso. In light of this, the Court dealt with what kind of contracts existed in 1959 and it turned out that there were contracts of the kind involved in *Woelke*, i.e., a contract between the union and the general contractor whereby the general contractor agreed to do business only with union subcontractors. Those kinds of agreements were around in 1959 and therefore Congress intended to preserve their legality by passing the construction industry proviso to section 8(e).

The hypothetical question posed here involves a different kind of agreement. It concerns an agreement between a union and a subcontractor that the subcontractor will not accept contracts from union general contractors. I rather doubt that such clauses were around in 1959 and if they were not around in 1959 maybe the court would reach a different result. I think I agree with Dan as to the ultimate answer, but I am not sure that *Woelke* covers the point.

Judge Aldisert: All right now, let us move on to the next problem. I thought that discussion was very important. I think that the constant emphasis by Mr. Datz on the construction industry proviso must be the polestar because this is a statutory limitation and it does not apply to all aspects of organized labor. Let us go to the sixth problem:

The three major department stores in your town are Thomas', Richards' and Harris'. The three stores historically have bargained as a multi-employer unit with the Retail Clerks' Union. In recent years, however, Harris' has had significant financial difficulties and has now withdrawn from the multi-employer bargaining group. It has announced its intention to seek substantial wage concessions from the union, and the unions have indicated some openness to this possibility. You represent Thomas' and Richards'

in negotiations with the union. They wish to secure a promise from the union that it will not reach any more favorable wage agreement with Harris' than with them. What, if any, agreement do you try to negotiate with the union?

Mr. Zifchak: Again, to approach the problem from a practical point of view before getting to the law, you might attempt to persuade the union to bargain with Harris' first before making an agreement with you, thereby avoiding any possible problem under *UMW v. Pennington*. However, I assume that the union would rather talk with you first, because they are more likely to get a better deal from you, since you're not the employer seeking concessions. They quite likely would be fearful, as for example in the automotive industry, that proceeding first with the weak employer would have some undesirable impact on contracts with the more prosperous employers.

In any case, I think the hypothetical as written is looking for some form of most-favored-nations clause. Here again we have the bizarre situation that collectively-bargained restraints with identical market impact may suffer different fates under the antitrust laws. The case law since *Pennington* has made it reasonably clear that a most-favored-nations clause, by which an employer or group of employers agrees with the union that whatever the union negotiates subsequently with another employer or another bargaining unit will rebound to the benefit of the first employer or group of employers by way of a revision in terms and conditions under the labor agreement, would be exempt, assuming no predatory intention, despite *Pennington*. Yet the form of agreement in *Pennington*, where you have employers number one and number two agreeing with the union that the union will seek identical terms and conditions of employment from a third employer is not exempt, even though the market impact of the agreements is the same. When all is said and done, all three employers will wind up with the same terms and conditions of employment. Actually this is a situation where the argument based on market impact works against me, because I suppose I should argue that the most-favored-nations clause should be illegal under *Pennington*. That's one good reason you would try and avoid the situation in a practical manner by trying to persuade the union to make its peace with the healthy employer before dealing with you.

A sample most-favored-nations clause that you might consider using is found in the *Dolly Madison Industries* case. That NLRB case concerned a clause, which I'll paraphrase, which the Board

not only held to involve a mandatory bargaining subject, but which also was not, in the Board's view, subject to antitrust under *Pennington*. The clause might read something like this: "Should the union at any time hereafter enter into an agreement with any department store operating within the Pittsburgh area served by the employer, with terms and conditions more advantageous to such department store, or should the union in the case of any department store which has signed this form of agreement countenance a course of conduct by such company enabling it to operate under more advantageous terms and agreements than is provided for in this agreement, the employer, party to this agreement, shall be privileged to adopt such advantageous terms and conditions provided the employer has sent written notice to the union calling the matter to its attention." I think it is reasonable safe to say—it is tough to say anything safely in this field—that this kind of clause, absent predatory intention, would be exempt. Now to the second part of the hypothetical:

In the course of preparing for collective bargaining, Thomas' advises the representatives for Richards' that it is planning to shorten its work hours by remaining open late at the downtown store only one night during the week, rather than the historical two nights. Richards' agrees that this is a wise decision and says that it would like to do the same if possible; but it anticipates resistance to the change by the union. Thomas' then advises the union of this proposed change in its work hours. The union is unhappy about these shortened work hours and wishes to negotiate a promise by Thomas' and Richards' to operate at least two evenings each week. You are counsel for the Retail Clerks' Union. What position, if any, do you advise the union to take concerning Thomas' decision to shorten work hours?

Mr. Zifchak: This part of the hypothetical, at least it is my impression, is more straightforward. You are advising the union at this point. The facts smack of the *Jewel Tea* situation. In fact if this were a final exam I would be relieved to see this question because *Jewel Tea* would strike an obvious note. The union would be in a position to insist, under the circumstances, that the commercial hours are identical with the working hours of the union members. As such, the marketing hours are a mandatory bargaining subject. The union is free to bargain to impasse and any resulting agreement would probably be exempt under *Jewel Tea*.

Judge Aldisert: Let us move on. Bob King has volunteered to respond to question number six:

Suppose the Thomas' and Richards' Department Stores bargain collectively with the Retail Clerks' Union, but that Harris' engages in collective bargaining with a different union, the Fraternal Association of Retail Employees. FARE has in the past negotiated wages with Harris' somewhat below the wages negotiated by the Retail Clerks' Union with Thomas' and Richards'. Thomas' and Richards' have complained about this on several occasions to the Retail Clerks' Union. As a result of these complaints, the Retail Clerks' Union has met with FARE and persuaded FARE to negotiate for the same wage and benefit levels enjoyed by the Thomas' and Richards' employees. You are counsel for Harris'. What is your advice?

Mr. King: Counsel for Harris' would probably approach the problem as follows: As we discussed before, the first thing you have to determine is whether there is an agreement. That agreement need not be in writing, it may be proved by circumstance. I think from this, at least from the statement of facts given here, there could be an inference, *Sweeney v. Texaco* notwithstanding, that Thomas' and Richards' have requested the Retail Clerks' Union to act on their behalf and that the Retail Clerks' Union has done so for the benefit of Thomas' and Richards'. The Retail Clerks requested and obtained an agreement from FARE that it will limit its discretion in negotiation with Harris' to the point where it will negotiate only the same wage levels and benefit levels that the Retail Clerks have negotiated with Thomas' and Richards'.

Now you might be able to argue that this is an exempt agreement. You could come up with an argument, possibly, under *Connell*, to the effect that the agreement that was reached among the unions was only to eliminate competition over wages and working conditions and not to eliminate competition that may exist between Thomas', Richards', and Harris' based on items other than competition over wages and working conditions. But the manner and method of achieving that agreement is still possibly subject to antitrust scrutiny, and you would have to look at the concern that was expressed in *Pennington* that the discretion of FARE has been limited to the extent that it did not freely negotiate on the behalf of its members with Harris' and that it has limited that discretion solely for the benefit of Thomas' and Richards'. If that is correct, then those business groups, by combining with the labor unions, are able to fix prices and to buy up markets, and it would have been little more than a futile action for Congress to prohibit price fixing by business groups if Thomas' and Richards' is able to do

this indirectly. These would be the problems that I would see in this particular question.

Mr. Booker: In an antitrust context the first thing that you always look for when you are trying to determine whether there is liability in the great bulk of cases is whether there is a conspiracy. In order for there to be a conspiracy or agreement you have to have two parties. An interesting, I think, variation of that theme, is the search for two parties presented by this problem. First you should question, is there a conspiracy as a result of the complaints from—I like to call them the Tom, Dick, and Harry department stores—Tom and Dick to their union and then further, as a consequence of the discussions between the union they deal with and a second union. If there is a conspiracy that can be inferred from those facts, then I think you would have a *Pennington* type case here and a possible antitrust claim. Surely the facts would support a finding of agreement between the two unions. But for antitrust liability, you must find an employer as party to the agreement. If you are not willing on these facts to infer any agreement by the employer, then, as among the two unions there is no violation, in view of section 6 of the Clayton Act which says that workers can join together for their mutual benefit in terms of wages, hours, and working conditions. Although you have two separate entities, unions, separately incorporated and so on, nevertheless it is inconsistent with section 6 to permit an inference of a conspiracy to be based upon cooperation between two unions. That is an argument that I am not aware has been discussed in any case. I raise it tentatively but I think that it is a feature of the analysis of the conspiracy question in the labor field that should be commented upon.

Mr. Zifchak: Another argument could run as follows: You may recall language from the *Hutcheson* case to the effect “so long as the union does not combine with non-labor groups.” Another union is not a non-labor group, it is a labor group. I think you would have an argument that any agreement between the two unions would be protected by the statutory exemption as set out in *Hutcheson*.

Mr. King: I have also been assigned to address the next question. This hypothetical probably has two of the most difficult problems. They’re both questions I think that are going to be in front of the Supreme Court or are presently in front of the Supreme Court right now:

Four general contractors who operate in Western Pennsylvania have successfully resisted efforts to organize their carpenter em-

ployees for collective bargaining purposes. The contractors, after a meeting of the Western Pennsylvania Right to Work Coalition, of which they are each members, agree among themselves to pay no more than twelve dollars an hour to their carpenter employees. You are counsel to the Carpenters' Union and have been consulted by a carpenter employed by one of these contractors who has been unable to negotiate for himself a wage rate higher than twelve dollars per hour. His problem has been brought to you by a business agent for the Carpenters' Union. What do you advise the carpenter about his remedies and what advice do you give the business agent?

Mr. King: Well, I think in this case you have the agreement among four contractors. There is no indication that they are members of any kind of multi-employer unit. They've attended a meeting of the right-to-work group, but that group apparently, at least on these facts, does not represent them in bargaining and it's a non-union situation. In any event, as such I don't think that you would find that the labor exemption would be involved at all. The agreement is among non-labor groups exclusively. There is no labor exemption involved in that agreement. The main problem as I see it, involves questions of standing and the question of whether this type of agreement is even included within the scope of the antitrust laws. There is no apparent intent from this agreement to affect any business market. It appears to be a pure and simple labor dispute or an agreement affecting a labor market itself, as to what you will pay your non-union carpenters. But anticompetitive effect even in the labor market may be subject to the antitrust laws.

With respect to standing, I think you have to analyze it both from the standpoint of the employee and the union because I think there are two different considerations that are involved. From the standpoint of the employee, the Clayton Act provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws has a right to sue. The question is, is the loss of employment or his inability to negotiate a wage, injury to business or property? You look at *Nicholas v. Spencer International Press* and our Third Circuit case, *International Association of Heat and Frost Insulators*, where the court has analyzed, with respect to employees of the contractors who have engaged in alleged illegal antitrust agreements, whether that plaintiff-employee is within the target area of the economy which is endangered by the anticompetitive conduct. In this case the em-

ployee-carpenter or carpenter-employee is affected by the anticompetitive conduct. He is not able to negotiate a wage in excess of twelve dollars. The incentive for any other carpenter at least to become employed or to engage in that livelihood is somewhat limited by the fact of the amount that they will pay. So, if you look at it from that basis and utilize those cases, I think you could come to the conclusion that the employee, at least, has standing to bring an antitrust action. The recovery which the employee may obtain would not be speculative, that is, the court could allocate the losses since the profit margin the contractor may get is not dependent upon the wages he pays and the employee himself does compete with others for the work.

From the union standpoint however, I don't think that you can come to the conclusion that the union, under these circumstances, has standing. The reason I say that, and I'm sure there is disagreement on this point, but under these circumstances the union has already lost, apparently, in an attempt to organize. If the agreement related to the ability of the union to organize then maybe the union would have standing to bring the action, but since the union has lost the election and there's no indication that the agreement among the contractors affected the union's ability to organize the employees before they lost the election, I think that it would be fairly speculative to permit the union to have standing in this particular case. That's the position which the government has taken essentially in the *AGC of California* case in which they say that the union should not be granted standing in that case because damages may be speculative and difficult to prove, there is serious risk of duplicative recovery, and there exists another class of plaintiffs more suited who have been clearly injured—that being the union subcontractors who have been cut out of the market in the *AGC* case.

Another factor involved, even if you give the union standing, is whether as a matter of law it can allege facts of damage, a necessary requisite for stating a cause of action. Again, the agreement was reached after the union lost its opportunity to organize and there is no indication in these facts that the agreement affected the union's ability to organize.

Finally, assuming that there is standing, and that the union and/or the employee can satisfy the fact of damage element in the antitrust cause of action, by what standards should the agreement be judged? Miles Kirkpatrick spoke this morning of the *Maricopa County* case that was recently decided and I think if you read that

case closely you will find that the Supreme Court has reaffirmed the per se rule, especially with respect to maximum pricing or maximum cost, essentially because it discourages entry into a market. For that same reason, I think that you would find that the per se rule would be applied here.

Judge Aldisert: Bill Zifchak will address today's final question:

You are counsel to one of four automobile manufacturers about to enter into collective bargaining with the United Auto Workers. Although the bargaining is done separately for each company (there is no multi-employer bargaining unit), it has become customary for the automobile manufacturers to consult with each other concerning the upcoming bargaining. Your client has been asked by the other manufacturers to agree that whatever concession one manufacturer makes to the union in bargaining all manufacturers will make. What is your advice? Should your client agree to this request?

In bargaining with the UAW for concessions based upon poor business conditions and inability to compete with imports, the union insists that any concessions be reflected in lower prices for automobiles. The union advises that if it extends concessions to other manufacturers it will likewise insist that the concessions be passed on to consumers in the form of lower prices. Your client is inclined to agree with this demand from the union but wishes to discuss it with the other manufacturers. What is your advice?

Mr. Zifchak: This hypothetical came out of some actual practical questions that were raised during the concession bargaining in the automotive industry a few months ago. As Len Scheinholtz' speech this morning made obvious, this is one of the developing, really interesting areas of labor-antitrust law, certainly for a management attorney. Basically here you have the question whether or not one manufacturer should agree with another that whatever the first employer agrees on with the union, the second should agree that he will give the same to the union. I think the answer, my advice, would be not to agree. I'll give you a real example. Two of the automobile companies considered agreeing that if one company committed itself, in bargaining with the UAW, to equality of sacrifice in its non-union sector, that is, any union concessions would be reflected in matching non-union sector concessions, then the other company would agree likewise with the union. It seems to me that would be a non-exempt agreement between two competitor employers. This is not a multi-employer bargaining unit. The question arises, who would bother to challenge that kind of restraint?

Obviously it would be very unlikely that the non-union employees would challenge it. However, the podiatrists are one of the more litigious organizations, and if for example one employer agreed with the union that he would take away the podiatry benefits of his non-union employees and the other company would have agreed to do likewise, the podiatrists would have standing to challenge the restraint.

The second part of the hypothetical is also something that was in the papers back in February. General Motors and the UAW tentatively agreed that any concessions granted by the union would not benefit GM directly but would be passed through to consumers in the form of lower car prices, dollar for dollar. The question arose whether or not this agreement was exempt, or whether it was unlawful under the antitrust laws. When you think about it, it is not exempt, because the union and GM are agreeing on a non-mandatory bargaining subject, to wit, a component of the price of automobiles, rather than labor. In *Pennington* and *Jewel Tea*, Justice White made it clear that agreements on prices were not exempt. Then there is the question whether or not it would be a per se price-fixing agreement. You could argue based on some recent Supreme Court opinions that because of unique circumstances in the industry it is not per se unlawful.

Who would be injured by this kind of an agreement? Suppose that the labor cost component of an automobile is greater for GM than it is for Ford. Then let's suppose further that GM knows this and thus knows that any concession it would get from the union and pass on in the form of a price reduction would be of greater benefit to it than a comparable act by Ford. Ford as a practical matter nevertheless would feel compelled to lower its car prices to remain cost competitive with General Motors. Ford in that situation would be suffering economic injury, and could perhaps argue that GM concocted the concession pass-through as a way of gaining an edge on Ford.

It seems to me that even price-fixing agreements designed to lower prices to consumers have been held to be per se violative of the Sherman Act. And while the Antitrust Division might not prosecute you, that's one problem. The second problem is, if you look at *Pennington* and *Jewel Tea*, Justice White made clear—and it's one of the few clear things in those opinions—that agreements on price might benefit the union indirectly, but that wasn't sufficient to make prices a subject of compulsory bargaining. Agreements on non-mandatory subjects are today not exempt from antitrust.

Judge Aldisert: The hour has arrived that we must thank the panel, Bob King, William Zifchak, Daniel Booker, and Harold Datz. I think it has been very stimulating. I want to again commend those who planned this seminar today and also commend those who dreamed up these hypotheticals.