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Labor Law -- Antitrust Liability of Labor Unions -- Connell Construction Co. v. Plumbers Local 100

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reasonable nexus to matters within the SEC's jurisdiction under other provisions [of the Holding Company Act]."[118]

Therefore, the interpretation given to matters which the SEC must investigate in the "public interest" when considering an authorization to issue securities is congruent with the interpretation given the phrase in the FPC's domain. Accordingly, it does not appear that the securities of holding companies will have any great advantage, if any advantage at all, over the securities of operating companies. What does seem to follow from the decision in *Gulf States Utilities* is that public utilities (and holding companies) will be more reticent about contravening the antitrust laws since it may jeopardize their ability to raise necessary capital.

CONCLUSION

In summary, it is submitted that the Federal Power Commission took an antiquated view of its responsibilities when it ruled that the Cities' antitrust claims were irrelevant under a section 204 proceeding. When the Cities alleged that Gulf States was engaging in anticompetitive conduct, the FPC should have reconsidered its 1962 decision in *Pacific Power & Light* and should have brought itself in line with the Supreme Court's decisions affecting other administrative agencies dealing with similar matters. Thus, the decision in *Gulf States Utilities* brings the FPC up to date and establishes a standard for section 204 proceedings which is in conformity with the current conception of the "public interest."

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Labor Law—Antitrust Liability of Labor Unions—*Connell Construction Co. v. Plumbers Local 100.*[1]—Plaintiff, Connell Construction Co. (Connell), a general contractor in the construction industry in Texas, initially instituted this suit against defendant, Plumbers Local 100 (the Union), in Texas state court, alleging that picketing by the Union of Connell's construction project for the purpose of forcing Connell to sign an agreement not to employ nonunion subcontractors violated the antitrust laws of Texas.[2] The Union re-

[118] Id. at 956.

[1] 483 F.2d 1154, 84 L.R.R.M. 2001 (5th Cir. 1973), cert. granted, 42 U.S.L.W. 3631 (U.S. May 14, 1974).

[2] Tex. Code Ann. §§ 15.02-.04. The text of the proposed agreement was as follows:

> WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor Management Relations Act;
>
> WHEREAS, it is understood that by this agreement the contractor does not

moved the case to the United States District Court for the Northern District of Texas and Connell amended its pleadings, alleging that the proposed agreement and picketing to obtain it not only violated the antitrust laws of Texas, but also violated sections 1 and 2 of the Sherman Act[3] as an illegal restraint of trade.

After trial, the district court rendered judgment for defendant Union,[4] finding: the subcontractor agreement is authorized by the construction industry proviso of section 8(e) of the National Labor Relations Act;[5] picketing to secure the agreement is not unlawful since the agreement is so authorized; and, being authorized by Congress, such an agreement does not violate federal antitrust laws.

On appeal, the Fifth Circuit, affirming the lower court decision, HELD: the Union did not lose its exemption from the antitrust laws since no conspiracy to restrain trade between the Union and a non-labor group had been shown[6] and the agreement furthers legitimate union interests in seeking to eliminate competition based on differences in wage and labor standards.[7] The court refused to decide whether the Union's picketing and the subcontractor agreement were unfair labor practices on the ground that doing so would usurp the jurisdiction of the National Labor Relations Board.[8] Further, the court stated that such a determination would be immaterial to the antitrust inquiry since "legitimate union interest" is not controlled by the legality of the activity under the labor laws.[9] In a lengthy dissent, Judge Clark stated that the Union engaged in a

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grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and

WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms:

THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of the construction, alteration, painting or repair of any building, structure or other works, that if the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current, collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

483 F.2d at 1156-57 n.1, 84 L.R.R.M. at 2002 n.1.

[3] Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (1970).

Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U.S.C. § 2 (1970).

[4] 78 L.R.R.M. 3012 (N.D. Tex. 1971).

[5] 29 U.S.C. § 158(e) (1970).

[6] 483 F.2d at 1165, 84 L.R.R.M. at 2008.

[7] Id. at 1167, 84 L.R.R.M. at 2010.

[8] Id. at 1169, 84 L.R.R.M. at 2012.

[9] Id.

secondary boycott and that this violation of the labor laws resulted in a restraint of trade constituting a violation of the Sherman Act.[10]

The continuing clash between the antitrust laws, designed to preserve a competitive business economy, and the labor laws, which serve to foster union organization and collective bargaining to better labor conditions and to promote industrial peace, has generated legislative and judicial attempts to accommodate these conflicting national policies. The present case, in its attempt to interpret labor's exemption from the antitrust laws, serves to illustrate that the courts and Congress have done little to establish cohesive and clear approaches to accommodate or reconcile the conflict. In the *Connell* case, the Fifth Circuit has attempted to resolve some of the ambiguities created by prior judicial determinations regarding the antitrust liability of labor unions and to effectuate congressional intent in regard to the balance of interest between labor and management. More specifically, the court has interpreted two Supreme Court decisions, *Meat Cutters Local 189 v. Jewel Tea*[11] and *American Fed'n of Musicians v. Carroll,*[12] as permitting an antitrust inquiry even in the absence of a viable claim of conspiracy. This note will examine the history of the application of the antitrust laws to union activity, the ambiguities resulting from the Supreme Court's reexamination of the labor-antitrust issue in the last ten years, and the implications of the Fifth Circuit's interpretation of the current state of the law in this area.

In the early years after passage of the Sherman Act, the antitrust laws were broadly applied to union activity under rulings that condemned virtually every collective activity of labor as an unlawful restraint of trade.[13] Indeed, more actions were instituted against labor than against capital combinations.[14] The congressional response was the enactment in 1914 of sections 6 and 20 of the Clayton Act,[15] designed to protect labor unions from antitrust liabil-

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[10] Id. at 1179, 84 L.R.R.M. at 2020 (dissenting opinion).

[11] 381 U.S. 676 (1965).

[12] 391 U.S. 99 (1968).

[13] See Loewe v. Lawlor, 208 U.S. 274 (1908). For extensive analyses of labor's liability under the antitrust laws before 1940, see Barnes, Unions and the Antitrust Laws, 7 Lab. L.J. 133 (1956); Berman, Labor and the Sherman Act (1930); Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955); Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L.J. 14 (1963).

[14] See Winter, supra note 13, at 31.

[15] Section 6 provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1970). Section 20 provides:

ity by specifically excluding labor as an article of commerce and drastically limiting the injunction power of federal courts in labor disputes. The impact of this labor charter of antitrust immunity was severely restricted by the Supreme Court's 1921 decision in *Duplex Printing Press Co. v. Deering,*[16] which narrowly interpreted sections 6 and 20 of the Clayton Act as protecting only the existence and *lawful* activities of union organizations and preventing application of the antitrust laws only to a labor dispute between employees and their immediate employer. In *Duplex,* the Court found union use of secondary boycotts and sympathetic strikes outside the purview of these sections and thus not immunized from the antitrust laws.

In 1932, Congress clarified the policy which had been expressed in the Clayton Act, but had been frustrated by the courts in cases such as *Duplex;* through enactment of the Norris-LaGuardia Act.[17] This Act, striking directly at the *Duplex* decision, clearly limits the equity jurisdiction of federal courts in cases involving or growing out of labor disputes, whether or not between employees and their immediate employer,[18] and defines a public policy designed to pro-

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That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law . . . .

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; or from attending at any place where such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such a dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; or shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

29 U.S.C. § 52 (1970).

[16] 254 U.S. 443 (1921).

[17] 29 U.S.C. §§ 101-15 (1970).

The purpose of the bill is to protect the rights of labor in the same manner Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. L., 738), which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.

H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932).

[18] The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c) (1970).

mote collective bargaining.[19] Three years later, in the Wagner Act,[20] Congress created substantive rights for employees and established the National Labor Relations Board to handle labor management disputes, again emphasizing its intent to limit judicial involvement in labor policy.[21]

The first major case involving antitrust allegations against labor union activity following enactment of the Norris-LaGuardia Act was the 1940 case of *Apex Hosiery Co. v. Leader.*[22] The union had seized and occupied the company's plant in an attempt to obtain a closed-shop agreement, causing substantial damage to plant property and preventing orders from being filled from plant inventory.[23] The Supreme Court held that restraints of trade are not proscribed by the Sherman Act unless union activity is directed at control of the market with the intent to restrain commercial competition.[24] Although *Apex* did not expressly apply the Norris-LaGuardia Act, the Court recognized that elimination of price competition based on differences in labor standards is the objective of any national labor organization. The Court stated that such restraint on labor market competition does not result in the kind of curtailment of price competition prohibited by the Sherman Act.[25] Thus, *Apex* seems to have foreshadowed substantial union emancipation from the Sherman Act, but did not clearly articulate an exemption since antitrust liability still attached to union activities that intentionally affected or restrained commercial competition.[26]

One year after *Apex,* the Supreme Court in *United States v. Hutcheson*[27] expressly recognized and applied the Norris-LaGuardia Act and congressional intent to reestablish the broad labor union exemption from antitrust initially established by the Clayton Act. The *Hutcheson* case arose out of a work-jurisdiction dispute between rival unions in which one union engaged in primary and secondary activities, directing strike activities against the employer's product as well as against the employer and independent contractors who were working on the employer's property.[28] Reading the Sherman Act together with the Clayton Act and the Norris-LaGuardia Act, the Court reasoned that, since the union's conduct could not be enjoined under these Acts, it was also immune from antitrust

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[19] 29 U.S.C. § 102 (1970).

[20] 29 U.S.C. §§ 141-68 (1970).

[21] See Keyserling, The Wagner Act: Its Origin and Current Significance, 29 Geo. Wash. L. Rev. 199 (1960).

[22] 310 U.S. 469 (1940).

[23] Id. at 482.

[24] Id. at 513.

[25] Id. at 504.

[26] See Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965).

[27] 312 U.S. 219 (1941).

[28] Id. at 227-28.

attack.[29] The Court described labor's qualified exemption from the antitrust laws in terms that clearly prohibited the intervention of any judicial notions of the proper balance in the industrial struggle:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under section 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[30]

In 1945, the Supreme Court gave content to the *Hutcheson* exception concerning combination with non-labor groups in *Allen Bradley Co. v. Local 3, IBEW*.[31] The union in this case had obtained closed-shop collective bargaining agreements from local electrical contractors and local manufacturers of electrical equipment. The contractors agreed to buy only from manufacturers having current collective bargaining agreements with the union and the manufacturers agreed to sell only to contractors having current collective bargaining agreements.[32] In this suit by manufacturers who had been excluded from the market, the evidence showed that the manufacturers, contractors and union jointly participated to fix prices and that the union, through picketing and boycotts, provided a sheltered market by excluding nonunion operations. The Court recognized that the union's activities that contributed to the combination's purpose fell squarely within the protection of the Clayton Act and thus would have been immune from the Sherman Act, despite resulting product market restraints, if the union had acted alone.[33] The Court stated that the immunity was lost when unions combined with business groups to create business monopolies and control the marketing of businesses and services.[34]

For twenty years, neither Congress nor the Supreme Court disturbed labor's antitrust exemption as formulated in *Hutcheson* and *Allen Bradley,* and immunity was provided so long as a union acted in its self-interest and did not combine with non-labor groups to create monopolies or control markets.[35] The Court in *Hutcheson*

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[29] Id. at 231.

[30] Id. at 232.

[31] 325 U.S. 797 (1945).

[32] Id. at 799-800.

[33] Id. at 807.

[34] Id. at 808. The Court stated that a union crosses the line of permitted union activities when it participates in a business monopoly: "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." Id. at 810.

[35] There were cases during this period involving labor's exemption from the antitrust laws, but they reveal no significant departure from *Allen Bradley*. See Los Angeles Meat Drivers Union v. United States, 371 U.S. 94 (1962); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460

defined the union's self-interest to correspond to the scope of a labor dispute as provided in the Norris-LaGuardia Act, relating to terms or conditions of employment.[36] The national labor policy became one of fostering union organization and tolerating labor's use of economic weapons without resort to antitrust prosecution, leaving disputes to be handled by the National Labor Relations Board.[37] Labor abuses of this broad immunity were addressed by Congress and resulted in the Taft-Hartley Act[38] in 1947 and the Landrum-Griffin Amendments[39] in 1959, prohibiting "unfair labor practices" by unions.[40] However, in 1965, two Supreme Court cases produced more confusion than clarity in the application of the rule of exemption formulated in *Hutcheson* and *Allen Bradley: UMW v. Pennington*[41] and *Meat Cutters Local 189 v. Jewel Tea.*[42]

In *Pennington,* the labor-antitrust issue was initially raised by a small independent coal producer, alleging that the union and the larger coal companies had concluded a wage agreement that would establish production costs so high that small producers would be driven from the market, leaving a monopolistic situation for the large producers.[43] The Court, in an opinion delivered by Justice White,[44] held that the union lost its antitrust exemption "when it [was] clearly shown that it [had] agreed with one set of employers to impose a certain wage scale on other bargaining units."[45] Thus, *Pennington* is purportedly consistent with *Allen Bradley* in that the Court found that a labor union loses its antitrust exemption when it

(1949); United Bhd. of Carpenters v. United States, 330 U.S. 395 (1947); Hunt v. Crumboch, 325 U.S. 821 (1945).

[36] See note 18 supra.

[37] See Ratner, The Emergent Role of District Courts in National Labor Policy, 17 Lab. L.J. 36 (1966).

[38] 29 U.S.C. §§ 141-97 (1970).

[39] 29 U.S.C. §§ 153-87 (1970).

[40] For a discussion of congressional purpose, see National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 623 (1967).

[41] 381 U.S. 657 (1965).

[42] 381 U.S. 676 (1965). For comments on the *Pennington* and *Jewel Tea* decisions, see Cox, Labor and the Antitrust Laws: Pennington and Jewel Tea, 46 B.U.L. Rev. 317 (1966); DiCola, Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering, 33 U. Pitt. L. Rev. 705 (1972); Feller & Anker, Analysis of Impact of Supreme Court's Antitrust Holdings, 59 L.R.R.M. 103 (1965); Zimmer & Silberman, Pennington and Jewel Tea: Antitrust Impact on Collective Bargaining, 11 Antitrust Bull. 857 (1966); Comment, Labor's Antitrust Exemption After Pennington and Jewel Tea, 66 Colum. L. Rev. 742 (1966); Note, Labor-Antitrust: Collective Bargaining and the Competitive Economy, 20 Stan. L. Rev. 684 (1968); Note, 7 B.C. Ind. & Com. L. Rev. 158 (1965).

[43] 381 U.S. at 659-61.

[44] Three groups, composed of three justices each, produced five separate opinions in *Pennington* and *Jewel Tea.* Justice White, joined by Chief Justice Warren and Justice Brennan, delivered the opinion of the Court in *Pennington* and announced the judgment of the Court in *Jewel Tea.* Justice Douglas, joined by Justices Black and Clark, concurred in *Pennington* and dissented in *Jewel Tea.* In a single opinion, Justice Goldberg, joined by Justices Harlan and Stewart, dissented from the opinion but concurred in the reversal of *Pennington* and concurred in the judgment of *Jewel Tea.*

[45] 381 U.S. at 665.

combines with a group of employers in a conspiracy to eliminate competitors from the market. However, the Court in *Pennington* further limited labor's exemption by facilitating the implication of a union-employer conspiracy to control the market through an examination of the effects of a union-employer agreement on the market and judicial balancing of the union interests involved. Justice White pointed out that unions may unilaterally pursue uniform wage agreements from other employers in the industry, but an agreement with one employer to do so would be contrary to the union's interests as well as the antitrust laws.[46] Justice White reasoned that the duty to bargain unit by unit is more in a union's interests than an agreement with one employer to seek a uniform wage.[47] Speaking of such a uniform wage agreement, Justice White found that "[i]t is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy."[48]

Justice Douglas, in his concurring opinion in *Pennington*,[49] suggested that on remand the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and if it was made for the purpose of forcing some employers out of business, the union should be found to have violated the Sherman Act. Justice Douglas further suggested that an industry-wide agreement containing those features is prima facie evidence of a violation.[50]

In *Jewel Tea*, the companion case to *Pennington*, the union had obtained a collective bargaining agreement with a multi-employer bargaining unit representing retail meat dealers in the Chicago area, which agreement contained a provision restricting the sale of fresh meat to the hours between nine a.m. and six p.m.[51] Jewel Tea signed the agreement under threat of strike and brought suit alleging that the operating hours provision unduly restricted competition because it prevented self-service stores from retailing prepackaged meat after six p.m. Although there is no majority opinion in *Jewel Tea*,[52] a majority of the Court did find that the union did not lose its exemption from the Sherman Act.[53]

In his opinion in *Jewel Tea*, Justice White again focused his inquiry on the union interest involved.[54] Unlike in *Pennington*,

[46] Id. at 666.

[47] Id.

[48] Id. at 668.

[49] See note 44 supra.

[50] 381 U.S. at 672-73 (concurring opinion). On remand, the district court held that the evidence was not sufficient to prove a conspiracy. Pennington v. UMW, 257 F. Supp. 815 (E.D. Tenn. 1966).

[51] 381 U.S. at 679-80.

[52] See note 44 supra.

[53] 381 U.S. at 684.

[54] See id. at 689.

however, in *Jewel Tea* there was no viable claim of a union-employer conspiracy.[55] Therefore, the sole inquiry made by Justice White was whether the union's interest in the operating hours restriction justified the resulting anticompetitive effect on the product market:

> Thus the issue in this case is whether the marketing hours restriction, like wages, and unlike prices, is so *intimately related* to wages, hours, and working conditions that the union's successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.[56]

If this "intimately related" test shows that the labor exemption has been lost, the existence of a substantive violation of the Sherman Act would then turn "on whether the elements of a conspiracy in restraint of trade or an attempt to monopolize had been proved."[57] In balancing the relative impact of the operating hours restriction on the product market against the interests of union members, Justice White found the restrictive provision "intimately related" to the union's concern with working hours and therefore exempt from Sherman Act liability.[58]

Justice Goldberg, while concurring with the result reached by Justice White in *Jewel Tea* and concurring in the reversal of *Pennington*,[59] suggested a different test: antitrust immunity for collective bargaining activity concerning "mandatory subjects of bargaining" under the labor statutes.[60] Otherwise, in Justice Goldberg's opinion, the "intimately related" test of Justice White would allow antitrust liability in the area of collective bargaining to be governed by judicial notions of the social and economic desirability of union action.[61]

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[55] Id. at 688.

[56] Id. at 689-90 (emphasis added). Justice White states: "The crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members." Id. at 690 n.5.

[57] Id. at 693.

[58] Id. at 691.

[59] See note 44 supra.

[60] 381 U.S. at 710. Mandatory subjects of bargaining are those relating to wages, hours and other terms and conditions of employment. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958). See Section of Labor Relations Law, American Bar Ass'n, The Developing Labor Law 379-439 (C. Morris ed. 1971).

[61] Justice White's "intimately related" test also has been criticized as inherently ambiguous. One commentator observes:

> Does the intimate relation involve a balancing of product market restraint against labor interest? Or must one intimately relate first and balance later? If immunity is dependent upon such a balancing at any point in the analysis, it must be noted that the fulcrum will be the economic prejudices of the judicial fact-finder.

In his dissent in *Jewel Tea,* Justice Douglas found that the collective bargaining agreement itself is evidence of a conspiracy among the employers with the unions to impose the operating hours restriction on competitors.[62] Justice Douglas interpreted *Allen Bradley* as condemning this type of product market restraint.[63] Yet, the Court in *Allen Bradley* specifically stated that the collective bargaining agreement was *but one element* in a far larger program in which unions and non-labor groups united to fix prices and allocate markets.[64]

Starting from the broad immunity of labor unions recognized in *Allen Bradley* in 1945, with its exception of union combination with non-labor groups to fix prices and allocate markets, the Supreme Court in *Pennington* and *Jewel Tea* has almost allowed the exception to swallow the rule. The exception in *Allen Bradley* focused on the use *by business groups* of labor unions as a shield to allow employers to achieve ends proscribed by the Sherman Act.[65] In *Pennington* and *Jewel Tea,* however, the Court focused on balancing the union interests involved in certain collective bargaining agreement provisions with their effect on the product market, inferring an *Allen Bradley*-type conspiracy in *Pennington* and attempting to redefine the scope of labor's immunity even without a conspiracy in *Jewel Tea.* This balancing act would seem to return the status of labor's exemption to the days of the *Duplex* case, during which judicial notions of the proper balance in the industrial struggle were determinative of labor's antitrust liability. This practice was condemned in *Hutcheson,*[66] wherein the Court found that Congress had defined labor union interests and thereby excluded any substitution of judicial policy judgments concerning union purposes. One group of judges in *Pennington* and *Jewel Tea* even found a collective bargaining agreement that resulted in product market restraints to be prima facie evidence of a conspiracy in violation of the Sherman Act.[67] Further, the Court's inability to agree on a single test for balancing union interests against product market restraints provides little guidance for lower courts faced with antitrust allegations against labor union activity.

DiCola, supra note 42, at 721. Another commentator finds no less than four possible interpretations of the test. See Comment, supra note 42, at 757-58.

[62] 381 U.S. at 736 (dissenting opinion). Note that this corresponds to his jury instructions in *Pennington.* See text at note 50 supra.

[63] Unless *Allen Bradley* is either overruled or greatly impaired, the unions can no more aid a group of businessmen to force their competitors to follow uniform store marketing hours than to force them to sell at fixed prices. Both practices take away the freedom of traders to carry on their business in their own competitive fashion. Id. at 737 (dissenting opinion).

[64] See 325 U.S. at 809.

[65] Id. at 809-10. See Note, 7 B.C. Ind. & Com. L. Rev. 158, 160-61 (1965).

[66] See text at note 30 supra.

[67] See text at note 50 supra.

In two cases since 1965, the Supreme Court has again faced the labor-antitrust issue without providing any greater clarity. In *Ramsey v. UMW*,[68] the Court was asked to determine what standard of proof must be met in order to establish a union-employer conspiracy. In this antitrust suit, small coal mine operators sought to show an express or implied agreement between the union and a multi-employer group to impose a certain wage scale on all coal mine operators, with the knowledge that the smaller operators would be driven out of the market.[69] The district court had required "clear proof" that the alleged acts had occurred, that the acts had revealed a conspiracy, and that they had caused harm to the small coal mine operators.[70] The Supreme Court, clarifying its holding in *Pennington* that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units,"[71] ruled that in antitrust actions against labor unions the standard of proof required to establish the occurrence of illegal acts or to determine that the acts constitute a conspiracy is the usual preponderance of the evidence standard.[72] Although the district court's "clear proof" standard would have restored labor's exemption under the *Allen Bradley* rule,[73] the Court in *Ramsey* chose to continue the vague standard of *Pennington* that "some evidence" which creates an inference of conspiracy is sufficient.[74]

Although the evidentiary question concerning a union-employer conspiracy raised by *Pennington* was answered in *Ramsey*,[75] the Supreme Court in *American Fed'n of Musicians v. Carroll*[76] failed to make a choice between the "intimately related" test[77] and the "mandatory subject of bargaining" test[78] of labor's exemption from the Sherman Act when there is no conspiracy alleged. In *Carroll*, the union had a virtual closed shop in New York City by means of agreements with hotels, booking agents and record companies, regulating musicians' employment through the union bylaws.[79] The bylaws required each member orchestra leader to follow a minimum price scale and to use certain booking agents. The antitrust suit was brought by orchestra leaders against the union.[80] The Supreme

[68] 401 U.S. 302 (1971).
[69] Id. at 304.
[70] Id. at 307.
[71] 381 U.S. at 665.
[72] 401 U.S. at 309.
[73] See Note, 13 B.C. Ind. & Com. L. Rev. 383, 392 (1971).
[74] See id. at 389-90.
[75] See id. at 390.
[76] 391 U.S. 99 (1968).
[77] See text at note 56 supra.
[78] See text at note 60 supra.
[79] 391 U.S. at 102-04.
[80] Id. at 102.

Court held that the orchestra leaders constituted a "labor group" and thus there was no combination with a non-labor group.[81] The Court also held that the fixing of price scales was a "legitimate union interest" because the price floors actually operated to protect the wages of other union members.[82] In reaching its determination, the Court emphasized Justice White's statement in *Jewel Tea* that the crucial determinant of antitrust liability is not the form of the agreement but its impact on the product market and the interests of union members.[83] However, Justice White's "intimately related" test seems stretched almost beyond recognition in *Carroll.* Indeed, Justice White himself dissented in *Carroll,* finding that the balance in favor of price competition outweighed the union interest in wage scale.[84] Although the Court stated that it was expressing no opinion on whether all union activities concerning subjects of mandatory bargaining are exempt from the Sherman Act,[85] as suggested by Justice Goldberg in *Jewel Tea,* it certainly seemed to be implying such a result. However, to find such a holding by implication may prove unwarranted, for it has been suggested that the holding in *Carroll* may be limited to the special employment conditions of the music industry or to industries in which the cost of the product is little more than the total wage bill.[86]

From these renewed pronouncements by the Supreme Court in *Pennington, Jewel Tea, Ramsey* and *Carroll,* the lower federal courts must discern the scope of labor's antitrust exemption and the appropriate test to apply to determine if union activities fall within the exemption. It is such a situation that faced the Fifth Circuit in *Connell Construction Co. v. Plumbers Local 100.*

In *Connell,* the antitrust allegations were based on grounds similar to the "mandatory subject of bargaining" test proposed by Justice Goldberg in *Jewel Tea.* Connell sought to distinguish its situation from a "primary subcontractor agreement" contained in a collective bargaining agreement, which would be a mandatory bargaining subject and legal under the National Labor Relations Act in the construction industry.[87] Connell stated that a "secondary subcontractor agreement," as in this case, is one between a union and an employer who has no employees who are members of that union and thus is not a mandatory bargaining subject.[88] Connell argued

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[81] Id. at 107.

[82] Id. at 109.

[83] Id. at 107, citing *Jewel Tea,* 381 U.S. at 690 n.5.

[84] Id. at 119 (dissenting opinion).

[85] Id. at 110.

[86] See Note, 10 B.C. Ind. & Com. L. Rev. 480 (1969); DiCola, supra note 42.

[87] 29 U.S.C. § 158(e) (1970); see Centlivre Village Apts., 148 N.L.R.B. No. 93, 57 L.R.R.M. 1081 (1964).

[88] Brief for Appellant at 14, Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154, 84 L.R.R.M. 2001 (5th Cir. 1973).

that since the construction industry proviso of section 8(e) of the National Labor Relations Act reached only primary subcontractor agreements, the legality of secondary subcontractor agreements should be determined by reference to national economic policies as embodied in the Sherman Act.[89] Under the Sherman Act, the secondary subcontractor agreement at issue would result in an illegal restraint of trade by forcing non-unionized contractors out of the Dallas area construction market.

The Fifth Circuit, after analyzing the history of labor's exemption from the antitrust laws, found a two-fold test for determining a union's antitrust exemption emerging "from the thicket of *Jewel Tea*":[90] (1) if a conspiracy between labor and non-labor groups to injure the business of another non-labor group is alleged and proven, the exemption is not available; (2) if no conspiracy is alleged, there is no exemption if the agreement does not encompass a "legitimate union interest."[91] After finding that Connell had made out no sufficient claim of conspiracy to create a monopoly for a non-labor group, the court turned to the second step of analysis to determine whether there was a "legitimate union interest."

Basing its inquiry into "legitimate union interest" on the *Jewel Tea* and *Carroll* cases, the court appears to have adopted Justice White's "intimately related" test in determining what constitutes a legitimate union interest.[92] The court recognized that the subcontractor agreement was sought by the Union to help organize other subcontractors,[93] a difficult task in the construction industry due to its ambulatory nature and the lack of continuity between the various parties on a construction project.[94] Concluding that the agreement was "directly related to work attainment, work preservation, and other labor standards which directly benefit the members of the union involved,"[95] the court found the agreement in *Connell* even more directly related to union benefit than the agreements in *Jewel Tea* and *Carroll*. Balancing these direct union benefits against the

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[89] Reply Brief for Appellant at 13, Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154, 84 L.R.R.M. 2001 (5th Cir. 1973).

[90] 483 F.2d at 1166, 84 L.R.R.M. at 2009.

[91] Id. at 1164, 1166, 84 L.R.R.M. at 2008, 2009.

[92] The approach thus selected by the Fifth Circuit substantiates a thesis of this note that the Supreme Court has not provided a cohesive guideline for lower courts to follow in this area, as the Fifth Circuit's choice of Justice White's test is a break in the trend described by DiCola, supra note 42, at 753: "*Jewel Tea*-type cases of 1965-72 vintage indicate little adherence to Justice White's 'intimately related' test in the lower courts. Justice Goldberg's view in *Jewel Tea* seems to have gained acceptance, if only by default." See text at note 105 infra.

[93] 483 F.2d at 1167, 84 L.R.R.M. at 2010.

[94] Id. at 1168, 84 L.R.R.M. at 2011. For an excellent analysis of the unique labor situation in the construction industry, see Comment, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.J. 673 (1951).

[95] 483 F.2d at 1168, 84 L.R.R.M. at 2011.

anticompetitive effects of the agreement on the product market, the court found the balance in favor of the Union.[96]

The *Connell* court appears to reject the "mandatory subject of bargaining" test suggested by Justice Goldberg in *Jewel Tea* and the analysis offered by Connell in its brief.[97] Finding that the legality under the labor laws of the subcontractor agreement had not been determined by the National Labor Relations Board, the court stated that labor law legality, and impliedly the mandatory/non-mandatory subject distinction, is irrelevant when it is not material to an antitrust suit.[98] The labor laws themselves provide sanctions for certain objectionable practices; further, activities not specifically covered by the labor laws may have been left intentionally unregulated by Congress.[99] The Fifth Circuit therefore seems to have left the balance of interest between labor and management up to Congress, allowing antitrust inquiry by the courts regarding this balance only when the terms of the agreement a union seeks are not designed to "benefit its members in the hours, conditions, and other immediately relevant concerns of the working man."[100]

In his dissent in *Connell,* Judge Clark interpreted *Jewel Tea* and post-*Hutcheson* congressional action to signify that a union loses its antitrust exemption when it engages in an unfair labor practice that results in product market restraint.[101] Judge Clark concluded that secondary boycotts should be included with price-fixing and market allocation as a classic antitrust problem.[102]

In its attempt to discern the scope of labor's exemption from the Sherman Act, the Fifth Circuit has attempted to interpret *Jewel Tea* and *Carroll,* in which antitrust inquiries were permitted with respect to unilateral union activity, as consistent with the principle of the Norris-LaGuardia Act and *Allen Bradley* that elimination of competition based on differences in wages and labor standards is not the type of anticompetitive result that is condemned by the Sherman Act. Although the result reached may have been appropriate in this case, the *Connell* case illustrates the problem the lower courts have in attempting to follow the Supreme Court's multifarious attempts to define labor's antitrust liability. It is submitted that Congress must act to clarify labor's exemption from the antitrust laws and to balance the judicially irreconcilable policies of labor and antitrust law.

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[96] Id. at 1168-69, 84 L.R.R.M. at 2011.

[97] See text at notes 87-89 supra.

[98] 483 F.2d at 1169, 84 L.R.R.M. at 2012. The Court finds that it has no jurisdiction to decide the legality of the agreement under the labor laws since that issue would be within the exclusive jurisdiction of the National Labor Relations Board.

[99] Id. at 1170, 84 L.R.R.M. at 2013.

[100] Id.

[101] Id. at 1178, 84 L.R.R.M. at 2019 (dissenting opinion).

[102] Id., 84 L.R.R.M. at 2020 (dissenting opinion).

Antitrust inquiry into unilateral union activity was originally directed at labor's use of certain economic weapons such as secondary boycotts.[103] Under the congressional mandate of the Norris-LaGuardia Act, the Supreme Court recognized that the rightness or wrongness of union methods for achieving labor goals was not to be susceptible to judicial inquiry and treble damages under the Sherman Act.[104] Presently, many of the condemned activities of earlier antitrust cases are now prohibited by the labor laws.

With the protective legislation of Congress and the establishment of the administrative tribunal of the National Labor Relations Board, union organization has been fostered with the resulting growth of union power. In *Pennington* and *Jewel Tea,* the Supreme Court appears to have been responding to this greatly increased power of labor and to unions' use of this power in collective bargaining efforts with multi-employer groups at an industry-wide level.

If the balance of power between labor and management needs readjusting in the public interest in light of the success of the labor movement, the adjustment should be made by Congress, not the courts. Judicial inquiry into unilateral union activity returns the labor-antitrust issue to the pre-Norris-LaGuardia era when courts were free to substitute their own views as to the union's interests for the views of the union's officers and members. Further, the courts are unable to agree on what test should be applied to determine labor's antitrust liability. Since union goals ultimately can be achieved only through collective bargaining agreements, the courts will always be able to find a combination with a non-labor group.

Without legislative guidance, the lower courts must choose which blend of *Jewel Tea* to follow. Under Justice White's "intimately related" test, the courts cannot avoid injecting judicial notions of the rightness and wrongness of union ends, for they must determine if union interests are strong enough to outweigh any resulting product market restraints. As the Fifth Circuit in *Connell* implicitly demonstrated, the balance reached may depend on special employment conditions in certain industries, such as the construction industry. On the other hand, the "mandatory subject of bargaining" test proposed by Justice Goldberg in *Jewel Tea* may not always provide the relevant inquiry.[105] The National Labor Relations Board determines what is a mandatory bargaining subject in the context of charges of unfair labor practices for refusal to bargain in good faith, not in consideration of the anticompetitive effect of completed collective bargaining agreements. If this test had been applied in the *Connell* case, the union would not have been exempt

[103] See, e.g., Duplex Printing Press Co. v. Deering, 254 U.S. 433 (1921).

[104] See text at note 30 supra.

[105] See note 92 supra.

from the Sherman Act since a mandatory bargaining subject was not involved.

It thus appears that, as in the situation following the *Duplex* decision, Congress must act to resolve some of the judicially-created ambiguities regarding labor's exemption from the Sherman Act. If the courts persist in finding the Sherman Act to be applicable to union efforts to achieve, maintain or exploit its monopoly in the labor market for union ends, it is suggested that Congress should clearly state whether violations of the labor laws should ever give rise to antitrust liability.

DONNA M. SHERRY

Patents—Allocation of Territories—Restrictions on Sublicensees —Per Se Violations of Section 1 of the Sherman Act—*American Industrial Fastener Corp. v. Flushing Enterprises, Inc.* [1]—A suit for breach of contract was brought by the plaintiffs, American Industrial Fastener Corporation (American) and its secretary-treasurer Arthur Herpolsheimer.[2] The defendants, Flushing Enterprises, Inc. (Flushing) and specified individuals, counterclaimed that the agreement sued upon was void and unenforceable because it contained restrictions constituting per se violations of the Sherman Act,[3] and on these grounds moved for summary judgment.

The contract sued upon established a pyramidal relationship ranging from licensors to subdistributors. At the top of the pyramid, as licensors, were both Herpolsheimer and American. The original patent was obtained by Herpolsheimer, who transferred to American the exclusive rights of sale throughout the world.[4] One level below the licensors was Flushing, who, as licensee, obtained from the plaintiffs the exclusive manufacturing and sales rights of the patented device within a fourteen state territory. Pursuant to the minimum requirements, the licensee (Flushing) was to establish distributors subject to approval by the licensor (American); the distributors in turn were to set up subdistributors. The distributors were permitted to manufacture and sell the patented device, *provided they agreed to be bound by the territorial restrictions* imposed

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[1] 362 F. Supp. 32 (N.D. Ohio 1973).

[2] The statement of facts is based on that set out in 362 F. Supp. at 33-35.

[3] 15 U.S.C. §§ 1, 2 (1970).

[4] For a discussion of the assignability of patents generally, see Deller's Walker on Patents §§ 335 et seq. (2d ed. 1965). The major distinction between an assignment and a license is that "an assignment endows the assignee with the right to sue for infringement, while a license merely provides the licensee with immunity from suits for infringement." Id. § 343, at 377. See also R. Ellis, Patent Assignments §§ 49 et seq. (3d ed. 1955); R. Ellis, Patent Assignments and Licenses §§ 54 et seq. (2d ed. 1943).