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Antitrust and Labor - Union Liability under the Sherman Act

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NOTES

Antitrust and Labor — Union Liability Under The Sherman Act

I. The Boundaries of Union Liability Under the Sherman Act

Enacted by Congress in 1890, the Sherman Antitrust Act[1] declared illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. . . ."[2] The courts lost no time in applying section 1 of the act to labor union activity. The Supreme Court, in the famous *Danbury Hatters*[3] case in 1908, held that labor unions enjoy no blanket immunity from the Sherman Act. In that case the United Hatters Union of North America combined with the American Federation of Labor to force all fur manufacturers to unionize their shops by boycotting the manufacturer's hats and the businesses of those who dealt with them as wholesalers or retailers. The Court affirmed a treble damage[4] judgment against members of the Hatters Union, holding that the combination was in restraint of trade or commerce among the several states within the meaning of the Sherman Act.

Two other statutory provisions, the Clayton Act[5] of 1914 and the Norris-LaGuardia Act[6] of 1932, granted labor unions partial immunity from antitrust prosecution. The Clayton Act contained provisions apparently designed to forbid antitrust attack upon the normal functioning of labor unions in pursuit of their legitimate objectives.[7]

[1] 26 Stat. 209 (1890), as amended, 69 Stat. 282, 15 U.S.C. §§ 1-7 (1964).

[2] 26 Stat. 209 (1890), as amended, 69 Stat. 282, 15 U.S.C. § 1 (1964).

[3] Loewe v. Lawlor, 208 U.S. 274 (1908), *further proceedings*, Lawlor v. Loewe, 235 U.S. 522 (1915).

[4] Violations of the Sherman Act are restrained or redressed by injunction, criminal prosecution and (since the Clayton Act) civil action for treble damages. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-4 (1964), 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

[5] 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964), 38 Stat. 738 (1914), 29 U.S.C. § 52 (1964).

[6] 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1964).

[7] Section 6 of the Clayton Act states: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from *lawfully* carrying out the legitimate objects thereof. . . ." (Emphasis added.) 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964). Section 20 provides that "no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning the terms or conditions of employment. . . ." unless certain procedural requirements are met. Even after these requirements are met, the injunction or restraining order is not to prohibit any person or persons, whether singly or in

The Norris-LaGuardia Act, in more express terms, exempted from injunction under the Sherman Act peaceful activities of striking, picketing, and primary and secondary boycott where carried on in a "labor dispute."[8] Section 13(c) of the act defined a labor dispute as "any controversy concerning terms and conditions of employment. . . ."[9]

It was not until the early 1940's that labor's exemption from antitrust laws began to take on definable judicial boundaries. In 1940 the Supreme Court in *United States v. Hutcheson*[10] held that the Clayton and Norris-LaGuardia Acts must be considered *in pari materia* as having amended the Sherman Act by removing from its scope the activity defined in Norris-LaGuardia as a "labor dispute."[11] In effect, the *Hutcheson* decision gave unions a free hand to effect

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concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where 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 abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means to so do "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." 38 Stat. 738 (1914), 29 U.S.C. § 52 (1964).

[8] Section 4 of the Norris-LaGuardia Act provides that

> No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization regardless of any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
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> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. 47 Stat. 70 (1932), 29 U.S.C. § 104 (1964).

[9] 47 Stat. 70 (1932), 29 U.S.C. § 113(c) (1964).

[10] 312 U.S. 219 (1941).

[11] *Id.* at 235-36.

legitimate labor objectives by peaceful means.[12] The Court in *Hutcheson*, however, qualified labor's freedom from the Sherman Act by requiring that the unions act in their own self-interest and not in combination with non-labor groups.[13]

In 1945, four years after *Hutcheson*, the Court further delineated the boundaries in *Allen-Bradley Co. v. Electrical Workers Union, Local 3*.[14] That case involved a collective bargaining agreement between the union and a group of employers in a scheme to monopolize a local market by boycotting out-of-city and non-union goods. The Court held that the union had violated the Sherman Act even though the restraint of trade was the result of a contract formulated in the interests of the union. The Court reiterated the qualifying expression in *Hutcheson*[15] and held that:

> When the union participated with a combination of business men 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.[16]

Essential to the *Allen-Bradley* holding was the unlawful combination of employees and employers. The difficulty lies in determining what constitutes such a combination. It has been held that a union retains its immunity from the Sherman Act when it combines with a non-labor group to achieve an end beneficial to, or involving the interests of, only the union.[17] Later cases, however, have interpreted *Allen-Bradley* to mean that antitrust immunity is lost when the

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[12] Though the Norris-LaGuardia Act prohibited the use of injunctions "in any case involving or growing out of any labor dispute," it apparently did not legalize the union activity originally covered by § 20 of the Clayton Act, for the final "catch all" clause of that section was not repeated in the new act. However, the Court in *Hutcheson* decided that passage of the Norris-LaGuardia Act had accomplished just such a broad legalizing of union conduct within the scope of § 20. See GREGORY, LABOR AND THE LAW 273-77 (2d ed. 1958).

[13] "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfish or unselfish of the end of which the particular activities are the means." United States v. Hutcheson, 312 U.S. 219, 232 (1941).

[14] 325 U.S. 797 (1945), *later proceedings*, 164 F.2d 71 (1947).

[15] See note 13 *supra*.

[16] Allen-Bradley v. Electrical Workers Union, Local 3, 325 U.S. 797, 809 (1945); *Pennington*, 381 U.S. 657 (1965).

[17] See Davis Pleating & Button Co. v. California Sportswear & Dress Ass'n, 145 F. Supp. 864 (S.D. Cal. 1956); United States v. American Fed'n of Musicians, 47 F. Supp. 304 (N.D. Ill. 1942), *aff'd per curiam*, 318 U.S. 741 (1943). See also Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

employer-union combination exists coupled with an anticompetitive intent on the part of either the employers or the union.[18]

From the above background it appears that labor is exempt from antitrust attack as long as the activity falls within the "labor dispute"[19] category of the Norris-LaGuardia Act. Even though a labor dispute is present, however, the exemption is lost when such dispute is effected by the requisite union-employer conspiracy coupled with an anticompetitive intent. The National Labor Relations Act,[20] section 8(d), requires the employer and the union to bargain collectively concerning the subjects of wages, hours, and other terms and conditions of employment; according to the Norris-LaGuardia Act any controversy over these subjects is a "labor dispute" and exempt from antitrust attack.[21] This leads to the apparent conclusion that any management-union controversy over activities concerning wages, hours, and other terms and conditions of employment are exempt from antitrust attack; *a fortiori* all controversies concerning mandatory subjects of bargaining—absent an *Allen-Bradley* combination—are exempt from the anti-trust laws.

The present status of this seemingly logical conclusion is the consumation of a building-block endeavor on an *ad hoc* basis.[22] This fact alone stresses the significance and impact of each new decision concerning labor's immunity from or susceptibility to antitrust actions under the Sherman Act. Just what topics are mandatory subjects of collective bargaining, just what activity evidences an illegal management-union combination, and what other possible labor activities might fall within the ambit of antitrust attack are the problems before the courts today. These problems were recently faced in two United States Supreme Court cases: *United Mine Workers v. Pen-*

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[18] See Electrical Workers Union, Local 175 v. United States, 219 F.2d 431 (6th Cir. 1955) (per curiam), *cert. denied*, 349 U.S. 917 (1955); Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n, 155 F.2d 799 (3d Cir. 1946); United States v. Milk Drivers Union, 153 F. Supp. 803 (D .Minn. 1957).

[19] See text accompanying note 10 *supra*.

[20] 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1964).

[21] See note 13 *supra*.

[22] For a detailed review and analytical history of antitrust application to labor unions since the passage of the Sherman Act, see Barnes, Goldberg & Miller, *Unions and the Antitrust Laws*, 7 LAB. L.J. 133, 178, 186 (1956); Bernhardt, *The Allen-Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. PA. L. REV. 1094 (1962); Clark, *Application of the Sherman Antitrust Act to Unions Since the Apex Case*, 2 SW. L.J. 94 (1948); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 264-65 (1955); Gregory, *The Sherman Act v. Labor*, 8 U. CHI. L. REV. 222 (1941); Schmidt, *The Application of the Antitrust Laws to Labor: A New Era*, 19 Texas L. REV. 256 (1941); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

nington[23] and *Amalgamated Meat Cutters and Butcher Workmen, Local 189 v. Jewel Tea Co.*[24]

II. United Mine Workers v. Pennington

The *Pennington* case involved a collective bargaining agreement between the United Mine Workers Union and the nation's major coal producers on a "wage equalization" program. Both the union and the large coal companies recognized that a major problem of the industry was overcapacity resulting from the large number of mines. To alleviate the problem, they agreed upon a wage level which was expected to drive the marginal coal producers out of business. The small, unautomated firms would bear a larger relative burden of the increased wage costs which they could not afford.

One of the small coal companies[25] alleged that the union had conspired with the major companies to drive smaller operators out of the industry, and that this conspiracy violated the Sherman Act.[26] The Supreme Court concluded that the collective agreement between UMW and the large operators to secure the uniform wage scheme throughout the industry, if proved, was not exempt from the antitrust laws: "One group of employers may not conspire to eliminate competitors from the industry and a union is equally liable if it becomes a party to the conspiracy."[27] Notwithstanding the conspiracy issue, the Court, on narrower procedural grounds, reversed the lower court ruling against the union and remanded the proceedings.[28]

At first glance, the *Pennington* decision appears to be a clear reaffirmation of *Allen-Bradley*. However, the Court went a step beyond *Allen-Bradley* and applied the Sherman Act to what it labeled a "more basic defect" from the standpoint of antitrust policy.[29] In *Allen-Bradley*, the conspiracy between the union and the employers was for the purpose of excluding competition from out-of-state

[23] 381 U.S. 657 (1965).

[24] 381 U.S. 676 (1965).

[25] For a detailed and analytical history of the factual aspects of the *Pennington* case, see Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 51-53 (1963).

[26] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-2 (1964). See text accompanying note 2 *supra*.

[27] 381 U.S. 657, 665-66 (1965).

[28] The Court reversed the holding and remanded the case for a new trial because it found that the trial court erroneously admitted evidence concerning the efforts of the UMW and the companies to persuade the Secretary of Labor to set a high Walsh-Healey minimum wage and then instructed the jury that it could include damages resulting from this action in its verdict. Thus, joint efforts by a group of employers and a union to influence *public officials* do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or *as part of a broader scheme that itself violates the Sherman Act.*

[29] 381 U.S. 657, 668 (1965).

employers (manufacturers). The union had no membership connection with the out-of-state employers and would benefit only through the monopolistic advantage of its own employers. In *Pennington,* however, the union *bound itself* to the policy of one group of employers in an industry wide bargaining unit to impose the *same* contract terms on the remaining employers of union members in the bargaining unit. The union thereby surrendered its freedom of action with respect to its bargaining policy. This inflexibility in the union's power to bargain was the "more basic defect" announced by the Court:

> Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy.[30]

Thus, when the unions bind themselves to a favored employer group and attempt to impose the same contract terms on the remaining employers in the bargaining unit, the antitrust laws are violated. The inflexibility in the union's freedom to bargain is a more basic violation of antitrust principles than the general combination-anticompetitive intent requisite of the *Allen-Bradley* situation. But as in *Allen-Bradley,* the fact that the agreement concerns mandatory subjects of collective bargaining does not of itself prevent successful antitrust attack.

III. Amalgamated Meat Cutters and Butcher Workmen, Local 189 v. Jewel Tea Co.

In the *Jewel Tea* case the meat cutters' local unions in the Chicago area and an association of independent retail grocers (Associated) had operated for many years under collective bargaining agreements which prohibited the sale of meat during evening hours. Jewel Tea Co., a large chain of retail grocery stores, consistently joined in these agreements. In 1957, however, both Jewel Tea Co. and Associated supported an all-employer proposal to allow evening sales. The unions rejected the proposals and authorized a strike, if necessary, to avoid night work. Associated surrendered to the union demands and signed the agreement restricting night sales. Finally, Jewel Tea also submitted to the agreement under duress of the threatened

[30] *Ibid.*

strike, but later brought suit against the union and Associated. Jewel alleged that the union had violated the federal antitrust laws by conspiring with Associated with intent to eliminate marketing hours as an area of employer competition. Jewel complained that the members of Associated had agreed among themselves to insist that all collective bargaining agreements negotiated with the defendant unions should prohibit the sale of meat before 9 a.m. and after 6 p.m., that the union locals conspired with Associated by refusing to allow union members to sell such meat at any time outside those hours, and that the unions had acted as enforcing agents of the conspiracy.

At the close of the evidence, the district court[31] dismissed the complaint and found that the record was devoid of any evidence to support a finding of a conspiracy[32] between Associated and the unions to force the restrictive provision on Jewel. The court of appeals[33] reversed the district court and held that a union loses its exemption from the Sherman Act when it negotiates a collective bargaining agreement which invades the proprietary function of setting marketing hours. The court held that the limitation upon marketing hours in and of itself established evidence of an illicit management-union combination—"the rest of the industry agreed with the defendant local union to infringe upon the rights and prerogatives of the employer."[34]

The Supreme Court reversed the court of appeals and held, without a majority,[35] that the market hour restriction in the agreement was within the scope of the labor exemption from antitrust attack, proceeding on the theory that the issue presented was not the alleged union-employer conspiracy against Jewel. The Court narrowed the issue to the question of the subject matter of the agreement itself, *i.e.*, whether the market hours restriction was immune from attack.

> [T]he issue before us is not the broad substantive one of a violation which unreasonably restrained trade or an attempt to monopolize and was Jewel damaged in its business—but whether the agreement is immune from attack by reason of the labor exemption from the antitrust laws.[36]

[31] Jewel Tea Co. v. Amalgamated Meat Cutters and Butcher Workmen, 215 F. Supp. 837 (N.D. Ill. 1962).

[32] *Id.* at 848.

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

[34] *Id.* at 551.

[35] The judgment was announced in an opinion by Mr. Justice White in which Chief Justice Warren and Justice Brennan joined. Mr. Justice Douglas, joined by Justices Black and Clark dissented in favor of the *Allen-Bradley* conspiracy doctrine. Mr. Justice Goldberg joined by Justices Harlan and Stewart concurred in the *result* of White's opinion but presented a lengthy opinion that the Sherman Act has no application to union activity.

[36] 381 U.S. 676, 688-89 (1965).

Thus proceeding, the Court said that the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of "wages, hours, and other terms and conditions of employment" about which employers and unions must bargain. And, under the Norris-LaGuardia definition, any controversy arising from these subjects, absent evidence of an illicit combination, is a "labor dispute" and exempt from antitrust attack.[37]

The *Jewel Tea* decision appears to flow directly from the *Hutcheson* holding that a union acting as a union, in the interests of its members, and not acting to fix prices or allocate markets in conspiracy with an employer is not subject to challenge under antitrust laws. Accordingly, joint negotiations and uniform collective bargaining do not of themselves evidence illegal management-union combinations as are violative of antitrust laws.[38] The *Jewel Tea* decision leaves the union free to bargain and strike for legitimate labor objectives so long as it acts independently of a non-labor group. Any controversy that arises over market operating hours would clearly be a labor dispute within the meaning of the Norris-LaGuardia Act.[39]

It is significant in itself that the Court found marketing hours, like working hours, to constitute a subject of such immediate and legitimate concern to union members to thus be a mandatory subject of bargaining. The chance that such an agreement may result in restraint of trade or competition does not of itself subject unions to prosecution under the antitrust laws.[40]

It is also interesting to note that the union-employer agreement in *Jewel Tea* approaches but does not fall within the "basic defect" criteria of *Pennington*. The union in *Jewel Tea* obtained the terms it desired from the retailers' association and then sought the same terms from Jewel Tea Co. However, the union in *Jewel Tea* did not absolutely bind itself to Associated to impose the same terms of Jewel. After the union had dealt with Associated, it might have submitted to Jewel's proposals for night sales, but assessing the probable costs of a strike or other collective action, it freely chose to strike. The union retained its freedom to bargain with Jewel in any way it de-

[37] United States v. Hutcheson, 312 U.S. 219 (1941).

[38] See Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46, 49 (8th Cir. 1958); Meier & Pohlman Furniture Co. v. Gibbons, 233 F.2d 296, 302 (8th Cir. 1956), *cert. denied*, 352 U.S. 879 (1956); Rossi v. McCloskey & Co., 149 F. Supp. 638, 640 (E.D. Pa. 1957); Cox, *Labor and The Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 271 (1955).

[39] See Railroad Telegraphers v. Chicago & N.W. Ry. Co., 362 U.S. 330 (1960); Aetna Freight Lines, Inc. v. Clayton, 228 F.2d 384, 386-87 (2d Cir. 1955), *cert. denied*, 351 U.S. 950 (1956).

[40] 381 U.S. 676, 692 (1965).

sired. It is precisely this freedom of choice that the union retained in its bargaining activity—the freedom the union did not enjoy in *Pennington*—that exempted it from successful antitrust attack.

IV. Conclusion

The Court in *Pennington* found that the management-union combination sufficiently evidenced a violation of the Sherman Act according to the *Allen-Bradley* decision. However, the Court discovered that apart from and beyond the *Allen-Bradley* doctrine there existed a more fundamental violation of antitrust laws. *Pennington* seems to have extended the *Allen-Bradley* combination-anticompetitive intent theory of antitrust violation. When a union binds its interests to a favored employer group in a multi-employer bargaining unit, there exists a "basic defect" from the viewpoint of antitrust principles. It is the restraint upon the freedom of the union to act according to its own choice and discretion that runs counter to antitrust policy.

Thus, even in management-union negotiations over mandatory subjects of bargaining, (wages in *Pennington*) if the union obligates itself unconditionally to impose the same terms agreed upon with the favored employer on other employers in the bargaining unit, the antitrust laws are violated. This implies that to warrant antitrust attack there need not necessarily be extrinsic evidence of an illicit combination with anticompetitive motives on the part of either the union or the employer. The restraint upon the union's power to bargain is enough.

In *Jewel Tea,* by classifying market operating hours as a proper subject of mandatory collective bargaining, the Court declared such a restriction exempt from antitrust attack absent an *Allen-Bradley* or *Pennington* violation. The limitation upon marketing hours in a collective bargaining agreement, being the consummation of arm's length negotiations, did not of itself establish an illicit management-union combination. It thus appears that when a union agrees with one set of employers in a multi-bargaining unit as to *when,* as distinguished from *how long,* employees must work, the union is pursuing a legitimate labor objective even though the agreement may result in forfeiting the element of marketing hours as a competitive tool among employers.

The controversies in *Pennington* and *Jewel Tea* furnish fresh and contemporary evidence of the traditional *ad hoc* approach that leaves management and labor in a state of uncertainty in trying to ascertain their legal obligations under the antitrust laws. The formulation of any rule of thumb which would harmonize the policies of the labor