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A PARADIGM OF LABOR-ANTITRUST RELATIONS:
DEFINING A UNION’S ALLOWABLE AREA
OF ECONOMIC CONFLICT

KENNETH J. KRYVORUKA*

We would thereby give to one labor union an advantage over another by prohibiting the use of peaceful and honest persuasion in matters of economic and social rivalry. This might strike a death blow to legitimate labor activities. It is not within the province of the courts to restrain conduct which is within the allowable area of economic conflict.

Cuthbert W. Pound†

INTRODUCTION

Since 1914 and the enactment of the Clayton Antitrust Act,1 labor organizations have ostensibly enjoyed a limited exemption from the antitrust laws.2 While appearing to exempt from the antitrust laws all unions and all collective bargaining, the Clayton Act also declared that all non-enjoinable conduct was not to be the subject of substantive violations of any federal law.3 This limited exemption for labor organizations, attributable

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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, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, 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 held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
3 Clayton Act, § 20, 29 U.S.C. § 52 (1970). This section prohibits a federal court, in any dispute between employers and employees “concerning terms and conditions of employment,” from issuing an injunction against certain concerted activities. In part, under section 20 the court cannot enjoin anyone from
terminating any relation of employment, or from ceasing to perform any work of labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any 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

[59]
to an express statutory declaration and further implied from our national labor policy, reflects the concept that labor cartelization should be encouraged.4

The friction between a relaxed labor policy and the stringent antitrust laws presents a dilemma. In 1921, Chief Justice Taft noted that the purpose and effect of every labor organization is to eliminate competition in the labor market,5 while Learned Hand, in reflecting the national policy favoring competition, stated that: "It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."6

When confronted with the task of construing a statutory exemption to the antitrust laws, courts often have cautioned that it is for the Congress to determine whether or not such immunity is in the public interest.7 For example, an agreement on wages entered into between a labor union and a multi-employer bargaining unit was held to be within reach of the antitrust laws:

Wages lie at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit.


5 American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921). See also S. & B. Webb, Industrial Democracy, 173-179 (1920). For a more current exposition, see L. Reynolds, Labor Economics and Labor Relations 647-57 (5th ed. 1970); Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1, 21 n.47 (1971), which defines labor union as "a horizontal agreement between competitors to fix the prices (wages) at which they will work." The author goes on to state that "[i]t is not fashionable to call unions cartels, because the term is thought to be derogatory. But if the term is to have any analytic content, it must encompass labor unions, for their express purpose is to eliminate competition among particular workers." Id.

6 United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945). See also authorities cited note 17 infra.

The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe.

But there are limits to what a union or employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement may disregard other laws.8 Thus, while acknowledging the existence of such exemptions in construing such legislation, courts nonetheless have emphasized “that exemptions from the antitrust laws are strictly construed, and that ‘[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored . . .’ [and that] ‘courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.’”9

Looking through form to substance, courts have attempted to insure that legislative intent is accurately enforced.10 Since competition is the over-riding principle and any immunity is an exception, the courts will construe narrowly any departure from this maxim.11 Thus, any party invoking the benefit of such exemption bears a heavy burden of establishing the right thereto.12 Courts therefore have required those sheltered with antitrust immunity to adhere strictly to the conditions by which it was extended.13 As such, labor organizations cannot lawfully combine with non-exempt parties to achieve certain objectives.14 Although enjoying privileged status under the antitrust legislation, labor unions must confine their activities solely to the employment of peaceful means to achieve labor and not commercial objectives.15

Notwithstanding a national labor policy that “fosters or at least toler-

12 United States v. First City Nat'l Bank of Houston, 386 U.S. 361 (1967). In the cited case, the Court, in placing the burden of showing that an exemption applied to the person claiming the exemption, stated that “[t]hat is the general rule where one claims the benefits of an exception to the prohibitions of a statute.” Id. at 366.
ates, large-scale labor organization despite its capacity to interfere with those economic and noneconomic objectives of the antitrust laws, courts have attempted to accommodate these conflicting policies. Though courts have responded by applying the antitrust laws to union activities in certain situations, both labor and antitrust experts have not been amenable to the efforts to integrate labor policies and the antitrust laws. Those efforts necessarily involve the "troublesome and unruly issue" of the subordination of one policy to another.

Professor Cox once stated as his basic premise that "the antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor—its compensation or hours of service or the selection and tenure of employees." However, more recently, litigation has increased in those situations where the federal antitrust statutes must be


17 See Bartosic, The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Law Policy, 62 VA. L. REV. 533, 591 (1976) [hereinafter cited as Bartosic] (The Supreme Court was "confronted once again with a difficult, if not impossible, judicial task of reconciling two antithetical and perhaps irreconcilable national policies."); St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, 62 VA. L. REV. 603, 604 (1976) [hereinafter cited as Expense of Labor] (The author stated that "the difficulty in applying the antitrust concept to organized labor has been that the two are intrinsically incompatible"); St. Antoine, Collective Bargaining and the Antitrust Laws, 115 Pitt. LEGAL J. 25 (1967) ("[A] central aim of the antitrust laws is the promotion of competition. A central aim of collective bargaining is the elimination of competition according to classical trade union theory, the elimination of wage competition among all employees doing the same job in the same industry.")

18 E.g., E. KINTNER, AN ANTITRUST PRIMER 126-27 (2d ed. 1973) ("a . . . somewhat controversial exemption"); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 237 (1977) (describing the attempted integration as a "tortured history"); Anker, Pattern Bargaining, Antitrust Laws and the National Labor Relations Act, in PROCEEDINGS OF N.Y.U., THE NINETEENTH ANNUAL CONFERENCE ON LABOR 81-90 (1967) ("[Antitrust laws should not be used to] hamper employers or unions in their effort to establish wages, hours and working conditions through collective bargaining. This activity should be regulated by the labor laws, not the antitrust laws. In other words the question of what unions or employers may or may not do to achieve uniform agreements concerning wages, hours or working conditions should be a labor law question, not an antitrust question.") See also Labor-Management Relations and the Antitrust Laws, in PROCEEDINGS OF N.Y.U., THE SEVENTEENTH ANNUAL CONFERENCE ON LABOR 229-279 (1964); Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. PA. L. REV. 252 (1955).

19 Meltzer, supra note 16, at 659.

20 Cox, supra note 18, at 255.

21 Apparently Professor Cox reversed his opinion in a later suggestion that the uncertainty of conflicting court opinions would lead to an increase in litigation. Cox, Labor and the Antitrust Laws: Pennington and Jewel Tea, 46 B.U.L. REV. 317, 328 (1966). Professor Meltzer has predicted increased extension of the antitrust laws to union activities. Meltzer, supra note 16, at 660. See also REPORT OF THE ATTY GENERAL’S NATIONAL COMM. TO STUDY THE ANTITRUST LAWS 304-05 (1955). See generally Di Cola, Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering, 33 U. PITT. L. REV. 705 (1972); Comment, Labor’s Antitrust Exemption, 55 CAL. L. REV. 254 (1967); Comment, Labor Law and Antitrust: So Deceptive and Opaque are the Elements of these Problems,” 1966
accommodated with the policies of the National Labor Relations Act and the Norris-LaGuardia Act.  

For more than 70 years, the underlying dispute has existed and burned more intensely. The issue has been tested in the courts, with some decisions upholding an exemption and others condemning union conduct on facts that would appear indistinguishable to the casual observer. Congress took up the issue with the enactment of the Clayton Act which expressly exempted labor organizations from the antitrust laws and later the Norris-LaGuardia Act, which expressly prohibited the use of the labor injunction in a "labor dispute." Nothing in the Norris-LaGuardia Act, however, insulated a combination in illegal restraint of trade between businessmen and a labor union from the injunctive or damage provisions of the antitrust laws.

While recognizing the existence of the controversy and that the underlying issues may never be solved to the satisfaction of all, the Court has nonetheless developed a consistent model. The most recent attempt by the Supreme Court in construing labor's limited exemption is Connell Construction Co. v. Plumbers & Steamfitters Local 100. Connell, when viewed in its historical progression, delineates those labor objectives which come within labor antitrust exemptions and those that are beyond labor's antitrust

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22 Under the preemption doctrine, state antitrust legislation may not regulate conduct which is arguably protected by the National Labor Relations Act. See Weber v. Anheuser-Busch, 348 U.S. 468 (1955); Local 24, Int'l Bd. of Teamsters v. Oliver, 358 U.S. 283 (1959) (holding that a union wage package, sanctioned by federal law, may not be invalidated under a state antitrust law). The clearest statement of this principle is found in Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, reh. denied, 423 U.S. 884 (1975), where the Court found that state antitrust law may not prevail over federal labor law because of the substantial risk of conflict with a sufficiently expressed congressional purpose to regulate union organizational activities. But see, Foods, Inc. v. Leffler, 240 N.W.2d 914 (Iowa 1976).

23 But see Bartosic, supra note 17, at 591 (referring to labor's "general exemption").

exemption. This methodical progression evidences a consistent development, illustrative of both creativity and reverence for past precedent by introducing both new and old concepts into the area of labor antitrust.

An observer, in relating the assimilation of antitrust legislation to the problems of labor, would trace the economic and social considerations behind the antitrust laws and labor legislation, pay ample heed to the legislative histories, and stress the experience of the social and economic integration. The purpose of this article is more modest. The thesis of this article is that crystallized rules that are the product of judicial development can be identified and that one may accurately state the methodology and considerations which are the result of this development.

In retrospect, though one is likely to encounter some minor variants in the pattern of development, each succeeding case has affected the structure of this methodology and has suggested a more rigid definition in the field of labor antitrust. It is to be understood that past judicial development represents solutions; however, certain problems still remain. Given the efficacy of each succeeding decision, the problems can be reduced to components which bear a keen resemblance to the overall approach adopted by the court. Each case is a paradigm which offers guidance to the courts and the practitioner. By determining the significant facts of each situation and assimilating them to the policies of antitrust and labor, subsequent cases have produced a more precise paradigm, and thus have advanced a consistent rationale. What each case has in common is a full, explicable set of rules that gives cohesiveness to an admittedly complex area, evidencing a consistent development in defining the “allowable area of economic conflict.”

I. EARLY APPLICATION OF THE ANTITRUST LAWS TO LABOR

Prior to the enactment of the Taft-Hartley Act in 1947, the only significant federal legislation regulating the activities of labor unions was


26 Id. at 34, 45, 163. Expense of Labor, supra note 17, at 630, has suggested at least that the circumstances in Allen Bradley v. Local 3, IBEW, 325 U.S. 797 (1945), remain as a paradigm of the union antitrust violation.

27 C. GREGORY, LABOR AND THE LAW 200 (2d rev. ed. 1958). Nevertheless, this was a significant advancement from the use of common law criminal conspiracy to prohibit concerted activity on the part of labor unions. Philadelphia Cordwainers’ Case (Commonwealth v. Pullis) (Philadelphia Mayor’s Ct. 1806), reported in 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (J. Commons ed. 1958). It was not, however, until 1842 that courts came to accept the legality of peaceful strikes by employees for improved working conditions. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842). For an excellent summary of labor’s historical background, see R. SMITH, L. MERRIFIELD, & T.
the Sherman Antitrust Act. An examination of the role the Sherman Act once played is necessary to understand the relevance of the Act in regulating present day union activities. The operative language of course, is the broad statement of Section 1 of the Act which prohibits "[e]very 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."

Through an expansive reading of the words "commerce" and "restraint" courts declared secondary boycotts and transportation strikes to be in violation of the antitrust law. As a result, all union conduct which affected interstate commerce was within reach of the Sherman Act. However, what was once a broad application of the antitrust laws has now withered into a cautious exemption.

A. Defining Restraint of Trade: Primary Activity and Secondary Boycotts

Initial application of the Sherman Act was not directed at union efforts to obtain a monopoly by organizing all the workers producing in a given market. "The act was essentially a proscription against bad practices, such as union-instigated boycotts enforced either through consumers or through employees of secondary employers."
In the *Danbury Hatters* case, an early Supreme Court case applying the Sherman Act to labor, the Court noted the union’s resort to secondary pressure and not its objective of securing an industry-wide organization. The Court was not concerned with the actual impact of particular boycotts on the price or supply in interstate commerce. This early case resulted in the creation of the conclusive presumption that once the basic fact was found, *i.e.*, that the union coerced or otherwise persuaded union and nonunion members in interstate commerce not to buy nonunion products (hats) or not to patronize merchants handling such products, the union was guilty of a direct restraint of trade. It was not relevant that the purpose of the boycott was to persuade the employer to unionize his shops and that there was no tangible evidence of direct impact on interstate commerce, so long as the boycott was "aimed" at interstate trade. The effect of the decision therefore was to create two tenuous distinctions, that is, a distinction between strikes and boycotts on the one hand, and intrastate and interstate activity on the other. Both distinctions rested on a finding of where the dispute was located. For example, strikes that obstructed the manufacture of goods destined for interstate commerce were not condemned by the Sherman Act, but boycotts which interfered with the free exchange of goods at their destination rather than at their point of origin were prohibited. Thus, a union powerful enough to close off a supply of goods at its source was rewarded with antitrust immunity, while those unions compelled to resort to a "boycott" to inhibit the sale (or use) of products at their destination were punished. This was so, even if such economic pressure was critical for the preservation of union goals or the furtherance of union objectives. Notwithstanding the lack of union animus to keep a nonunion product out of interstate markets, or lack of an actual impact on interstate markets, if the union’s primary objective was seen to have been a resolution

44 F.2d 58 (N.D. Ill. 1930), *aff’d per curiam*, 284 U.S. 582 (1931); cases cited note 33 *supra*.

37 *Loewe v. Lawler (Danbury Hatters Case)*, 208 U.S. 274 (1908). Note that St. Antoine in his article, *Expense of Labor, supra* note 17, at 604 n.8, implies that had the case been argued differently, the entire area of the law would have progressed differently.

38 208 U.S. at 294-96, 305. *See also* cases cited note 33 *supra*.

39 The Court did not distinguish between primary consumer boycotts and secondary consumer boycotts in the *Danbury Hatters Case*.

40 *But see* Ramsey v. UMW, 401 U.S. 302 (1971) (giving the current formulation).

41 The same result was reached where a union was found to have persuaded employees in another state to refuse to transport, install or perform work on nonunion products. *See* cases cited note 33 *supra*.

42 In UMW v. Coronado Coal Co. (Coronado I), 259 U.S. 344, 404 (1922), the Court later concluded that the local strike, as labor’s basic weapon, ordinarily constituted only an indirect restraint on competition and therefore did not violate the antitrust laws.

43 *See Expense of Labor, supra* note 17, at 605.
of a local controversy, strikes that interfered with the production of goods destined for interstate commerce were held not to be direct or unlawful restraints of commerce.\(^4^5\)

Even after Sections 6 and 20 of the Clayton Act were enacted, it was incorrect to assume that labor unions were exempt from the antitrust laws.\(^4^6\) In *Duplex Printing Press Co. v. Deering*,\(^4^7\) the Court reasoned that since Section 6 of the Clayton Act protected only "lawful" activities, and since Section 20 prevented the application of antitrust law only to a bona fide labor dispute between employees and their immediate employer, neither section exempted the secondary boycott.\(^4^8\)

**B. Limited Application: Focus on the Union's Subjective Intent**

Since it was evident that every peaceful strike or boycott that interfered with interstate commerce could be frustrated by application of the Sherman Act,\(^4^9\) a departure from the widespread, unqualified use of the antitrust laws was inevitable. While still using the same concept of interstate commerce, the Court was now prepared to limit the application of antitrust laws to those strikes and boycotts established with the purpose to restrain and directly affect interstate commerce.\(^5^0\) In *Coronado II*,\(^5^1\) the Court underscored

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\(^{4^4}\) Presumably a boycott at this level would likewise be permissible.

\(^{4^5}\) United Leather Workers Local 66 v. Herkert & Meisel Trunk Co., 265 U.S. 457, 465 (1924); UMW v. Coronado Coal Co., 259 U.S. 344, 359 (1922). *See also* Levering & Garrigues v. Morrin, 289 U.S. 103 (1933); Industrial Ass'n v. United States, 268 U.S. 64 (1925). Note the narrow concept of interstate commerce in these cases which was prevalent until 1937.

\(^{4^6}\) Ironically, the Clayton Act had been lauded as the "Magna Charta of Labor." 2 S. Gompers, *Seventy Years of Life and Labor* 299 (1925). After the Court's decision in the Danbury Hatters Case, 208 U.S. 274 (1908), labor's rallying cry was "The Sherman Law—amend it or end it." A. Mason, *Organized Labor and the Law* 162 (reprint ed. 1969).

\(^{4^7}\) 254 U.S. 443 (1921).

\(^{4^8}\) Id. at 469, 474.

Note that even though Congress passed the Norris-LaGuardia Anti-Injunction Act, with its explicit withdrawal of jurisdiction from the federal courts to issue injunctions against peaceful conduct arising out of a labor dispute (thus intentionally repudiating the *Duplex* decision), the Court continued to construe the Sherman Act as applicable when a union combined with an employer. For example, in Local 167, Int'l Brotherhood of Teamsters v. United States, 291 U.S. 293 (1934), a conspiracy among poultry merchants, Local 167, and the slaughterer's union, to fix prices, divide territories, and refuse to deal with uncooperative dealers was enjoined under Sections 1 and 2 of the Sherman Act on the basis that a combination of workers with businessmen to monopolize commercial activities had little immediate relation to the needs or objectives of the union. Thus a distinction for "non-labor conspiracies" was established.

\(^{4^9}\) This realization was in large part motivated by labor's intense hostility toward the antitrust laws, coupled with the rapid growth of unionism. *See sources cited note 46 *supra*.

\(^{5^0}\) The Court still retained the distinction between the process of manufacture as opposed to the movement of goods across state boundaries. United Leather Workers' Local 66 v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924).

\(^{5^1}\) Coronado Coal Co. v. UMW, 268 U.S. 295 (1925). *See also* Alco-Zander Co. v. Clothing Workers, 35 F.2d 203 (E.D. Pa. 1929) (subjective intent and a violation of the Sherman Act found).
the union's subjective intent as the operative element in passing upon an alleged violation of the Sherman Act. Absent such intent, there would be no antitrust liability, regardless of the tangible effect such conduct had on interstate commerce. The counterpart, of course, was that evidence of union intent to keep a nonunion product out of interstate market (even if primary) would be unlawful. The only significant advancement was that the union would no longer be presumed to have an anticompetitive animus.

Several difficulties were inherent in this approach. As a practical matter, the union could avoid liability by expressing no concern over the supply of nonunion goods in interstate markets. Secondly, the actual effect on interstate commerce was not necessarily related to the union's dominant purpose, be it the protection of local markets or the reduction of the flow of nonunion goods out of state. The success of union activity depended upon the elimination of the employer's product from any market, or the hampering of the flow of nonunion goods. Lastly, the distinction between legal strikes and illegal boycotts was irrelevant to the ideal of insuring competitive markets.

C. Antitrust Violation by Restraining the Product Market

Despite Congressional enactment of the Clayton Act in 1914, application of the Sherman Act to union activities proceeded much as it had before, much to labor's surprise. The culprit was the Duplex case wherein the Court interpreted the Clayton Act to be a mere codification of then existing law. The Court held that the terms "lawfully" and "legitimately" in the Clayton Act only referred to union activity that was permissible under the Sherman Act, and that Section 20 of the Clayton Act (enumerating

52 268 U.S. at 310. For a discussion of Coronado II, see Gregory, The Sherman Act v. Labor, 8 U. Chi. L. Rev. 222, 231 (1941) [hereinafter cited as Gregory]. Evidence had been produced at the second trial of Coronado II indicating that the union's strike and destruction of mining equipment and facilities was motivated by a desire to reduce the output of nonunion coal capable of competing with union products in interstate commerce. Thus the union's activity transcended a purely local labor controversy and was therefore characterized as a direct restraint.

53 Notwithstanding the fact that a "local motive" of gaining benefits from the struck company or the illegal motive of protecting gains secured elsewhere often coexisted and were inseparable. See Alco-Zander Co. v. Clothing Workers, 35 F.2d 203 (E.D. Pa. 1929).

54 Meltzer, supra note 16, at 663.

55 Expense of Labor, supra note 17, at 606.

56 Labor and the Law, supra note 27, at 212-13, 216. It has been held, however, that a combination of business organizations that attempts to set the terms by which tradesmen may have access to the business market constitutes a per se violation of the Sherman Act irrespective of the combination's ultimate purpose or effect. See Fashion Originator's Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).


certain activities as non-violative of federal law) only referred to activities involving an employer and his own employees. The effect was an increased federal commitment to judge the propriety of the object of union activities.

Since the narrow construction in *Duplex* failed to protect the secondary boycott because of a lack of a direct employment relationship between the defendant employees and a plaintiff employer who was the object of the boycott, and due to increased sensitivity to the interests of labor, Congress responded with the enactment of the Wagner Act of 1935 and the Norris-LaGuardia Act of 1932. This legislation was motivated by a desire to equalize the effect of those cases that had denied the labor clause of the Clayton Act any significance, and to curtail the role of the courts in formulating labor policy by drastically limiting the ability to issue an injunction in the federal courts. But as Professor Meltzer opines, this legislation unfortunately "had not integrated the new freedoms with the old restrictions; indeed, the new statutes had not even mentioned the Sherman Act and, hence, had not eliminated the threat of criminal and treble damage actions based on the characterization of boycotts or organizational efforts as 'direct' attacks on interstate commerce."
With the advent of the 1940 decision in *Apex Hosiery Co. v. Leader*, the Supreme Court began to apply the antitrust laws less stringently to labor unions. *Apex* marked the first attempt at harmonizing the antitrust statutes with the new found freedom afforded by the recent labor legislation. Its significance lies in the fact that the Court was prepared to recognize that even an anticompetitive effect in the product market is a natural and allowable by-product of a union's lawful attempt to eliminate competition from non-union goods as a means of protecting organizational gains elsewhere.

In *Apex*, the union attempted to enforce its demand for a closed shop by engaging in a sit-down strike and by seizing the plant. By "reinterpreting" the Sherman Act and court precedents under the Act, the Court was able to afford unions a broad shield from antitrust liability. Based on the finding that antitrust legislation was intended to apply to "business combinations" and restraints upon "commercial competition" in the marketing of goods and services where the effect or intent was to fix prices or suppress competition, the employer could not recover treble damages absent a showing that the restrictions "operated to restrain commercial competition in some substantial way."

*Apex* should not, however, be read as abandoning *Coronado II*, since the Court emphasized that the union's obstructions of commerce had not affected prices and had not been so intended. Since the opinion stressed the fact that the union's conduct was compatible with the Sherman Act (i.e., the Act did not reach this particular restraint), it should not be viewed as articulating a statutory exemption. Though the implication was that the union's conduct was protected by Section 6 of the Clayton Act, homage must be paid to the Court's determination that there had been no

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65 310 U.S. 469 (1940).
66 A. Cox, LAW AND THE NATIONAL LABOR POLICY 5, 8 (1960).
67 310 U.S. at 502-03. For a discussion of the relationship between *Apex* and *Connell Construction*, see note 237 infra.
68 Although the union represented only eight company employees, it sought a closed shop agreement from a large Philadelphia industrialist. Union activity resulted in the stoppage of $800,000 worth of finished hosiery ready for shipment, and extensive damage to the factory and equipment. A jury returned a verdict for $237,310 against the union leaders which the court trebled. 310 U.S. at 481-83.
69 Id. at 497.
70 Coronado Coal Co. v. UMW, 268 U.S. 295 (1925). But see Expense of Labor, supra note 17, at 606.
71 310 U.S. at 501-02. The assumption was that had Apex produced a larger percentage of the total market, the union may have been presumed to have intentionally affected such price or market. See Cavers, Labor v. The Sherman Act, 8 U. Chi. L. Rev. 246, 249 (1941). *Apex* did, however, take *Coronado II* one step further by requiring proof of the actual effect on the market.
72 310 U.S. at 503-04.
intent to restrain trade or any actual restraint in fact,74 and to the language throughout the opinion suggesting that the Sherman Act was directed solely at business combinations and trusts.75 Therefore, regardless of any implications that the labor market would be immune to the antitrust statute, union activity that affected or restrained "commercial competition"76 would be within reach of the Sherman Act. It is difficult to accept the efficacy of the Court's distinction between the labor market and the product market (as permitting the former and condemning the latter), when in fact, the specific dispute was resolved by finding an absence of price effects.77

Though the Court's treatment of Coronado II was strained,78 nonetheless the Court was compelled to admit that past precedents were instances of intended restraint and actual interference with commerce.79 At most, Apex suggested that the application of the "rule of reason" in antitrust law might shelter union activity in light of the union's purpose of strengthening its bargaining position rather than merely eliminating competition. Since the strike was "local" and not intended to and did not restrain interstate commerce, the union was not the subject of antitrust liability. While Apex is arguably of little precedential value, it is helpful in defining the area of union activities, particularly in determining commercial restraint which is still subject to the Sherman Act under the Allen Bradley doctrine.80

II. ACTING ALONE: A REQUIREMENT FOR THE LABOR EXEMPTION

Given the narrow holding in Apex, commentators have suggested that the modern era in the Court's effort to integrate labor and antitrust81 really began with United States v. Hutcheson.82 In Hutcheson, union activity

74 Presumably union activity for conventional objectives, such as the elimination of wage differentials, would be lawful without regard to their impact on price and competition in the product market.
75 310 U.S. at 492, 493 n.15.
76 Id. at 495.
77 Id. at 511-13.
78 Id.
79 See Gregory, supra note 52, at 226, 228, 232. Since previous cases did not emphasize actual impact on prices, it is difficult to see the basis for distinguishing the boycott cases from the interference with an interstate shipment of hosiery in Apex.
82 312 U.S. 219 (1941). Thurmond Arnold, as chief of the Antitrust Division of the Department of Justice, had decided that various restraints imposed by labor (i.e., prevention of the use of cheaper materials and more efficient types of equipment, feather-bedding, price-fixing, and disruption of established collective bargaining relationships) should be challenged under the antitrust laws. Hutcheson, a test case to advance that policy, involved a jurisdictional dispute between two unions and union resistance to the installation of new equipment. The union's activity was challenged as a criminal conspiracy under Section 7 of the Sherman Act. Public Statement, Department of Justice, "Application of Anti-trust Laws to Labor," (Nov. 26, 1939). See also C. SUMMERS & H. WELLINGTON, Labor Law:
previously condemned under Sections 1 and 2 of the Sherman Act was removed from application of antitrust law, with one important exception for non-labor conspiracies that in actuality had been recognized previously in 1934. Justice Frankfurter concluded in *Hutcheson* that the net effect of the anti-injunction provisions of the Clayton Act and the Norris-LaGuardia Act was to deem an activity immunized against injunctive relief by those two acts not to be a substantive violation of the Sherman Act. While *Apex* addressed the question whether union conduct imposed the type of restraint referred to in the Sherman Act, *Hutcheson* extended labor a different type of immunity by invoking the labor exemptions found to exist in the Clayton and Norris-LaGuardia Acts.

*Hutcheson* resulted in a further refinement of the reasoning of *Local 167, International Brotherhood of Teamsters v. United States*. The Court for the first time, felt comfortable in harmonizing the Sherman Act with the provisions of the Clayton and Norris-LaGuardia Acts. Rather than embrace the ambiguous *Apex* standard to determine whether the strike or boycott was an impermissible restraint upon the product market, the Court squarely faced the asserted exemption of a labor union for peaceful concerted activities, as enumerated in Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act.

In *Hutcheson*, the Court affirmed the dismissal of the complaint, finding that so long as a labor organization does not combine with a non-labor group, all activities of the nature described in Section 20 of the Clayton Act are exempt from the Sherman Act. Noting only one qualification, the Court declared:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end which the particular union activities are the means. There is nothing remotely within the terms of § 20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and

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83 Local 167, Int'l Brotherhood of Teamsters v. United States, 291 U.S. 293 (1934). *See also* note 48 and accompanying text *supra*.

84 312 U.S. at 236. *See also* Cedar Crest Hats, Inc. v. United Hatters, 362 F.2d 322 (5th Cir. 1966).

85 291 U.S. 293 (1934). *See also* United States v. Hutcheson, 312 U.S. at 245 (Roberts, J., dissenting).

86 312 U.S. at 231.
conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer.\textsuperscript{87}

Since defendant union officials were not employees of Anheuser-Busch,\textsuperscript{88} they arguably could not take advantage of the statutory exemption. The Court determined, however, that they were within the class of defendants protected by the more encompassing definitions found in the Norris-LaGuardia Act.\textsuperscript{89} Finding express Congressional intent to divest the federal courts\textsuperscript{90} long-abused power to identify, judge and evaluate union objectives, the Court construed the 1932 Norris LaGuardia Act to override the narrow judicial interpretation of the Clayton Act.\textsuperscript{91} The Court stated that:

The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such allowable conduct from the taint of being a "violation of any law of the United States," including the Sherman Law.\textsuperscript{92}

The Court's next step in the integration of the antitrust restraints with the laissez-faire labor policy consisted of a refining of the broad exemption as articulated in Hutcheson. The requirement of a product market restraint\textsuperscript{93} in order to constitute a substantive antitrust violation was also more fully explored in subsequent decisions.

A. Loss of the Exemption through "Aiding and Abetting"

\textit{Allen Bradley Co. v. Local 3, IBEW}\textsuperscript{94} highlighted the task of harmonizing the conflicting policies of preservation of competition and the right of labor unions to bargain collectively.\textsuperscript{95} In \textit{Allen Bradley}, consideration was paid to the limitation imposed by \textit{Hutcheson}, that is, if labor groups conspire...
with non-labor groups to restrain trade, such conduct is not exempt from the antitrust laws. Local 3, IBEW was found to have entered into a conspiracy with both manufacturers and installation contractors in the electrical supply industry. Simply stated, the scheme was designed to establish a monopoly over the electrical business and a union monopoly over work opportunities in New York City. Even though the agreement was explicitly made part of a collective bargaining contract, the union was held not to be exempt from the antitrust laws. Hutcheson could not be applied to protect the union because it was not acting alone and principles of Apex could not shield the union since the restraint was not confined to the labor market.96

The agreement in Allen Bradley specified in part that the manufacturers would confine their sales to city contractors who recognized Local 3, IBEW. The contractors in turn agreed to purchase equipment only from city manufacturers who recognized Local 3.97 This agreement had the combined effect of:

1. preventing the sale of electrical supply manufactured elsewhere to city contractors;
2. reducing the influence of out-of-city competition upon the New York manufacturers, thus increasing their business;
3. creating a significant disparity between the in-city and out-of-city price of electrical supply, permitting an increase of the price of city produced equipment;
4. increasing profits for manufacturers and contractors (who, incidentally, engaged in bid-rigging); and
5. increasing wages for union electricians in the city.

The union not only joined in this arrangement but attempted to solidify its control over the supply of labor by striking for a closed shop among all manufacturers and contractors.

It does not tax the imagination to understand that this was the situation cautioned against in Apex and Hutcheson. In addition to knowingly entering into a combination to fix prices, restrict entry of competing businesses, and allocate customers, the union actually utilized economic coercion for the purpose of enforcing its terms.

In a suit brought by the out-of-city manufacturers, the Court held the entire arrangement violative of the Sherman Act, with the union guilty along

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96 Apex was relevant to the extent that it dealt with the meaning of the effect of union activity on the product market. See note 71 and accompanying text supra.

97 Local 3, IBEW represented the employees of both the manufacturers and the contractors, but had jurisdiction only in the New York metropolitan area. 325 U.S. at 799.
with the employers. To exempt the employers from antitrust liability merely because a union is a party to an agreement and to protect a union solely because its purpose was to increase wages would take the bite out of the antitrust legislation and unduly hamper its policy.\textsuperscript{98} Allen Bradley made explicit what was suggested in Hutcheson's concept of "acting alone," that is, a labor union loses its immunity when it "aid[s] non-labor groups to create business monopolies and to control the marketing of goods and services."\textsuperscript{99}

Significantly, the Court extended a broad prerogative to a union acting in harmony with the Norris-LaGuardia Act. The facts in the case indicate that the union was engaged in a "labor dispute,"\textsuperscript{100} which if involved in a peaceful strike in support of a union initiated boycott would not be enjoinable.\textsuperscript{101} It follows that acquiescence by the employer, through a collective bargaining agreement in the form of a refusal to buy nonunion goods,\textsuperscript{102} could also be protected, if standing alone. This is supported by the Court's statement that:

So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. But when the unions participated with a combination of businessmen who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

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.\textsuperscript{103}

Herein lies the Court's novel balancing approach. Had the union acted alone, a victory in its dispute with the employers would clearly have resulted in an increase in the price of goods or individual refusals of the employers to purchase electrical supply not produced by Local 3, IBEW. Only the legitimate collective bargaining goals would be beyond the scope of the

\textsuperscript{98} Id. at 808-10.
\textsuperscript{99} Id. at 808.
\textsuperscript{100} See note 97 and accompanying text supra.
\textsuperscript{101} Such conduct was clearly allowed by the Clayton and Norris-LaGuardia Acts.
\textsuperscript{102} See Discussion of the National Woodwork case, notes 204-21 and accompanying text infra.
\textsuperscript{103} 325 U.S. at 809-10 (citations omitted). In United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949), the Court invoked Allen Bradley declaring: "[a]nd if it [the union] did [participate], benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires."
antitrust laws. *Allen Bradley* does, however, raise the burdensome issue of to what extent a union may progress in bargaining the terms and conditions of employment when direct market restraints will inevitably result and yet not be a component of an illegal combination. Taken together, however, *Hutcheson* and *Allen Bradley* may be read as support for the proposition that union activity, including collective bargaining, is shielded from antitrust liability if such activity is related to the union's self-interest (in a narrow sense) and if the union is not a knowing party to a larger combination designed to increase prices or regulate supply in the commercial market.

Although in *Allen Bradley* the union was the prime mover, the situation was unlike *Hutcheson* since the union combined with employers in a common cause. The Court rejected the view taken by the court of appeals that so long as the union was acting solely in its own self-interest and by means not prohibited by Section 20 of the Clayton Act, the conduct escaped antitrust liability.

The Court embraced an alternative presumption to that in *Hutcheson*. If a labor union is found to be acting so as to "aid and abet businessmen" in conduct, which if carried out by businessmen alone, would violate the Sherman Act, such union is presumed to have relinquished its antitrust immunity. Notwithstanding the union's interest and initiative, it was not immune merely because, acting in furtherance of its own goals, it designs the union-employer combination. The implication in *Allen Bradley* was that if the employer agreed, though unwillingly and under union pressures, to joint activity which would violate the law if agreed to by the employer alone, the employer as well as the union violated the Act.

B. Refining the Union-Abetted Conspiracy: The Statutory Duty to Bargain on a Unit-by-Unit Basis

Subsequent to *Allen Bradley*, the law remained stable for some twenty years until *United Mine Workers v. Pennington* and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Company* were decided. In these cases, the Court split into three different groups, each writing separate opinions (there was no majority opinion in Jewel Tea). As a result, commentators have suggested that a fragmented Court has weakened the unqualified proposition laid down in *Allen Bradley*. However, certain writers were not

105 381 U.S. 657 (1965).
confident that the most recent attempt, the *Connell* case, satisfactorily articulated clear principles for the application of the Sherman Act within the context of employer agreements. Both *Pennington* and *Jewel Tea* involved actions by employers against labor unions under Sections 1 and 2 of the Sherman Act. *Pennington* arose out of the National Bituminous Coal Wage Agreement of 1950, entered into by the United Mine Workers and the larger operating companies. The complaint alleged that the agreement constituted a conspiracy to drive the smaller, less efficient operators out of business by instituting a uniform industry-wide wage scale beyond the financial capabilities of the smaller employers. The agreement provides that in return for higher wages and benefits, the union would not oppose automation and that it would impose the terms of the agreement on all operators. The purpose of the agreement was to eliminate the small operators (who were not members of the association) from the industry. By answering that it was exempt from the antitrust laws, and since the agreement dealt with wage standards, the union highlighted the potential conflict between the *Hutcheson* and *Apex* decisions.

The Court held that a cause of action under the Sherman Act had been stated based on two principles. First, although a union wage agreement with a multi-employer bargaining unit is not in itself a violation of the antitrust laws, the mere fact that a union-employer agreement concerns a mandatory subject of bargaining does not automatically exempt the agreement from the Sherman Act. Secondly, the union may lawfully attempt to acquire the same benefits for all its employees but may not agree with one group of employers to impose certain wage scales on other bargaining units because:

One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's...
part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.\textsuperscript{114}

Thus a union acting independently can determine that all employers meet a rate set in negotiation with the most efficient employers.\textsuperscript{115} Although acknowledging that the duty to bargain under the National Labor Relations Act has significance in determining the scope of labor's antitrust immunity,\textsuperscript{116} the Court replied to the union argument\textsuperscript{117} by finding that the statutory duty to bargain exists only on a unit-by-unit basis.\textsuperscript{118} Therefore a union need not make its wage demands with the problems of the less affluent employers in mind. It may engage in conduct protected by the Clayton and Norris-LaGuardia Acts to achieve its objectives, notwithstanding the fact that such employers are driven out of business. When it acts alone and not in concert with employers, all such conduct is shielded. Nothing in our labor policy, however, permits concerted action between a union and one or more employers concerning the labor (or product) market which competing employers will be compelled to meet. Antitrust considerations should and do prevail.\textsuperscript{119}

Justice Douglas, with whom Justices Black and Clark concurred,\textsuperscript{120} suggested that the labor exemption was abused only if the union and employers agreed to a particular wage scale to be enforced industry-wide, knowing full well that some employers could not meet it and with the intent of driving this class out of business.\textsuperscript{121} According to Justice Douglas, such a showing of an industry-wide agreement between the union and some employers is prima facie evidence of a violation.\textsuperscript{122}

The situation in \textit{Pennington} occurs most frequently in a "most favored

\begin{footnotesize}

\textsuperscript{115} Of interest is the question of whether a "mandatory subject of bargaining" is one in which employers may act concertedly even though an agreement with a union has not been concluded. National Labor Relations Act, 29 U.S.C. § 158(d) (1970 & Supp. V 1975). In Smith v. Pro Football, 420 F. Supp. 738, 742 (D.D.C. 1976), the court found that no labor exemption was gained until a union "in its own interests", negotiated an agreement.

\textsuperscript{116} 381 U.S. at 665.

\textsuperscript{117} Implicit in the union's argument of course, was that the purpose of any wage contract is irrelevant, even if the intent was to put competing employers out of business.

\textsuperscript{118} 381 U.S. at 665.

\textsuperscript{119} \textit{Id.} at 665-66.

\textsuperscript{120} \textit{Id.} at 672.

\textsuperscript{121} \textit{Id.} at 672-73.

\textsuperscript{122} \textit{Id.} at 673. \textit{But see} the majority opinion where Justice White stated that a unilateral move by the union for a wage agreement which would drive smaller employers out of business was not actionable. \textit{Id.} at 665 n.2.
\end{footnotesize}
Clearly the balancing test of *Allen Bradley* is relevant since such a clause is a form of restraint. The National Labor Relations Board has declared a most favored nation clause to be a mandatory subject of bargaining, which an employer may insist upon in the absence of a “predatory purpose.” Emphasizing the predatory intent, the Board was able to distinguish *Pennington* on the ground that the clause sought by the employer in the case before the Board did not obligate the union to impose the same standards on the employer's competitors.

*Ramsey v. United Mine Workers* later elaborated upon the “predatory purpose” suggested in *Pennington*. The lower courts, in construing a phrase in Justice White's *Pennington* opinion, had required that a jury be instructed that “clear proof” of an employer-union conspiracy be shown to merit a finding of an antitrust infraction. The majority reversed, holding that a plaintiff involving the *Pennington* doctrine need establish his case only by a “preponderance of the evidence.”

It had been argued that “clear proof” (a more stringent standard than the usual “preponderance of the evidence” in a civil case) was required by Section 6 of the Norris-LaGuardia Act. The Court determined that the language and legislative history of that section was intended specifically to curb the inclination of federal courts to impose vicarious liability on unions for any illegal activities committed during the course of a labor dispute, including conduct that was

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123 Such a clause (most used in the construction industry) would require the union to accord the signatory employer the benefit of the most favorable terms the union subsequently grants any other employer. L. REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS* 647-57 (5th ed. 1970).

124 Dolly Madison Industries, Inc., 182 N.L.R.B. 1037 (1970). The most favored nation clause is not a per se violation of the antitrust laws. It can be held so only if there is proof of a predatory purpose on the part of the signatory employer and union to force some other employer out of business. Associated Milk Dealers v. Milk Drivers Local 753, 422 F.2d 546 (7th Cir. 1970).

125 The Board stated that:

In *Pennington*, the contractual clause provided that the union would impose upon all other coal operators in the area the terms of the agreement without regard to their ability to pay, but the contractual provision herein imposes no such mandate . . . . In contrast to *Pennington*, the MFNC provision . . . was manifestly not an effort to impose wage and working conditions on other employers or employees in other bargaining units but was designed only to assure that this Employer could be relieved of any disadvantage that it might otherwise suffer if the Union subsequently negotiated more favorable wage and benefit levels with other employers. 182 N.L.R.B. at 1038.


128 401 US. at 307-11.

129 This section provides in pertinent part that no labor organization “shall be held responsible or liable in any court of the United States for the unlawful acts . . . [of its agents] except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.” Norris-LaGuardia Act § 6, 29 U.S.C. § 106 (1970).
not specifically authorized or ratified.\textsuperscript{130} This provision is not to be construed as requiring clear proof of elements of the antitrust question other than those of agency:

The section neither expressly nor by implication requires satisfaction of the clear proof standard in deciding factual issues concerning the commission \textit{vel non} of acts by union officers or by members alleged to constitute a conspiracy, or the inferences to be drawn from such acts, or concerning overt acts in furtherance of the conspiracy, the impact on the relevant market or the injury to plaintiffs' businesses.\textsuperscript{131}

On such factual issues other than authorization or ratification, the Court held that the standard of proof was the lesser preponderance of the evidence standard.

For our purposes, \textit{Ramsey} is much more significant. It expresses a continued receptiveness for the place of antitrust legislation in labor. To the suggestion that the Court reconsider its holding in \textit{Pennington}, Justice White, in reaffirming the underlying tenets of \textit{Pennington} and \textit{Allen Bradley}, responded:

The Court made it unmistakably clear in \textit{Allen Bradley Co. v. Union}, that unilateral conduct by a union of the type protected by the Clayton and Norris-LaGuardia Acts does not violate the Sherman Act even though it may also restrain trade. . . . We adhere to this view. But neither do we retreat from the "one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. . . . A business monopoly is no less such because a union participates, and such participation is a violation of the Act." Hence we also adhere to the decision in \textit{Pennington}: "[T]he relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws."\textsuperscript{132}

The most significant point in \textit{Pennington} was the notion articulated by Justice White. If a court cannot conveniently determine whether the specific activities challenged fit neatly into the Clayton or Norris-LaGuardia Acts, the court must assume that the labor exemption applies. Also, a court cannot rigidly conclude that when a labor-management combination is accomplished, the exemption is forfeited. Only if the two national policies genuinely conflict must a choice be made since only "unreasonable restraints

\textsuperscript{130} 401 U.S. at 307-11.


\textsuperscript{132} 401 U.S. at 313 (citations omitted).
of trade run afoul of the Sherman Act.” An underlying assumption was that resort to the “rule of reason” afforded the Court considerable flexibility in dealing with multi-unit agreements. Despite suggestions to the contrary in Hutcheson and Allen Bradley, this area does not lend itself to mechanical, per se rules. Resort to the rule of reason may prove to be practical and would obviate the necessity of admitting some conflict between the national labor and antitrust policies, and of painfully determining, in a specific context, which policy must surrender.

The “predatory intent” rationale was recently controlling in Embery-Riddle Aeronautical University v. Ross Aviation, Inc. In this case, the Fifth Circuit extended Pennington to reach a situation where an employer, Ross, recognized and contracted with a union shortly after it had been announced that Ross would be replaced by another company which had submitted the low bid for a successor services contract with the Army. The evidence showed that Ross (who had previously resisted unionization) took advantage of the opportunity (knowing that the successor employer would retain the Ross employees when it assumed the contract) to negotiate a wage agreement that the successor would not be able to afford, thus forcing the successor to relinquish the contract. The testimony also indicated that the union acquiesced in this scheme. The court rejected the union contention that its contract was only with Ross, a single employer, and therefore was not distinguishable from the multi-employer conspiracy of Pennington, and the contention that the collective bargaining agreement was not designed to have “extra-unit” effect, but was simply intended to extend to a successor employer in the same bargaining unit.

C. Loss of the Exemption Through Union Initiated Conspiracies

The question in Pennington was whether a labor agreement, though embodying wages, violates the antitrust laws if its purpose was to put certain competitors out of business. In a companion case, Local 189, Amalgamated Meat Cutters v. Jewel Tea Company, the issue was quite different, yet the

133 For the origins of the rule, see Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, 221 U.S. 1 (1911); and United States v. American Tobacco Co., 221 U.S. 106 (1911). See generally Adams, The “Rule of Reason”: Workable Competition or Workable Monopoly?, 63 YALE L. J. 348 (1954).

134 See Lewis v. Pennington, 400 F.2d 806, 810 (6th Cir.), cert. denied, 393 U.S. 983 (1968), reh. denied, 393 U.S. 1045 (1969) (which held that a substantive violation required a predatory intent and definite purpose to impede or destroy business competitors). Other coal operators prevailed, however, against the UMW in their treble damage antitrust suits. See South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767 (6th Cir. 1970), cert. denied, 402 U.S. 983 (1971); Tennessee Consolidated Coal Co. v. UMW, 416 F.2d 1192 (6th Cir. 1969), cert. denied, 397 U.S. 964 (1970).

135 504 F.2d 896 (5th Cir. 1974).

136 Id. at 902-03.

decision reinforced the notion that the Court must meter conflicting policies.

The case arose out of an industry-wide agreement between the meat cutters union and Chicago butchers which restricted store hours from 9:00 A.M. to 6:00 P.M. In response to a threat of a strike, the Jewel Tea Company reluctantly agreed to that provision. Jewel Tea brought an action under Section 1 of the Sherman Act alleging that the union and the employers who had negotiated the agreement conspired to prevent Jewel Tea from freely marketing at whatever hours it chose. The district court found that the union’s sole motive was to gain desirable working conditions for members and therefore found the arrangement to be inside the labor exemption. The Seventh Circuit reversed and the Supreme Court, split in the same fashion as in Pennington, reversed the circuit court’s decision.

The essential problem in Jewel Tea was one of characterization. There was no evidence of a union-employer conspiracy, but rather there was a situation where the unions, having obtained a marketing-hours agreement from one group of employers, have successfully sought the same terms from a single employer, Jewel, not as a result of a bargain between the unions and some employers directed against other employers, but pursuant to what the unions deemed to be their own labor union interests.

Absent evidence of a conspiracy between the union and other employers, as required in Pennington, the question was whether the working-hours clause was so intimately related to wages, hours, and other terms and conditions of employment as to be a mandatory subject of bargaining. Since the union had a direct interest in the work they performed and the hours they worked, Justice White found that the clause was a mandatory subject of bargaining. Since self-service meat markets could not operate

138 The Meat Cutters Union had negotiated separate agreements with Chicago food stores and Jewel Tea, with each agreement fixing the hours when meat could be sold in the city. Jewel Tea, a large self-service chain, would thus be prevented from engaging in night meat market operations. 381 U.S. at 680-81.


140 Jewel Tea Co. v. Associated Food Retailers of Greater Chicago, 331 F.2d 547 (7th Cir. 1964).


142 Id. at 688.

143 Id. at 692-93. The alternative was to find that such activity constituted an illegal restraint on the product market, thus the relevance of Apex and Allen Bradley.

144 Id. at 695-97. Justices Goldberg, Harlan and Stewart concurred for the same reasons that led them to dissent in Pennington. They accepted the union’s contention that agreements dealing with mandatory subjects of bargaining are unqualifiedly exempt from antitrust enforcement.
at night without affecting the hours of butchers, the agreement concerned a legitimate union interest and was not merely an effort to protect one group of employers from adverse competition. Therefore White concluded that the union's "successful attempt to obtain that provision through bona fide 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." It is significant, however, that Justice White would not have applied an automatic exemption to an agreement solely because it embodied a mandatory subject of bargaining.

An admirable consequence is that although a discussion of wage rates naturally involves consideration of the impact upon the employer's business, which in turn inevitably involves determining the wages to be exacted, any chilling effect that one cannot confidently assume the legality of a "most favored nation" clause, is counterbalanced by the limited reach of Pennington. Only conspiracies are placed in jeopardy. This adds credence to the notion that the subjective motivation for a particular union contract provision is crucial.

The clear import of the Hutcheson decision was to shield a union acting alone when it initiated a strike over a particular bargaining demand. It would consistently follow that a collective bargaining agreement, even by a multi-employer bargaining unit, granting such a demand, is also immune. To hold otherwise would create an "intolerable paradox" by sanctioning economic warfare while outlawing a peace treaty. Allen Bradley, however, would prohibit a union's participation in a preexisting employer conspiracy only if it knowingly, actively and physically aids in enforcing its terms.

The restraint in Pennington, though a prima facie restriction on the labor market, nonetheless affected the product market. Jewel Tea high-
lighted the task of distinguishing between agreements properly concerned with wages, hours and conditions of employment and agreements illegally concerned with the product market.\textsuperscript{153} If the agreement dealt directly with the product market, with any benefit to the employees merely collateral, it would not have been immune to the antitrust laws.\textsuperscript{154} A characterization that the restriction was “intimately related” to wages, hours and conditions of employment immunized the provision. A showing of an “immediate and legitimate” union concern was sufficient to outweigh the adverse effects on the product market.\textsuperscript{155}

Though commentators may be less than satisfied with the reasoning of the case, \textit{Jewel Tea} effectively laid to rest the question of the applicability of the doctrine of primary jurisdiction as an alternative ground to limit the jurisdiction of the courts.\textsuperscript{156} That doctrine “applies where a claim is originally cognizable in the courts,” and the court is compelled to defer to an administrative agency due to its own lack of expertise or the need to protect the integrity of the agency.\textsuperscript{157} Without negating the existence of concurrent jurisdiction at the inception of the action, Justice White saw no reason to compel the Court to defer to the National Labor Relations Board.\textsuperscript{158}

\textbf{III. LABOR DISPUTE: A REQUIREMENT FOR THE LABOR EXEMPTION}

It will be recalled that in order to enjoy the broad benefit of the labor exemption statutorily and judicially extracted from the antitrust legislation, a union must be involved in a “labor dispute” for the purpose of protecting its interests and secondly, it must not combine with a non-labor party. A convenient vehicle to illustrate the former consideration is the Court’s confrontation with the breed known as independent contractors.\textsuperscript{159}

\textit{American Federation of Musicians v. Carroll}\textsuperscript{160} involved unilaterally adopted union regulations which set minimum fees to be charged by orchestra

\textsuperscript{153} \textit{Jewel Tea} involved both a restraint on the labor market (defining the butchers’ working hours) and restraint on the product market (restricting the hours for the sale of meat.)

\textsuperscript{154} 381 U.S. at 689.


\textsuperscript{156} See Meltzer, \textit{supra} note 16, at 696-701.

\textsuperscript{157} 381 U.S. at 684-85.

\textsuperscript{158} \textit{Id.} at 686-88.

\textsuperscript{159} National Labor Relations Act, § 2(3), 29 U.S.C. § 152(3) (1970) (independent contractors are expressly exempted from coverage under the Act).

leaders on club date engagements. While price fixing is generally a per se violation of the antitrust law, the Court found that the union could avail themselves of the labor exemption. The minimum prices constituted a means of protecting wage scales of the musicians who played in the orchestra on the club date engagements from the adverse effect of the job and wage competition among the orchestra leaders.\(^{161}\) Quoting Justice White's opinion in Jewel Tea, the Court emphasized that "[t]he 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."\(^{162}\) The price list was found to be indistinguishable from the collective bargaining clause in Local 24, International Brotherhood of Teamsters v. Oliver\(^{163}\) which had "governed not prices but the mandatory bargaining subject of wages."\(^{164}\) In Oliver, it was held that a state court could not prohibit, under its antitrust laws, a provision regulating the price which an employer could pay to independent carriers for the rental of their trucks. The clause was held to be necessary to preserve the wage scale of the employer's own drivers in light of the competition by independent contractors who could, by changing a rent which did not cover their operating and maintenance (i.e., non-wage) expenses, effectively receive less than union scale for their driving services.\(^{165}\)

Similarly in Carroll, since the price regulations were in substance designed to preserve the wage scale of persons employed as leaders and of each of the instrumentalists for their services as musicians, the elimination of price competition was accomplished through the allowable means of avoiding competition in the labor market.\(^{166}\) The Court stated that:

\[^{161}\] The Second Circuit had disqualified the "price list" concluding that the list was concerned with prices and not wages. 391 U.S. at 107. But see Goldfarb v. Virginia State Bar, 421 U.S. 773, reh. denied, 423 U.S. 886 (1975).
\[^{162}\] 391 U.S. at 107, citing to Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 690 n.5 (1965). The Court in Carroll stated:

The majority of the Court of Appeals ... read the opinions of Mr. Justice White and Mr. Justice Goldberg in that case as requiring a holding that "mandatory subjects of collective bargaining carry with them an exemption ... ," but that "[o]n matters outside of the mandatory area ... no such considerations govern ... ." Even if only mandatory subjects of bargaining enjoy the exemption—a question not in this case upon which we express no view—nothing Mr. Justice White or Mr. Justice Goldberg said remotely suggests that a distinction between mandatory and nonmandatory subjects turns on the form of the method taken to protect a wage scale, here a price floor.

319 U.S. at 110 (citations omitted).

\[^{164}\] 391 U.S. at 109.

\[^{166}\] The union regulations prescribed prices which members serving as orchestra leaders on one time engagements could charge the purchaser of the entertainment. This price was the total of the union wage scale for each of the instrumentalists, plus the scale for each of the instrumentalists, plus the scale for the leader (usually double that of the instrumentalists), plus 8% to defray insurance and other expenses.
The price of the product, — here the price for an orchestra for a club date — represents almost entirely the scale wages of the sidemen and the leader. Unlike most industries, except for the 8% charge, there are no other costs contributing to the price. Therefore, if leaders cut prices, inevitably wages must be cut. 167

What was on its face a price regulation, was in reality an exempt shield to protect the instrumentalists from the leader's cutting their wages below union scale.

A related question in Carroll was whether the leaders (qua employer) constituted a "labor group" which was a party to a "labor dispute" within the meaning of Section 13 of the Norris-LaGuardia Act. 168 Writing for the majority, Justice Brennan found the existence of "a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors" was the relevant criteria for determining that the leaders were a labor group. 169 Since there was no evidence of a conspiracy and the subject of bargaining was one of legitimate union interest, there was no antitrust violation.

The problem is to what extent an employer can organize a union and restrict competition from outsiders on matters which on its face involve wages, working hours and other conditions of employments, but in actuality are restraints upon the product market by non-labor groups on matters of price, supply and consumer distribution. 170 The issue is explained by reference to two Supreme Court cases. In Columbia River Packers Association v. Hinton, 171 the Court upheld an injunction against a group of independent fishermen who had organized an association which bargained collectively with fish processors and canners relating to the sale of fish. The association demanded that the processors and canners agree in their purchase contract not to buy fish from non-members of the association. Since the dispute was between businessmen concerning the sale of commodities and did not relate to the working conditions of the fisherman or to the relationship between employer and employee, there was no "labor dispute" within the meaning of the Norris-LaGuardia Act. An injunction preventing the association's attempted monopolization of the Northwest fishing industry in violation of the Sherman Act was in order.

167 391 U.S. at 112. There was evidence to support the conclusion that if the leader did not charge the amount stipulated by the union, including a charge for out of pocket expenses and the wage of himself and all of the instrumentalists, he would not pay the sidemen the prescribed scale.


169 391 U.S. at 106.


171 315 U.S. 143 (1942).
Similarly, in Los Angeles Meat Drivers Union v. United States, grease peddlers (those who purchased grease from local restaurants and other sources of supply and then sold to grease processors) organized a union, along with truck drivers employed by the processors themselves, who not only purchased from the peddlers but used their own drivers to make pickups directly from the sources of supply. The union fixed prices at which the peddlers were to buy from sources and were to sell to the processors, allocated accounts and territories, published among the processors a "black list" of nonunion peddlers and engaged in strikes and boycotts to achieve its objectives. Although the union was in no position to contest its violation of the Sherman Act, it forcefully contested the order of the trial court terminating membership in the union. In light of the evidence that the processors had never replaced or threatened to replace their drivers with peddlers and since there was no "job or wage competition, or economic interrelationship of any kind between the grease peddlers and the other members of the appellant union" which could otherwise justify unionization of peddlers and drivers, the injunction was proper.

United States v. Olympia Provision and Baking Co. is illustrative of the considerations underlying this line of decisions and is worth reviewing at length. This case presented an action for injunctive relief brought against a manufacturing company and a union composed partly of independent contractors. The complaint alleged that defendants entered into a combination and conspiracy to restrain and monopolize interstate trade in violation of Sections 1 and 2 of the Sherman Act, in that they conspired to fix and maintain prices, terms and conditions of sale of frankfurters, to allocate customers, and to boycott distributors not members of the defendant union. The distributors, held to be independent contractors became members of a union which included employees of defendant company, without solicitation by or apparent benefit to the union, with whose members the distributors were not in competition and whose welfare was not affected by the distributors' business. Significantly, the court stated that since the distributors were not employees of the manufacturers and since a fundamental conflict existed between the underlying labor and antitrust goals, the activities of labor organizations on behalf of their members who had the status of independent contractors must be closely scrutinized prior to the extension

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173 Id. at 98.
174 Id. at 103.
176 282 F. Supp. at 827.
177 Id. at 825.
of any antitrust exemption. Finding that the actions complained of were not exempt, the court stated that "[o]nly where union-imposed restraints upon the labor market directly yield immediate benefits to the legitimate interests of labor organizations, and where the relative impact upon the product market is indirect and consequential, have such activities been protected." After concluding that "where union activities have been aimed directly at commercial competition (such as price fixing or boycotts), antitrust considerations have prevailed despite the labor interest sought to be protected or advanced thereby," the court warned that agreements between unions and non-labor groups in furtherance of anticompetitive goals need not be explicit, but may be inferred from acts and surrounding circumstances where there is clear proof of union participation and authorization.

A similar result as Carroll was arrived at in Scott Paper Co. v. Gulf Coast Pulpwood Association where members of certain associations of pulpwood producers conducted a work stoppage and picketing directed at pulpwood dealers for whom the producers cut, transported and loaded the wood. Certain paper companies sought to enjoin the activities of the pulpwood producers, alleging that such producers were independent contractors rather than employees of the pulpwood dealers. After examining the economic relationship between the producers and the dealers, the court found that the producers were employees and that therefore there was a labor dispute within the protection of the Norris-LaGuardia Act.

Columbia River Packers and Los Angeles Meat Drivers were easily distinguished since those cases involved a "union" of persons who were actually independent businessmen as opposed to employers.

IV. THE CONNELL CONSTRUCTION COMPANY CASE

A. Judicial and Legislative Background

Subsequent statutory developments, i.e., amendments to the National Labor Relations Act (NLRA), have supplemented Allen Bradley. It will be recalled that despite the anti-competitive nature of collective bargaining,

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178 Id. at 827.
179 Id. at 827-28.
180 Id. at 828 (citations omitted).
181 Id.
182 85 L.R.R.M. 2978 (S.D. Ala. 1973), aff'd, 491 F.2d 119 (5th Cir. 1974). Note that the attempts to band together to raise the prices paid to the producers for the pulpwood delivered to the Scott mills would have constituted per se violations of Section 1 of the Sherman Act. See United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).
183 85 L.R.R.M. at 2984-86. See also Armco Steel Corp. v. UMW, 87 L.R.R.M. 2799 (4th Cir. 1974); Conley Motor Express, Inc. v. Russell, 500 F.2d 124 (3rd Cir. 1974).
184 Id. at 2984-86.
185 Id. at 2986-88.
the Court has acknowledged the legislative desire to protect the bargaining process, and has held that not all collective bargaining agreements are outside the limitations of the Sherman Act, i.e., where such agreements involve mandatory subjects of bargaining. 188

Amendments to the NLRA outlawing certain secondary pressures and hot cargo provisions 187 that had previously been useful in restraining product competition 188 and the legislative endorsement of multi-unit employer bargaining 189 have given added vitality to the Allen Bradley doctrine by further delineating its parameters. Neither the language nor the legislative history of these amendments imply that their purpose was to abandon the limitation on the labor exemption imposed by the business monopoly rationale of Allen Bradley. Moreover, the secondary boycott amendment (Section 8(e) of the NLRA) was designed to eliminate loopholes in the antitrust laws and the tenuous distinctions that had developed with respect to hot cargo provisions. 189 Since the applicability of these amendments does not depend upon the concerted action by or the benefit to employer groups, 191 one commentator has suggested that these provisions have reduced the need for additional legislation prohibiting union involvement in restraints on product competition. 192 However, Section 8(e) 193 deals with more limited restrictions (i.e., those which prevent one employer from dealing with another possibly

186 Allen Bradley Co. v. Local 3, IBEW, 325 U.S. at 806, 810. The Court recognized both the need to reconcile the two congressional policies and the absence of any congressional intent wholly to exempt collective bargaining from the Sherman Act.


188 The 80th Congress expressly rejected proposals for eliminating the labor exemption from union activities involving price fixing and other direct market restraints. The rationale appears to be that boycotts, previously utilized to accomplish such restraints, were regulated by the Taft-Hartley amendments. It is significant to note however, the absence of any intention to expand the labor exemption into areas previously reached by the Sherman Act. H. Conf. Rep. 510, H.R. 3020, 80th Cong., 1st Sess. 65 (1947), reprinted in [1947] U.S. CODE CONG. & AD. NEWS 1135. See also Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 YALE L. J. 14, 59 n.217 (1963).

189 See NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957).

190 Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 MINN. L. REV. 257, 271-72 (1959). The provisos to Section 8(e) exempt the construction and garment industries from the prohibition against securing hot cargo agreements or enforcing them by exerting economic pressure. The provisos are silent concerning the antitrust exemption and clearly do not purport to allow horizontal price fixing or other restraints on the product market.

191 See generally Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e), 113 U. PA. L. REV. 1000 (1965).


193 Section 8(e) prohibits agreements whereby (1) an employer agrees to cease or refrain from handling products of another employer and (2) by which an employer agrees to cease doing business with another employer.
because the latter is on unfriendly terms with the contracting union or another union, or possibly because it pays substandard wages), and has been limited consistently with this intent.

The National Labor Relations Board has upheld agreements aimed at preserving jobs within the bargaining unit. Section 8(e) does, however, condemn agreements designed to acquire new work for the unit, as distinguished from work that has been traditionally or regularly performed by the unit. It appears that neither the NLRA nor the Sherman Act reaches agreements which are designed to protect jobs (traditionally within the union's jurisdiction) by prohibiting the use of new materials, new equipment or by preventing all subcontracting without regard to the union relationship of the potential sellers.

The text and legislative history of Section 8(e) evidence an intent to continue the distinction between valid primary activity and unlawful secondary activity that is the fulcrum of Section 8(d)(4) as construed for years by the courts and the Board. In Council of Painters Local 48 v. NLRB, the court set forth guidelines for construing Section 8(e) so as to prohibit only contracts having an unlawful secondary object:

The test as to the "primary" nature of a subcontractor clause in an agreement with a general contractor has been phrased by scholars as


195 E.g., Council of Painters Local 48 v. NLRB, 328 F.2d 534, 538 (D.C. Cir. 1964), wherein the court upheld the validity of a clause limiting subcontracting to employers meeting union standards, determining that such a restriction was designed to protect primary work opportunities by removing the incentive to subcontract. See also International Bd. of Teamsters v. NLRB, 335 F.2d 709 (D.C. Cir. 1964).

196 Meat and Highway Drivers Local 710 (Swift & Co.), 143 N.L.R.B. 1221, 1229-30 (1963), enforcement denied in part, 335 F.2d 709, 714 (D.C. Cir. 1964) clarified, 348 F.2d 803 (D.C. Cir. 1965); Ohio Valley Carpenters Dist. Council, 136 N.L.R.B. 977, 986 (1962); Milk Drivers & Dairy Employees Union (Minnesota Milk), 133 N.L.R.B. 1314, 1317 (1961), aff'd, 314 F.2d 761 (8th Cir. 1963). See Comment, Subcontracting Clauses and Section 8(e) of the National Labor Relations Act, 62 MICH. L. REV. 1176, 1188 (1964), questioning the distinction between new and traditional work and implying that union efforts to expand jobs should not be limited by prior work jurisdiction.


199 328 F.2d 534 (D.C.Cir. 1964).
whether it "will directly benefit employees covered thereby," and "seeks to protect the wages and job opportunities of the employees covered by the contract." We have phrased the test as whether the clauses are "germane to the economic integrity of the principal work unit," and seek "to protect and preserve the work and standards [the union] has bargained for," or instead "extend beyond the [contracting] employer and are aimed really at the union's difference with another employer." 200

_National Woodwork Manufacturers Association v. NLRB_ 201 is illustrative of the relationship between Section 8(e) and the antitrust legislation. These guidelines were expressly adopted in _National Woodwork_ when the Court considered a challenge pursuant to Section 8(e) to a clause in a labor contract which allowed carpenters to refuse to handle pre-fitted doors prior to shipment to the jobsite. Clearly the objective of the product boycott was to preserve fitting work for bargain unit employees, 202 thus rendering the provision primary and legal. A central issue was:

[W]hether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's [the contracting employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, . . . the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary . . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of a contracting employer _vis-a-vis_ his own employees [or whether it seeks to benefit other than the boycotting employees of the primary employer]. 203

Since the union's objective was the preservation of unit work, and since it had no quarrel with the union status of the door manufacturers, the contract provision was upheld. 204

In the companion case, _Houston Insulation Contractors Association v. NLRB_, 205 the Court extended _National Woodwork_ by finding that a work

200 Id. at 538 (footnotes omitted). See generally Feldacker, _Subcontracting Restrictions and the Scope of 8 (b) (4) (A) and (B) and of 8 (e) of the NLRA, 17 LAB. L. J. 170 (1966).
202 Id. at 648 (Harlan, J., concurring).
203 Id. at 644-45 (footnotes omitted).
204 Id. at 646. The dissenting opinion would have invalidated the clause since it was a literal agreement to refrain from handling products of a neutral employer and was the type of product boycott for work-preservation goals that the dissenters believed Congress had intended to outlaw under Section 8(e). _Id._ at 650. This reasoning conveniently points out the majority's approach to limiting the reach of Section 8(e) as originally intended. _See_ notes 187-97 _supra_ and accompanying text.
preservation clause between a company and a local union could be enforced by members of an affiliated local. Thus, such a local union employed by the same company could also use the work preservation clause and refuse to work on “hot goods” handled by the company in derogation of the union’s contractual commitment. The objective of the signatory local was primary, as was the supportive work cessation by fellow employees of the same company. Notwithstanding that the latter employees belonged to a different union at a separate location, no secondary employer was drawn into the situation.

Because of friction traditionally inherent in the construction industry due to union and nonunion personnel working side by side at the jobsite,\textsuperscript{206} Section 8(e) expressly exempts hot cargo clauses “relating to the contracting or subcontracting of work to be done at the jobsite.”\textsuperscript{207} If a construction employer agrees to cease accepting at the jobsite materials made elsewhere by a nonunion producer, such an agreement is not sheltered by the proviso. A work stoppage to obtain an unlawful hot cargo clause relating to jobsite work is lawful, but a strike to obtain such a clause relating to work performed elsewhere will violate Section 8(b)(4)(A) and thus may be enjoined pursuant to Section 10(e) or made subject to damages under Section 303 of the Labor Management Relations Act.\textsuperscript{208}

In contrast to the clothing industry, there is no explicit provision in Section 8(e) which takes the construction industry out of the reach of Section 8(b)(4) altogether. For this reason, a strike which is not aimed at securing a hot cargo clause but rather to enforce it, and thus to discontinue the relationship between the employer and a nonunion contractor, is prohibited by Section 8(b)(4)(b).\textsuperscript{209} Since Section 8(e) shelters only agree-

\textsuperscript{206} See notes 194, 196, 197 and accompanying text supra.

\textsuperscript{207} The breadth of the protective proviso in 8(e) relating to the clothing industry was dramatically highlighted in Joint Board of Coat Workers’ Union (Hazantown, Inc.), 212 N.L.R.B. 735 (1974), wherein the Board rejected the jobber’s argument that picketing, regardless of whether or not it was sheltered under the secondary boycott statutes, had an object of securing recognition (by the contractor and in substance, by the jobber as something of a common employer of the contractor’s employees) and thus violated Section 8(b)(7). The Board, noting the broad protection given by the proviso to hot cargo agreements in the clothing industry and to picketing to secure such clauses, held that 8(b)(7) should not be construed to prohibit picketing. 212 N.L.R.B. at 738.


\textsuperscript{209} This is true even if the nonunion employer is performing work at the jobsite. A strike to force a cessation is prohibited, but an employer agreement is lawful, as is any other measure short of work stoppage or coercion by the union. Northeastern Indiana Trades Council, 148 N.L.R.B. 854 (1964), enforcement denied on other grounds, 352 F.2d 696 (D.C. Cir. 1965).
ments dealing with the subcontracting of work at the jobsite, there is no disagreement as to the reach of the proviso's language of "work to be done at the site of construction, alteration, painting or repair of a building, structure or other work." The cases have construed this phrase narrowly, requiring that the work be essentially performed away from the jobsite. In rejecting a strict "physical test" in determining whether subcontracted work is jobsite work, one court has chosen to examine the policies behind the proviso: "The potential for conflict is likely to arise only when the nonunion laborers are in frequent and relatively close contact with the union craftsmen." 211

While contract provisions prohibiting employer business with a company which has not executed a union signatory clause is secondary and unlawful, the Board and the courts have exempted the "union standards" clause, wherein the contracting employer agrees not to have work performed by any other company which "does not observe the wages, hours and conditions of employment" which are found within its own bargaining unit. 212 Although a union has a "legitimate interest in preventing the undermining of the work opportunities and standards of employees in a contractual bargaining unit by subcontractors who do not meet the prevailing wage scales and employee benefits covered by the contract," 213 such a union may not "control the employment practices of firms which seek to do business with the employer." 214 Similarly a clause which ostensibly appears to be a union standard clause or a no subcontracting clause, may be invalid when the standards enumerated relate to work, skills, or geographical jurisdiction different than those of the contracting employer. For example, a no subcontracting clause violated Section 8(e) when the clause encompassed the hauling of concrete girders, while employees under the labor agreement hauled only dirt, rock, debris, asphalt and other supplies. 215

Of far greater interest to us is the analogy drawn in National Woodwork wherein the Court upheld a work preservation clause in part because it was being used as a "shield" to retain work traditionally performed by unit

210 Hickey, Subcontracting Clauses Under Section 8(e) of the NLRA, 40 Notre Dame Law. 377 (1965); Note, 57 Va. L. Rev. 1280 (1971).
211 E.g., NLRB v. Teamsters Local 294, 342 F.2d 18 (2d Cir. 1965); Ohio Valley Carpenters' Dist. Council, 136 N.L.R.B. 977 (1962).
212 Acco Constr. Equip., Inc. v. NLRB, 511 F.2d 848, 851 (9th Cir. 1975).
213 See cases cited note 195 supra. Such a provision has a primary object, i.e., the retention of that work and the preservation of work standards within the bargaining unit and the removal of any inducement to subcontract the work more cheaply.
214 Teamsters Local 386, 198 N.L.R.B. 1038 (1972).
215 Id.
216 Teamsters Local 216 (Bigge Drayage Co.), 198 N.L.R.B. 1046 (1972), enforced, 520 F.2d 472 (D.C. Cir. 1975).
employees at the jobsite rather than as a “sword” to acquire new work. The union contract contained a provision negotiated by a carpenters union under which its members would not handle prefabricated, factory pre-cut doors. The Court determined that the union’s “will not handle” clause was to protect and preserve work customarily performed by bargaining unit employees and consequently not a product boycott. After reviewing the legislative history and judicial decisions with regard to the “primary” and “secondary” pressure distinction, the Court in National Woodwork distinguished Allen Bradley on the ground that there the employer-union agreement was used as a “sword” to monopolize other jobs for union members, where here it was used as a “shield” to preserve work and jobs for members of the bargaining unit. Based on the implicit legitimization of the validity of a work preservation clause in Fibreboard Paper Product Corporation v. NLRB, the Court found that the activities were primary and hence not unlawful signatory contracts under Section 8(e): “The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees.”

B. Antitrust Implications

Against this backdrop the Court decided Connell Construction Co. v. Plumbers & Steamfitters Local 100. After determining that the labor

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217 National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 630, reh. denied, 387 U.S. 926 (1967). Compare NLRB v. Sheet Metal Workers Local 141, 425 F.2d 730 (6th Cir. 1970), with Sheet Metal Workers Local 223 v. NLRB, 498 F.2d 687 (D.C. Cir. 1974) and Canada Dry Corp. v. NLRB, 421 F.2d 907 (6th Cir. 1970), sustaining work acquisition clauses for “fairly claimable work”, or work so closely related to the union's old work whether they take the form of no-subcontracting clauses or union standards clauses. See also Teamsters Local 386, 198 N.L.R.B. 1038 (1972).

The same is true in cases invoking the “right to control” doctrine. Local 438, Journeyman Plumbers (George Koch Sons, Inc.), 201 N.L.R.B. 59, enforced 490 F.2d 323 (4th Cir. 1973). However, most courts have rejected the Board's right of control test and have followed National Woodwork, holding that a union will not violate 8(b)(4)(b) (what is prohibited by the Board is not the hot cargo clause itself, but rather its enforcement by a work stoppage, a violation of 8(b)(4)(b) but not of 8(e) or 8(b)(4)(a)) if the object of the strike is work preservation for unit employees. NLRB v. Enterprise Ass'n Local 638, 97 S. Ct. 891 (1977); Carpenters Local 742, v. NLRB, 444 F.2d 895 (D.C. Cir. 1971), cert. denied, 404 U.S. 986 (1974) (the fact that a signatory employer lacks the right to control the assignment of work in question is only one factor in determining the union's objective).


219 379 U.S. 203 (1964). See also 386 U.S. at 642.

220 386 U.S. at 645.

221 421 U.S. 616, reh. denied, 423 U.S. 884 (1975). Professor Hanslowe has opined: Connell seems to me to contain these somewhat random, but nevertheless interesting nuggets. First of all, the case involves the interesting resurrection of some ancient ideas or, as others might call them, old friends. Thus, there is worry in the case over direct restraints on trade. Of course, that was the worry of some very old anti-trust labor cases indeed. Secondly, there is the observation made in the course of the majority opinion, that even though the union's end was lawful, the means used were bad. That, if my
exemption from the antitrust laws did not apply to Local 100's conduct,\textsuperscript{222} the Court exacted a significant limitation upon the protection afforded by the construction industry proviso to Section 8(e).\textsuperscript{223}

The \textit{Connell} case involved Local 100's picketing of Connell, a general contractor which did not itself employ plumbers and steamfitters, for a clause under which Connell would subcontract work only to companies with a signed contract with Local 100. Connell signed under protest and then filed an antitrust suit against the union.\textsuperscript{224} In rejecting the union’s argument that the agreement with Connell was expressly authorized by the construction industry proviso and therefore lawful under the antitrust laws, the Court noted that while the agreement came within the literal language of the proviso, the agreement was not saved. The majority relied upon the statutory setting that gave rise to the enactment of Section 8(e),\textsuperscript{225} including the fact that one of the principal purposes of the 1959 Act was the ban on “top down” organizing.\textsuperscript{226} Since Local 100 did not have as its objective the protection of either Connell’s employees or Local 100’s members from having to work with nonunion personnel on the jobsite,\textsuperscript{227} the conclusion was that the Congressional authorization in the proviso extends only to subcontracting agreements “in the context of collective bargaining relationships” and that the proviso extended only to agreements related to “particular jobsites.”\textsuperscript{228} The lack of an orthodox collective bargaining agreement between the union and the general contractor and the fact that the union was not the bargaining representative of the employees of the general contractor was destructive to the union’s defense of protection under the proviso. Since the prohibition on subcontracting would extend to jobsites at which

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\textsuperscript{222} 421 U.S. at 621-26. \\
\textsuperscript{223} \textit{Id.} at 626-33. \\
\textsuperscript{224} Connell also invoked state antitrust provisions. \\
\textsuperscript{225} \textit{Id.} at 628-30. \\
\textsuperscript{226} \textit{Id.} at 632. \\
\textsuperscript{227} \textit{Id.} at 625-26. \\
\textsuperscript{228} \textit{Id.} at 633. Mr. Cohen has suggested that this rationale is the “raison d’etre” for the majority opinion: A.B.A. \textit{Section of LAB. REL. L. REPORT OF 1975 PROCE. 62} (1976). 
\end{flushright}
the union members were not yet employed,229 and since the objective was generally to exert pressure on mechanical subcontractors in the area, the legislative policy was held to be inapplicable to the union. The Court, in considering the implication that Congress intended to shelter hot cargo agreements with contractors who were "strangers" to the union, refused to give construction unions "an almost unlimited organizational weapon" in achieving top down organizing contrary to the desire of employees.230 Much like the peculiar music entertainment industry in Carroll,231 the construction proviso was intended to deal with only a limited range of special problems in the construction industry.232

The real question in Connell, unnecessary to address in National Woodwork, was to what extent a union who violates a provision of the National Labor Relations Act is subject to the reach of the antitrust laws. Precisely articulated, is a union, acting in furtherance of its own interests and not as part of a conspiracy with a non-labor group, subject to either state or federal antitrust measures, when through economic coercion, it compels a general contractor whose employees such union does not represent, to agree to limit the subcontracting of on-site work, within the union's jurisdiction to employers who are parties to the union's multi-employer bargaining agreement?233 Even though the agreement was an unlawful hot cargo clause or union signatory clause, it did not follow that such agreement also enjoyed a federal antitrust exemption.234 The Court remanded the case for consideration of Connell's claim that the agreement violated Section 1 of the Sherman Act, forbidding contracts in restraint of trade, and Section 2 of the Act, forbidding monopolies.235

Although the hot cargo clause was designed to increase the organiza-
tional power of the union, it was not immune from the antitrust laws. The Court acknowledged that a labor organization may be shielded by two types of exemptions. First, there is the statutory exemption provided by the Clayton and Norris-LaGuardia Acts, as articulated in Hutcheson, which covers unilateral activity such as secondary picketing and boycotts. Secondly, there is the judicially fashioned exemption applied in Jewel Tea which "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions."

Justice Powell continued to point out that "while the statutory exemption allows unions to accomplish some restraints by acting unilaterally. . . ., the non-statutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market." In addition to holding that the agreement was not authorized by Section 8(e), the Court determined that Local 100 had used direct restraints on the product market to achieve its admittedly permissible organizational objective. The agreement, however, "indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods." The union could also utilize the clause and its control over the extent of its own organizing, to exclude certain targeted subcontractors for reasons wholly collateral to their wages and working conditions. Although the record was devoid of any evidence of such union intent or of such "spillover" anticompetitive effects, and although the Court conceded that the "record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible," it concluded that since a developed record might show such an intention or effect, a nonstatutory immunity was unwarranted and remand compelled. Secondly, the Court envisioned that such a subcontracting clause with a general contractor could give the union control over access to the mechanical subcontracting market, since the union could refuse to sign contracts with marginal or non-resident com-

236 Id. at 621-22.
237 Id. at 622. This exemption had its origin in Apex. While an argument may be advanced that Connell blatantly conflicts with Apex, it should be noted that the union in Apex sought to protect present organizational gains achieved elsewhere. 310 U.S. at 482. Also in Apex, the union in fact represented the employees of the employer upon whom pressure was being exerted.
238 421 U.S. at 623 (citations omitted). For an example of such a unilateral restraint, see Federation of Musicians v. Carroll, 391 U.S. 99, reh. denied, 393 U.S. 902 (1968).
239 421 U.S. at 629-31.
240 Id. at 623.
241 Id. at 623-24.
242 Id. at 625.
panies. Thirdly, since Local 100 disclaimed any interest in, and was not representing Connell's employees, the union was not within a bargaining setting. Thus, it could not rely on the federal policy favoring collective bargaining to protect its campaign to exclude nonunion subcontractors from the market. Since, as discussed earlier, Section 8(e) extends only to agreements in the context of collective bargaining and "possibly to common-situs relationships on particular job sites," that section offered no antitrust immunity. Lastly, the Court held that the remedies provided by the National Labor Relations Act were not exclusive. Notwithstanding the fact that the union violated Section 8(e), antitrust remedies were not precluded.

Since the union and Connell had already executed an agreement, the statutory exemption for a union acting alone could not apply. Although the apparent goal of organizing as many contractors as possible was permissible, even though the effect would be to reduce the competition unionized employers would face from nonunion companies, the methods the union chose were not immune simply because the goal was legal.

Here Local 100, by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

Notwithstanding the fact that such an agreement, if included in a lawful collective bargaining agreement, may have been entitled to an antitrust exemption, "[t]he federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell of its campaign to exclude nonunion firms from the subcontracting market."
Jewel Tea's protection therefore, of agreements "ultimately related" to working conditions, even though they may also directly effect the product market,\(^{252}\) was of no avail. Rather, Local 100's conduct came closer to Allen Bradley's proscription of union employer combinations to exclude the products of all employer's, union and nonunion, located outside a union's jurisdiction.\(^{253}\) As in Allen Bradley, the restraint went beyond the bounds of any immediate, legitimate demands, organizational or otherwise.

C. Application of the Connell Case

The first case applying the Connell rationale was California State Council of Carpenters v. Associated General Contractors of California.\(^{254}\) Defendant employers were able to successfully defend an antitrust suit by relying on Connell as a "shield" rather than a "sword." In that case the carpenters alleged that defendants had violated the antitrust laws by entering into a conspiracy to hire nonunion workers in order to destroy the plaintiff unions. The court described the essence of plaintiff's claim "to be that defendants violated the antitrust laws insofar as they declined to enter into agreements with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs, precisely the type of agreement which subjected the union in Connell to antitrust liability."\(^{255}\) Accordingly, the court held that the union had stated no cause of action under the antitrust laws, since the action alleged by the union against the employer occurred in the "normal type of labor dispute"\(^{256}\) which would not have a "potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."\(^{257}\)

\(^{252}\) 381 U.S. at 689-91.

\(^{253}\) 325 U.S. at 799-801. It should be noted that Pennington's requirement of a "predatory purpose" was inapplicable since there was no apparent evidence other than the union's intent to organize. Presumably this would be an issue on remand. 421 U.S. at 625 n.2. Part of the complaint was that Connell had been coerced by the picketing into conspiring with the union by signing the agreement. This should in no way prove fatal since it will be recalled that in Jewel Tea, Justice White passed over the lack of restrictive effect on other units and based his finding of an exemption on lack of a claimed conspiracy. Mishkin, The Supreme Court: 1964 Term, 79 Harv. L. Rev. 56, 178 n.11 (1965). It may be argued that Pennington was based upon the "extra-unit" bargaining infirmity and that the predatory intent was merely a makeweight. It is clear that a predatory purpose was not required in Allen Bradley.


\(^{255}\) Id. at 1070.

\(^{256}\) Id.

\(^{257}\) Id. (quoting Connell, 421 U.S. at 635). The court distinguished Heat and Frost Insulators v. United Contractors Ass'n, 483 F.2d 384 (3d Cir. 1973), modified, 494 F.2d 1353 (3d Cir. 1974), relied upon by plaintiffs, on the basis that Heat and Frost Insulators involved an alleged conspiracy between unions and employers to fix prices while the instant case only charged a conspiracy between defendant employer association and its constituent members. The court also distinguished Robertson v. National Basketball Ass'n, 389 F. Supp.
Similarly in *Operating Engineers Local 370 v. Neilson & Company*, the employer was able to rely upon *Connell* as a defense. In that case a collective bargaining agreement between the plaintiff unions, the five basic trades, and the defendant general contractor provided that the terms and conditions of the contract affecting the contractor apply equally to any subcontractor employed by the general contractor, and to any subcontract which the general contractor entered into. When the general contractor subcontracted part of the work on one of its jobsites to a nonunion company, the unions filed a suit to enforce the contract. The defendant employer responded by asserting that the clause in dispute violated Sections 1 and 2 of the Sherman Act, and Section 8(e) of the National Labor Relations Act, relying upon the *Connell* decision. Although the Court acknowledged that factually *Connell* was distinguishable, the plaintiffs here did in fact represent the general contractors' employees and the *Connell* rationale was still deemed appropriate. The Court stated, "The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market." Implicitly, the court in *Neilson & Company* embraced the balancing test previously articulated in *Jewel Tea* and *Allen Bradley*. The clause exacted a direct restraint on competition, notwithstanding the union's contention that it did not compel the employer to contract only with subcontractors who had a current agreement with the unions but merely required that the subcontractors meet certain terms of the contract. A substantive violation under the Sherman Act was stated since: (1) the clause could be complied with only if the employer contracts with union subcontractors; (2) the effect was to restrain trade by boycotting nonunion subcontractors; (3) unions gave up their freedom in dealing with subcontractors since they must agree only to equal terms and conditions; and (4) the clause amounts to a concerted refusal to deal, which in itself violates the Act. As regards the Section 8(e) defense, the court found no interest in the unions in

867 (S.D.N.Y. 1975) on the basis of that case's unique facts, "involving relatively powerless plaintiff employees arrayed against two allegedly independent employer associations accused of conspiring with each other to restrain competition . . ." and declined to follow *Robertson* since it was decided before *Connell*. 404 F. Supp. at 1071.


259 Id. at 2863.

260 Id. at 2862.

261 Id. at 2863 (quoting *Connell*, 421 U.S. at 626).

262 92 L.R.R.M. at 2863. See also Morse Bros. v. Engineers Local 701, 87 L.R.R.M. 2833 (D. Ore. 1974), also finding a similar clause to be a per se violation of Section 1 of the Sherman Act. See note 182 supra. Since the Sherman Act was interposed as a defense by the employer, a finding of invalidity of the clause in question ended the case.
alleviating jobsite friction, and under Connell, the clause was void as an attempt at "top down" organizing, and was not limited to jobsites where the employees represented by the union were working.263

In the first National Labor Relations Board decision affected by Connell, North Central Montana Building and Construction Trades Council (Sletten Construction Company),264 a union was charged with a violation of Section 8(b)(7)(A)265 of the NLRA for picketing in response to a general contractor's refusal to enter into a subcontract agreement. The facts indicated that the general contractor (Sletten) employed members of some trade unions, while other trades whose services were required were subcontracted to employers that employ members of such crafts.266 The contract proposed by the Council did not seek "recognition as the collective-bargaining representative" of Sletten's employees. The Board noted that by its terms, the contract "applies only to work which the contractor does not perform with his own employees, but uniformly subcontract to other firms"; and provides that for "the aforesaid work falling within the normal trade jurisdiction of any or all unions affiliated with the Council [Sletten] shall contract or subcontract such work only to firms that are parties to an executed, current collective-bargaining agreement with any or all union affiliates with the Council."267

Since here the demand was not recognitional and there could not be any valid recognitional motivation, the Board dismissed the Section 8(b)(7)(A) complaint.268 Of crucial significance is that the Board does not regard Connell to be applicable to any unfair labor practice other than a Section 8(b)(4) violation.269

263 92 L.R.R.M. 2863-64.
266 222 N.L.R.B. at 176.
267 Id. Thus the subcontracting clause was almost identical to that in Connell.
268 Id. at 177. This is in accord with the Board's decision in Dallas Bldg. & Constr. Trades Council, 164 N.L.R.B. 938 (1967), enforced, 396 F.2d 677 (D.C. Cir. 1968).
269 222 N.L.R.B. at 177 n.5. While the decision is not binding on the courts, it will at least prove persuasive in answering the question left open in Connell as to the reach of the case to an unfair labor practice by a union not expressly exempted by the NLRA. It would seem therefore, that Connell does not reach any and all unfair labor practices. See notes 208 and 247 supra.

For further cases subsequent to Connell and of some interest, see Adams, Ray and Rosenberg v. William Morris Agency, Inc., 411 F. Supp. 403 (C.D. Cal. 1976) (reaffirmation of the Hutcheson rule that a union's conduct is within the Clayton exemption and within the protection of the Norris-LaGuardia Act, if the union does not conspire with non-labor groups and acts in its own self-interest); Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, 408 F. Supp. 1251 (S.D. N.Y. 1976) (exemption from the antitrust laws held to be inapplicable where two union representatives and a third party conspired to drive a grocery store out of business by striking). Compare Tugboat, Inc. v.
CONCLUSION

For upwards of 100 years, courts have been largely concerned in labor cases with defining "the allowable area of economic conflict." This concern is never so present as in the area of labor-antitrust. Courts have accorded unions the use of economic weapons for conditions that are seen as advantageous, despite the fact that union objectives are squarely at odds with classical antitrust theory. The antitrust laws represent an effort to control abuses of commercial and union economic power. While the secondary boycott provisions of the National Labor Relations Act include sections controlling and regulating the use of union economic power, Sections 8(b)(4), 8(e) and 303 clearly do not reach far enough to offset traditional reluctance to apply antitrust laws to labor.

Of pressing concern, of course, are the "most favored nation" clauses, since such provisions invariably tamper with price structures by inhibiting individual negotiation of wages, hours, and other conditions of employment which significantly affect the price of goods. The duty to bargain in good faith mandated in the labor legislation is subject to the Sherman Antitrust Act, rather than the converse. One should consider the utility of the antitrust regulations as a remedy to prevent union or employer abuse of the bargaining process, for it is inevitable that union power in such settings presents significant barriers to our economic model as expressed in the antitrust laws.

In their entirety, the labor-antitrust decisions evidence a consistent position of accommodating labor and antitrust concepts. The difficult cases are those in which a court must balance the interests of each policy and express a preference for that which is more pervasive. This is evident in Connell's implication that the antitrust exemption extends only to that conduct expressly protected in labor legislation rather than to the generic class of activities regulated therein.

Multiemployer bargaining, when defined as the appropriate unit for collective bargaining within the meaning of the National Labor Relations Act, is such an area where labor policy warrants deference from antitrust policy. Appropriateness of the unit should initially be a task for the National Labor Relations Board prior to any consideration by a federal court in passing upon an antitrust claim. When a unit is judged inappropriate, a union would not enjoy the exemption, and any negotiation of wage rates

Mobile Towing Co., 92 L.R.R.M. 3351 (5th Cir. 1976) (found that the union was an intended victim of an alleged antitrust violation instituted by the defendant, Tugboat, Inc., to obtain an unfair advantage over its competitors by using nonunion labor) with National Maritime Union v. Commerce Tankers Corp., 92 L.R.R.M. 2385 (S.D. N.Y. 1976) (damages were not the proximate result of the activity alleged, nor was a conspiracy shown). See also ABA ANTITRUST LAW DEVELOPMENTS 258-62 (1975) concerning the target area test in antitrust, and note 229 supra.
is susceptible to a characterization of price fixing and held to be unlawful per se. When a unit is inappropriate, there is no valid labor policy demanding an antitrust exemption. Even in the "gray" area where particular conduct only collaterally falls within the protection of labor legislation and arguably does not constitute an unfair labor practice, courts should not compromise their flexibility in passing upon an antitrust claim; it may well prove an insufficient instance for guarding the conduct from antitrust liability as a result of its alleged importance to labor policy. Implicit in Connell is that absent a showing of a significant interest under labor law or a positive basis for condoning a particular practice under labor policy, antitrust policy should predominate. The validity of joint employer activity, whether industry-wide bargaining is conducted or such employers merely agree on the stance each will assume in bargaining with a union, will be judged under antitrust precedents. Such a rule has the added attraction of the availability of the "rule of reason" when a specific arrangement affects less than a substantial portion of the market or otherwise affects the price of goods. Application of the "rule of reason" test may prove helpful in a context where there is no obvious conspiracy to affect competition in the product market, but clear anticompetitive effects result from an agreement that is supported by less than legitimate objects of union or labor concern.