Collusion to Fix Wages and Other Conditions of Employment: Confrontation between Labor and Antitrust Law

Larry Smith

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CONFRONTATION BETWEEN LABOR AND ANTITRUST LAW

LARRY SMITH

AMERICAN ANTITRUST LAW generally prohibits activity which restrains freedom of trade. At the same time, American labor law encourages activity which does in fact restrain trade. The inherent conflict between these two substantive bodies of law is obvious. Congress and the courts have attempted to form a workable body of law which reconciles these conflicting doctrines. As a result, labor unions have traditionally been given a broad, but not unlimited, exemption to the federal antitrust laws. In recent years, however, courts have narrowed this exemption considerably. Activities by unions which in prior years would have been held exempt from antitrust laws without reflection may no longer be protected by this exemption. Because of this ero-

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sion of labor’s exemption from antitrust laws, it is no longer certain to what extent labor’s activities will be subject to antitrust liability.

The uncertainty extends to agreements among unions fixing the level of wages to be demanded from their respective employers. Courts have addressed the issue of antitrust liability for employer-union combinations to fix the level of wages to be demanded by employer agreements to fix the wages paid to their respective employees. Courts have not had the opportunity to consider whether a union’s agreement with another union to fix the level of wages to be demanded from their respective employers would result in antitrust liability for the unions involved.

This paper will address the question of whether unions combining to fix their demands for wages and other terms of employment are entitled to the protection of labor’s exemption from antitrust laws. This paper will first briefly outline labor’s historical exemption from antitrust law. Second, employer combinations aimed at employees will be reviewed as offering possible insights as to how courts might treat similar behavior by unions. Finally, the question of unions’ liability for combining to fix wages and other terms of employment will be addressed.

I. LABOR’S HISTORICAL EXEMPTION FROM ANTITRUST LAWS

Labor’s exemption from antitrust laws is not a recent phenomenon. Even before the passage of the Sherman Act, courts had suggested that common law restraint of trade laws should not apply to the collective activities of employees. America’s first comprehensive antitrust law, the Sherman

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8 See, e.g., Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842) (Massachusetts Supreme Court held that criminal liability could not be imposed on unions for their collective activities unless the unions’ objectives and means of achieving these objectives were illegal). See also R. Gorman, Labor Law 621 (1976).
Act,9 was enacted in 1890. The legislative history of the Sherman Act suggests that Congress did not intend for the Sherman Act to apply to labor unions.10 The courts did not heed the legislative history and applied the Sherman Act to labor activities.11 Congress decided that labor should be given an express exemption to the Sherman Act and passed the Clayton Act12 in 1914.13 The Clayton Act removed labor unions and their activities from the scope of the Sherman Act by declaring that an individual's labor was not to be considered commerce.14 When the courts failed to give the Clayton Act

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The Congressional debates on the subject of whether the Sherman Act applied to labor indicate that only one senator thought the Act applied to labor, while eight senators indicated on the floor of the Senate that the Act did not apply to labor. E. BERMAN, LABOR AND THE SHERMAN ACT 39-40 (1930). There were other indicators that Congress did not intend for the Sherman Act to apply to labor unions and their collective activities. See id., at 51-52 for a short discussion of these other indications of Congress' intent.

11 The most famous of these cases is Loewe v. Lawlor, 208 U.S. 274 (1908), which is also known as the Danbury Hatters case. In this case, the Supreme Court held that an action under the Sherman Act could be maintained against a union which organized a nationwide boycott against the hat manufacturer. Id. at 292-93. See also United States v. Brims, 272 U.S. 549 (1976); Ako-Zander Co. v. Amalgamated Clothing Workers, 35 F.2d 203 (E.D. Pa. 1929); Casey, supra note 10, at 238.

In commenting on the courts' willingness to apply the Sherman Act to labor's activities, one author observed: "It thus appears that the courts, in deciding that Congress intended that the Antitrust Law should reach labor unions, came to a conclusion which cannot be supported by a careful and thoroughgoing examination of the most substantial evidence available, the Congressional Record." E. BERMAN, supra note 10, at 53.

14 Clayton Antitrust Act, ch. 323, § 6, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 17 (1976)). The pertinent part of Section 6 of the Clayton Act provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objectives thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
the scope Congress intended, Congress enacted another law to clarify its intention to give labor an exemption from antitrust laws. The Norris-LaGuardia Act removed from the federal courts the jurisdiction to issue injunctions in cases involving labor disputes. These two statutes taken together were meant to exempt labor's activities during labor disputes from the antitrust statutes.

The Supreme Court established the scope of the exemption from antitrust law afforded to labor by the Clayton and Norris-LaGuardia Acts in three key cases in the middle of the century. In *Apex Hosiery Co. v. Leader*, the Supreme Court carved out a non-statutory exemption from the antitrust laws for labor by reinterpretting the Sherman act as not intended to cover the type of trade restraint resulting from union activity. In effect, under the non-statutory exemption, a labor union would be exempt unless the intention or effect of the union's activity is to restrain competition in the market for the employer's goods.

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15. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), and *Bedford Cut Stone Co. v. Journeyman Stone Cutters Assoc.*, 274 U.S. 37 (1927). In these cases, the Supreme Court narrowly interpreted the provisions of the Clayton Act, holding that the Act only applied to labor disputes involving direct employer/employee relationships. These cases involved picketing and other activities by individuals who were not employed at the plant that they were picketing. See also *R. GORMAN*, supra note 8, at 622-23; *Antitrust Law Development*, supra note 13, at 399.


17. Id. Specifically, section 4 of the Act removed the Federal Courts' jurisdiction to issue injunctions in labor disputes. It provides: "No court of the United States shall have the jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute..." 29 U.S.C. § 104 (1976).

The purpose of the Norris-LaGuardia Act is to "restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." United States v. Hutcheson, 312 U.S. 219, 236 (1941).


20. Id. at 491-94, 501-03. The Court observed: "[A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. Id. at 503-04.

21. Id. at 512. See *Antitrust Law Developments*, supra note 13, at 402.
The second case of this era interpreting the scope of labor’s exemption from antitrust laws under the Clayton and Norris-LaGuardia Acts was *United States v. Hutcheson.* The Supreme Court did not utilize the *Apex Hosiery* non-statutory formula to analyze the case. The Court instead reasoned that because the jurisdiction of the federal courts to enjoin such an action had been removed by the Norris-LaGuardia Act, it followed that the unions were also exempt from the substantive provisions of the act. The Supreme Court converted the procedural-jurisdictional language of the Norris-LaGuardia Act into a substantive exemption for labor from all antitrust laws. The effect of *Hutcheson* was to create a statutory exemption from the antitrust laws for any and all union activity as long as the union was acting in its own interests and not in combination with non-labor groups.

The Supreme Court applied the principles of *Apex Hosiery* and *Hutcheson* in the third important case of this era interpreting labor’s exemption from antitrust laws. In *Allen Bradley Co. v. Local Union 3, IBEW,* the Supreme Court ruled that a union forfeited its exemption from antitrust laws when it combined with non-labor groups to achieve a restraint of trade. The central idea of this case was that a union would only be exempt from antitrust laws if it was acting by itself. The union’s activity in *Allen Bradley* was not protected by the *Apex Hosiery* non-statutory exemption because the restraint

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22 312 U.S. 219 (1941).

23 *Id.* at 234-35.

24 Handler, supra note 5, at 475.

25 312 U.S. 219, 232 (1941). The Court stated:

So long as a union acts in 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 of which the particular union is the means.

*Id.*

26 325 U.S. 797 (1945). In *Allen Bradley,* the union and the electrical contractors and manufacturers had entered into an elaborate agreement which had the effect of excluding all manufacturers of electrical equipment who were not located in New York City. *Id.* at 799-801.

27 *Id.* at 809.

28 *Id.*
went beyond the labor market, and the *Hutcheson* statutory exemption did not apply because the union was not acting by itself.\(^{29}\)

This trilogy of cases: *Apex Hosiery*, *Hutcheson*, and *Allen Bradley*, formed the basis of labor's exemption from antitrust laws which remained intact for approximately twenty years.\(^{30}\) Under these cases, if a labor union's activities and conduct are within the scope of the Norris-LaGuardia Act, they are exempt under the statutory exemption of *Hutcheson*.\(^{31}\) If the union's activities only affect the market for labor and not the market for final goods, an antitrust exemption is provided under the non-statutory exemption laid out in *Apex Hosiery*.\(^{32}\) Finally, under the *Allen Bradley* decision, as long as the union is acting alone and solely for its self-interest, the activity is exempt.\(^{33}\)

During the two decades following *Allen Bradley*, the focus in labor law switched from union's activities at the plants to the collective bargaining process between management and labor.\(^{34}\) This shift in emphasis forced the Supreme Court to reconsider its earlier decisions concerning the scope of labor's exemption from antitrust laws.\(^{35}\) Specifically, the Court had to determine both the scope of labor's antitrust exemption in the collective bargaining arena and whether bargaining over a mandatory subject\(^{36}\) could result in antitrust liability.\(^{37}\)

The first case in which the Supreme Court re-examined labor's exemption from antitrust laws was *United Mine Workers v. Pennington*.\(^{38}\) In *Pennington*, the Supreme Court extended the

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\(^{29}\) St. Antoine, *supra* note 2, at 608.

\(^{30}\) Id.; *Casey, supra* note 10, at 242.

\(^{31}\) Handler, *supra* note 5, at 483.

\(^{32}\) Id. at 481, 483.

\(^{33}\) Id.

\(^{34}\) *Casey, supra* note 10, at 242.

\(^{35}\) Id.


\(^{37}\) *Casey, supra* note 10, at 242.

\(^{38}\) 381 U.S. 657 (1965). In *Pennington*, the UMW and several large coal companies
Allen Bradley rule\(^{39}\) by imposing liability for collusion in the actual bargaining process.\(^{40}\) The Court also suggested that a balancing process should be used to determine if the exemption should be forfeited.\(^{41}\) On the whole, Pennington indicated that an agreement on mandatory bargaining subjects reached during the collective bargaining process does not provide unions with an unconditional exemption from antitrust liability.\(^{42}\)

The companion case to Pennington was Meat Cutters Local 189 v. Jewel Tea Co.\(^{43}\) In Jewel Tea, the Court ruled that a union did not lose its exemption from antitrust laws where, even though the union’s activity did in fact restrain trade, the union was acting alone in matters intimately related to wages and other terms of employment.\(^{44}\) The Court indicated that the exemption would be forfeited if an agreed upon restraint was not genuinely related to legitimate union interests.\(^{45}\) The Court again, as in Pennington, balanced the benefits received by the union from the agreement against the impact that the agreement would have on market competition to determine if labor had forfeited its exemption.\(^{46}\)

The Supreme Court further examined labor’s exemption from antitrust liability in Connell Construction Co. v. Plumbers &
The Court in *Connell* basically held that a union may forfeit its antitrust exemption even where it is acting on its own and seeking a lawful and legitimate objective. The Court established that labor’s exemption was limited to those agreements which restricted competition in the product market through the elimination of competition for wages and other terms of employment.

The Supreme Court’s decisions in *Pennington, Jewel Tea, and Connell* indicate that the scope of labor’s exemption from antitrust law has been narrowed. Labor no longer enjoys the almost absolute immunity from antitrust laws which *Apex Hosiery* and *Hutcheson* bestowed upon it. In light of the Court’s recent trend, even union activities connected to mandatory bargaining subjects can result in antitrust liability. The scope of labor’s exemption from antitrust liability is now to be determined by balancing the labor policy furthered by the union activity against the harm this activity does to antitrust policy.

**II. EMPLOYER’S LIABILITY FOR COLLUSION TO FIX WAGES AND OTHER CONDITIONS OF EMPLOYMENT**

As stated previously, employers acting on their own, not in combination with a union, have been subject to the strictures of the federal antitrust laws in their dealings with employees. A review of the behavior by employers acting in concert which has been found to violate the Sherman Act may be

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*Steamfitters Local 100.* The union in *Connell* was seeking to have Connell, a general contractor, sign an agreement with the union whereby Connell would only sub-contract with firms which had a collective bargaining agreement with the union. *Id.* at 618-19. The union was not seeking to organize Connell’s employees, but the employees of the plumbing sub-contractors used by Connell. *Id.*

*Id.* at 623.

*Id.* at 622-23. In *Connell*, the agreement went beyond a simple restriction of competition in the product market through the elimination of competition for wages and other conditions of employment because it also “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 efficient operating methods.” *Id.* at 623.

*See supra* note 7 and accompanying text.
helpful in determining what form of combinations by unions may be held non-exempt from antitrust laws. While these rulings on management behavior do not in any way guarantee that the same rules will be applied to labor, they can illuminate the restrictive effects on the market that courts are trying to prevent in the labor/management area and thus give a hint as to how the courts would treat similar union behavior.

As far back as 1926, courts have held that employer combinations aimed at fixing the wages of their employees violate the Sherman Act.\textsuperscript{51} There are several kinds of such behavior which have been found illegal. The two basic requirements for finding liability are that the activity actually was a restraint of trade and that it was made outside a collective bargaining agreement arrived at in arms-length negotiations.\textsuperscript{52} The most obvious and blatantly illegal combinations occur when unassociated employers conspire directly to fix the wages of their employees. A prime example of this conduct occurred in \textit{Cordova v. Bache & Co.}\textsuperscript{53} In \textit{Cordova}, it was alleged that the employers, forty-two stock exchange brokerages and the New York Stock Exchange, had conspired to reduce the commissions on sales of securities paid to securities representatives.\textsuperscript{54} The court determined that a cause of action under the antitrust laws did exist for such employer activity.\textsuperscript{55}

The \textit{Cordova} court based its decision on two grounds. First, the court noted that the fact that the employers had the power to reduce commissions paid to the securities representatives indicated that "they ha[d] the same power to restrain competition as is inherent in a price fixing agreement."\textsuperscript{56} Second, the court found this kind of arrangement illegal be-

\textsuperscript{51} Anderson v. Shipowners Assoc., 272 U.S. 359 (1926).
\textsuperscript{52} Comment, Antitrust Law in the Labor Management Context; The Employer as Defendant and the Union as Plaintiff, 32 BAYLOR L. REV. 385, 389 (1980) [hereinafter cited as Comment, Antitrust]; Goldberg, Antitrust: The Union as Plaintiff, 1980 INST. ON LAB. LAW 174, 182.
\textsuperscript{54} Id. at 603.
\textsuperscript{55} Id. at 608.
\textsuperscript{56} Id. at 606.
cause it restrained the ability of a worker to change jobs and to seek higher pay.57

Employers are also subject to federal antitrust laws when they combine to limit their employees' or future employees' ability to bargain for the sale of their services. The best examples of this illegal arrangement can be seen in the numerous cases concerning the relationship between professional athletes and the owners of professional sports clubs.58 These cases generally deal with a challenge to the validity of the various draft and contract provisions of professional sports because of the impact they have on the competition for athletes' services.

In Mackey v. National Football League,59 a player challenged a rule known as the "Rozelle Rule" which limited the ability of a player to contract freely with the sports franchise of his choice.60 The district court found that the rule weakened a player's bargaining power, and as a result players were denied the opportunity to sell their services in a free and open market.61 Because of this effect, the rule was found to violate section 1 of the Sherman Act.

In Robertson v. National Basketball Association,62 the court analogized the player draft, the reserve clause and the standard player contract of the NBA to price-fixing devices considered per se violations of the Sherman Act.63 The court reasoned that these devices allowed competing teams to elim-

57 Id.
60 543 F.2d 606, 609 (8th Cir. 1976), cert. denied, 434 U.S. 801 (1977).
61 Id. at 609. The "Rozelle Rule" requires that if a player's contract with a team ends, and that player choses to play for a second team, the second team is to give the first team some compensation for the player. Id. at 609 n.1. The Rule inhibits teams from signing players because the teams do not want to have to pay the compensation. Id. at 618.
62 Id. at 620.
64 Id. at 893.
inate competition in the hiring of players. Similarly in *Smith v. Pro-Football,* a court found the NFL draft to be a restraint of trade because by allowing a player to deal with only one team, that individual was robbed of all bargaining power. Because players were not permitted to market their talents the effect of the draft was to "suppress or even destroy competition in the market for players' services."

Such illegal restrictions on employees' freedom to market their skills are also found outside the professional sports arena. In *Cordova v. Bache,* the court based its decision on the fact that employees would not be able to sell their services freely in an open, competitive market. In an early Supreme Court case, the Court found a group of employers guilty of antitrust violations not only because their agreement had limited the ability of employees to market their skills, but also because the employers had limited their own ability to compete for such services. These decisions indicate that an arrangement which restricts an individual's right to sell his talents or which limits an employer's ability to bid for the services of an individual can result in liability under the federal antitrust laws.

III. UNION LIABILITY UNDER ANTITRUST LAWS

It is clear that employers will be held liable under antitrust laws for colluding to fix the wages of their employees. It is also clear that unions will be held liable under the antitrust laws if they combine with an employer to fix the wages that the union will demand from other employers. The specific question of a union's liability under the antitrust laws for colluding with another union to fix their demands for wages or

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64 Id.
66 Id. at 1185.
67 Id. at 1185-86.
69 321 F. Supp. at 606.
72 Pennington, 381 U.S. at 661.
other conditions of employment, however, has not been addressed by the courts.

The question of whether a union loses its exemption from antitrust liability for colluding with another union to fix the wages to be demanded from their respective employers could arise in several ways. The situation most likely to occur is a combination between two or more unions, each representing a similar bargaining unit at different plants. In this situation, for example, Union A and Union B would hypothetically represent plumbers performing similar duties but at different plants owned by different people. Unions A and B would agree to demand the same wages or conditions of employment from their respective employers. They would also agree to coordinate their negotiating activities.

A second scenario in which the question of whether a union forfeits its antitrust exemption for colluding with another union is presented where two or more unions at the same plant, but in different bargaining units, agree to demand the same wages or conditions of employment from their employer. In this scenario, for example, Union A would hypothetically represent the plumbers and Union B the machinists. Once again, the unions would agree to fix their demands for wages and to coordinate their bargaining activities.\(^7\)

Before reaching the question of whether the combination of Unions A and B would cause them to forfeit their exemption from antitrust laws, it must first be determined if the activities in the examples above would be considered a restraint of trade outside the labor field. This type of conduct has been found to violate section 1 of the Sherman Act when engaged in by combinations of non-labor groups. First, such conduct could be analogized to a simple price-fixing agreement. In essence, Union A and Union B are merely combining to fix the price of a commodity used in production. Courts have condemned agreements by suppliers which fix

\(\text{\textsuperscript{7}}\) This second scenario might also be presented if Union A and B are locals of the same international union, as long as they are not negotiating a single contract for both units.
the price at which they are going to sell the commodity. Even absent a specific agreement to set prices, companies have been found to violate section 1 of the Sherman Act by coordinating their price changes so that their pricing behavior is parallel. The coordination of negotiations by Union A and B arguably falls into this category of illegal conduct. Even if the unions merely published or made known to each other what their demands in negotiations would be, if the effect of this conduct would be to standardize wage demands, the conduct would be considered illegal. Against this background, it appears that such collusive conduct by the unions is illegal unless it is afforded some exemption from federal antitrust laws.

A. Arguments for Exempting Collusive Union Activity

A union involved in the conduct posed by the two scenarios discussed above has several arguments available to defend its exemption from antitrust laws. First, the activity involved only impacts on the labor market and thus falls under the “labor market per se” exemption. Second, labor’s statutory exemption from antitrust laws applies to this activity. Finally, labor’s non-statutory exemption from antitrust laws would apply to insulate the unions from antitrust liability.

Against allegations of violations of the antitrust laws, a union involved in the conduct posed by the examples discussed above could be expected to raise as a defense that antitrust laws do not apply because the only subject involved is the labor market. This assertion is supported by such commentators as Professor Cox, who stated, “No one seriously suggests that antitrust policy should be concerned with the

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74 See, e.g., United States v. Trenton Potteries, 273 U.S. 392 (1927) (holding that price fixing by an association of manufacturers of vitreous pottery controlling 82% of the relevant market violated section 1 of the Sherman Act).

75 United States v. Container Corp. of Am., 393 U.S. 333 (1969) (conscious parallel price changes are evidence of an illegal conspiracy under section 1 of the Sherman Act).

76 Id.

77 See infra notes 78-82 and accompanying text.
labor market *per se*." The policy behind this statement, as embodied in the National Labor Relations Act (NLRA), is to protect collective activity by employees when they are seeking to negotiate with their employers over wages and other conditions of employment. This is true even if the collective activity could be considered anti-competitive. The position is not novel and has been followed by courts. One judge has even interpreted the Supreme Court's Connell decision to be in line with the "labor market *per se*" theory.

Alternatively, the union could claim that the activity was insulated from antitrust liability by one part of the traditional labor exemption. The statutory exemption embodied in the Clayton and Norris-LaGuardia Acts, as interpreted in *Hutcheson* and its progeny, exempt the combination from the antitrust laws. In *Hutcheson*, the Supreme Court stated that as long as labor was not acting with non-labor groups, any legal or illegal activity engaged is exempt from antitrust laws.

In the posed scenarios, the union is combining with an-

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78 Cox, *Labor and the Antitrust Laws-Preliminary Analysis*, 104 U. PA. L. REV. 252, 254 (1955). Professor Cox added, "[W]here a union controls job opportunities, it may abuse its power by limiting access to the trade, arbitrary discrimination, denials of individual liberty or unwarranted discipline; but these are problems primarily affecting labor-management relations or internal union affairs. They have little to do with the purpose of antitrust laws." *Id.* at 254-55.


80 Section 7 of the NLRA reads in part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." National Labor Relations Act, ch. 372, § 7, 49 Stat. 452 (current version at 29 U.S.C. § 157 (1976)).


83 The Court in *Hutcheson* interpreted the Clayton and Norris-LaGuardia Acts as supplying for labor an exemption from the antitrust laws for any of their activities, including criminal activities, directed at a legitimate end. See *supra* notes 22-25 and accompanying text.

84 312 U.S. 219 (1941).

85 *Id.* at 232.
other labor group; they are not combining with a non-labor group. Since one policy behind the Norris-LaGuardia and Clayton Acts was to give labor more flexibility in achieving its legitimate goals, a combination of two or more labor groups does not offend the aims of the acts. To hold this activity non-exempt would handicap labor in its efforts to achieve legitimate goals which are protected by the NLRA.

The union could also claim that the agreement between the unions was exempt under the non-statutory exemption first espoused in Apex Hosiery. In Apex Hosiery, the Court held that since the Sherman Act was aimed at direct price restraints in the product market and not on the labor market's indirect effect on price competition in the product market, trade-restraining activity by a labor union was not subject to antitrust liability. The idea that agreements which only reduce or eliminate price competition because of equalization of labor standards are exempt from the antitrust laws was reaffirmed in the Connell decision.

In the two basic scenarios, the union's wage demands are the subject of the agreement. This alone is not proof of an attempt or intention to control product prices directly; therefore, the agreement appears to fall under the non-statutory exemption. The impact on and restraint of the commercial market, which is scrutinized under both Apex Hosiery and Connell, results from the standardization of labor conditions. Because the restraint on the product market only occurs as a result of the standardization of labor conditions, Unions A and B would not forfeit their nonstatutory exemption.

In addition, the exemption set out in Jewel Tea also appears applicable. In Jewel Tea, the Court interpreted the non-statutory exemption to encompass any matters bargained over which were of genuine interest or intimately related to labor concerns, even if they did cause some restraint of com-

86 Antitrust Law Developments, supra note 13, at 400.
87 Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).
88 Id.
89 Id. at 491-94, 501-03.
90 421 U.S. at 622.
petition in the product market. The unions' demands in the hypothetical situation are clearly intimately related to legitimate union concerns; wages and other conditions of employment. While the Court in Jewel Tea indicated that the interests of labor in the subject being bargained over would be weighed against the impact it would cause in the product market, it would be difficult to imagine labor's interest being outweighed since wages are of a much more direct interest to labor than are marketing hour restrictions and since the restraint on the product market would be slight.

B. Argument for Not Exempting Collusive Union Activity

The combination of Union A and B to fix their wage demands might arguably cause them to forfeit their exemption to antitrust laws. It can be argued that the statutory exemption does not apply to these scenarios because of the actual language of the Clayton and Norris-LaGuardia Acts and because courts have narrowed the scope of the statutory exemption. The non-statutory exemption also probably does not afford the unions protection because of the balancing process involved. Finally, the policy behind the antitrust laws, as interpreted by the courts, suggests that this type of collusive activity does not escape liability under the antitrust laws.

The hypothetical combination of Union A and Union B to set their wage demands arguably falls outside the protection afforded labor by the statutory exemption. As stated previ-

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92 Id. at 689-91.
93 See id. Since the Supreme Court in Borg-Warner directed that employers and employees must bargain about wages, hours and other conditions of employment, it can be inferred that demands concerning wages, hours, and conditions of employment would be considered genuinely related to the union's interest.
94 Id. at 691.
95 Justice White pointed out that a marketing restriction would have more of an effect on the final product market than would a simple wage agreement. Id. at 691-92. Despite this greater effect, the interest in the marketing restriction was still held to outweigh the anti-competitive effect on the market. Since wage agreements have less of an effect on the market, the labor policy again outweighs the anti-competitive effects. Id.
96 See infra notes 100-106 and accompanying text.
97 See infra notes 107-109 and accompanying text.
98 See infra notes 112-121 and accompanying text.
ously, the goal of the Clayton and Norris-LaGuardia Acts was to protect certain labor activities aimed at legitimate union goals from antitrust liability. As interpreted by the Supreme Court in *Hutcheson*, this protection was only afforded to a union acting unilaterally in its own self interest.

The first of these criteria, unilateral action, is not met in the hypothetical situations. To begin with, unilateral means "done or undertaken by one person or party." Unions A and B are not acting alone; they are acting in combination with one another. The fact that both organizations in the conspiracy are labor unions does not transform them into a single entity capable of acting unilaterally.

The Court in *Hutcheson* also indicated that a labor group forfeits its exemption to the antitrust laws if it combines with a non-labor group. The Court's language can be interpreted to apply to any combination with a group or organization that is not part of that individual labor organization. Under this interpretation, the combination of Unions A and B would cause them to lose their exemption from antitrust laws.

The statutory exemption does not apply to the combination of Unions A and B because later cases have restricted the scope of the statutory exemption as defined in *Hutcheson*. The Supreme Court in both *Pennington* and *Jewel Tea* suggested that the statutory exemption only applied to those activities detailed in section 20 of the Clayton Act and section 4 of the Norris-LaGuardia Act. In *Pennington*, the Court stated that since neither of the acts dealt with employer-union agreements, an exemption from antitrust liability could not be based upon these acts.

Similarly in *Jewel Tea*, the Court noted that the determination of the legality of employer-labor agreements was to be

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102 *Hutcheson*, 312 U.S. at 232.
104 *Pennington*, 381 U.S. at 661-62.
weighed under the non-statutory exemption, not the statutory exemption.105 Thus, the statutory exemption is limited to the unilateral types of conduct detailed in the Clayton and Norris-LaGuardia Acts.106 Unions A and B cannot enjoy the protection of the statutory exemption because a single union is not acting alone and because Unions A and B are not conducting activities protected under either section 20 of the Clayton Act or section 4 or the Norris-LaGuardia Act.

The non-statutory exemption also may not be available to Unions A and B in this situation. Since the statutory exemption arguably does not apply, the non-statutory exemption is the proper vehicle to determine if their activities are exempt.

As noted in Connell,107 Pennington and Jewel Tea refined the non-statutory exemption into a weighing process where national labor and antitrust policy are balanced against each other.108 In the instant situation, a court would balance the union's interest in securing a certain wage for its members against the anticompetitive behavior of the union. In Jewel Tea, the Supreme Court found that the union's bargaining for a marketing-hours restriction was directly related to the genuine concerns of the union and that the resulting restraint on trade in the product market was outweighed by labor's interest.109

In the hypothetical situations, however, the antitrust policy tends to outweigh the labor policy. First, to allow the conduct of Union A and Union B to be exempt from the antitrust laws would be to afford a shield to egregious anticompetitive practices with an exemption meant for legitimate union activity. The fact that the union could achieve its goal in other ways less destructive of competition indicates that the harm to antitrust policy is much larger than any resulting harm to labor policy110

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105 *Jewel Tea*, 381 U.S. at 689.
106 *Connell*, 421 U.S. at 621-22; *Pennington*, 381 U.S. at 662.
108 Id. at 622.
109 *Jewel Tea*, 381 U.S. at 691.
110 The union could clearly legally bargain solely for its own members wages and terms of employment without violating antitrust laws. Thus its goal of maximizing its
Nor do the posed scenarios fall within the facts of *Jewel Tea*. The arrangement in *Jewel Tea* was legal because the restraint of trade, the marketing hours restriction, was not a subject remote to the legitimate interests of the union. In this case, however, the union's interest is remote. Union A's interest in the level of wages at another plant does not have a direct enough relationship to the wages paid its members to sanction the restraint of trade which results from the agreement.

There are other reasons why the unions in the hypothetical situations should be found liable under the antitrust laws. The Court in *Pennington* indicated that the UMW had also lost its exemption from antitrust laws because it had by its agreement restricted its ability to act for the good of its members. The Court found this to be contrary to both labor and antitrust laws and thus not deserving of an exemption.

The cases discussed above dealing with professional sports support the proposition that such activity is violative of antitrust laws. These cases also indicate that if collusive activity restrains another person from functioning in a competitive market, it is not exempt. The combination of Unions A members interests would be reached without any competitive restrictions which result when it colludes with other unions.

111 *Jewel Tea*, 381 U.S. at 691.

112 *Pennington*, 381 U.S. at 665-66. See R. GORMAN, supra note 89, at 630. Gorman stated:

What ousts the exemption in the case of the UMW, however, is that it bound itself to an agreement with the large operators to make certain wage demands upon employers in a different bargaining unit. Thus to confine one's bargaining flexibility is contrary to the policies of both labor law and antitrust law. *Id.*

113 *Pennington*, 381 U.S. at 666-68.

114 See supra notes 58-67 and accompanying text.

115 See Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), cert. denied, 434 U.S. 801 (1977) (holding that the National Football Leagues rule allowing the league commissioner to require a club acquiring a free agent to compensate free agent's former club was not exempt from coverage of antitrust laws); Smith v. Pro-Football, 420 F. Supp. 738 (D.D.C. 1976), aff'd in part and rev'd in part 593 F.2d 1173 (D.C. Cir. 1978) (holding that the professional football league player draft in which plaintiff had been selected did not violate the Sherman and Clayton Acts); Cordova v. Bache & Co., 321 F. Supp. 600 (S.D.N.Y. 1970) (holding that the provision of the Clayton Act exempting labor groups from antitrust laws did not exempt multi-employer units with respect to concerted action in reducing compensation of employees).
and B in the hypothetical situations clearly have two effects: restraint of their own ability to act and restraint of the other's ability to compete in a free market. Thus, the combination merits no exemption from antitrust liability. First, each union has surrendered its individual freedom to conduct negotiations for the good of its members, which falls squarely within the *Pennington* rule mentioned above. Second, as a result of the unions' agreement, the respective employers will be prevented from bidding in a competitive market for the services they need to maintain their production. A restraint of trade results with no offsetting benefit to labor policy to save the exemption.

Another reason that the agreement between Unions A and B should not enjoy immunity from antitrust laws is that it has extra-unit implications. The NLRA encourages and supports collective bargaining for employees in a bargaining unit. It is this kind of conduct, union activity for the benefit of its members in a bargaining unit, that is protected from antitrust liability. This does not necessarily mean that the same activity which also impacts on other bargaining units should be exempt. The Court in *Pennington* suggested that the extra-unit impact of that agreement was another reason why the union forfeited its exemption from antitrust liability.

The agreement between the two unions clearly has an extra-unit affect. The wages to be demanded by one unit are being set by a union representing another unit. Under the balancing process of the non-statutory exemption, the benefit to the national labor policy must outweigh the injury to competition or the exemption will be forfeited. In the two scenarios discussed previously, national labor policy is not furthered because the NLRA only supports bargaining done

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116 When the bargaining process between an employer an employee group affects bargaining units outside that specific group, it is said to have extra-unit implications. See *Pennington*, 381 U.S. at 664-65.

117 *Pennington*, 381 U.S. at 666. One commentator has suggested that *Pennington* does in fact stand for the proposition that if an agreement has extra-unit implications, the union involved will forfeit its exemption from antitrust laws. St. Antoine, *supra* note 2, at 610.
on a per unit basis.\textsuperscript{120} At the same time, competition is injured because employers are not free to bid for services in a free market and because the unions have restricted their own ability to act freely.\textsuperscript{121} The agreement thus does not deserve the exemption from antitrust liability.

C. \textit{The Per Se Rule v. Rule of Reason}

If it is concluded that the agreement between Unions A and B does not fall under labor’s exemption from antitrust law, it must be determined by what standard of antitrust liability the unions’ activity is to be judged. Courts use two standards to determine whether certain activities violate the Sherman Act. The \textit{per se} rule has been applied where the conduct involved is so blatantly anti-competitive that no inquiry into the reasonableness of the conduct is needed.\textsuperscript{122} Price-fixing agreements have been held to be such \textit{per se} violations.\textsuperscript{123} Under the “Rule of Reason,” the reasonableness of the conduct is scrutinized to determine if it imposes an undue restraint upon competition.\textsuperscript{124} The Supreme Court has not yet addressed the question of whether a \textit{per se} or rule of reason analysis should be used in a labor situation in determining liability under antitrust laws.

A good argument can be made for the application of the \textit{per se} rule of illegality to the arrangement between Unions A and B. First, it is clearly a price-fixing agreement. Price-fixing agreements have been ruled \textit{per se} violations since 1927.\textsuperscript{125} Second, lower courts have supported the use of the \textit{per se} illegality test when determining the legality of employers’ agreements to fix wages of employees.\textsuperscript{126}

\textsuperscript{120} \textit{Pennington}, 381 U.S. at 666-68.

\textsuperscript{121} \textit{Id.} at 668. The Court in \textit{Pennington} stated that the policy of antitrust is clearly set against agreements seeking to prescribe labor standards outside the bargaining unit. \textit{Id.}


\textsuperscript{123} A. STICKELLS, \textit{FEDERAL CONTROL OF BUSINESS: ANTITRUST LAWS} \S 42 (1972).

\textsuperscript{124} \textit{Standard Oil v. United States}, 221 U.S. 1 (1911).

\textsuperscript{125} \textit{United States v. Trenton Potteries}, 273 U.S. 392, 397 (1927).

In *Jacobi v. Bache*, the district court stated that any agreement with the purpose of fixing or stabilizing prices is *per se* illegal, even if it only indirectly impacts on the final product market. Similarly, in *Robertson v. National Basketball Association*, the district court compared the owner's arrangement to practices which had been traditionally held to be *per se* violations of the antitrust laws. Importantly, the Supreme Court has affirmed lower courts' use of the *per se* test in situations where members of a profession have fixed the prices of their services. Thus, there is some support for the application of the *per se* illegality test to the hypothetical agreement between Unions A and B.

Support also exists for the use of the "Rule of Reason" in analyzing the legality of agreements in the labor/management field. While some courts have sanctioned the use of the *per se* test in this area, other courts have expressly rejected its use and opted instead to use the "Rule of Reason." 

In *Smith v. Pro-Football, Inc.* the Circuit Court of Appeals for the District of Columbia rejected the district court's ruling that the owner's arrangement was a *per se* violation of the Sherman Act. The court held that the *per se* rule was not the appropriate test to be applied because the draft's impact was not "pernicious" and because the draft was not without some redeeming value.

Similarly, the Second Circuit Court of Appeals in *Mackey v.*
National Football League rejected the district court's application of the \textit{per se} rule to the NFL draft and "Rozelle Rule." The court in Mackey reasoned that the \textit{per se} rule was only concerned with business competition in a general sense and was thus inappropriate for the situation; the \textit{per se} rule was not concerned with persons who may have some mutual interest in the success of other "competitors."\textsuperscript{139} In \textit{Commerce Tankers Corporation v. National Maritime Union of America},\textsuperscript{140} the Second Circuit Court of Appeals also rejected the use of the \textit{per se} illegality test in the labor/management field. The court considered the \textit{per se} test to be inappropriate because of the "complex and significant questions"\textsuperscript{141} on the interaction between federal antitrust and labor laws.\textsuperscript{142} According to the court, a \textit{per se} approach would not permit the court to properly accomodate the conflicting policies of labor and antitrust law.\textsuperscript{143}

Underlying their rejections of the application of a \textit{per se} analysis to labor/management relations is the fact that courts are reluctant to apply a mechanical approach where two valid federal policies are in conflict. In a traditional price-fixing arrangement between firms, free trade is restrained, and there is no corresponding furtherance of a national policy to offset this harm. In the labor/management area, there is such a policy that is potentially being furthered. The mechanical application of the \textit{per se} test could do more damage than good.

In \textit{Commerce Tankers}, the court noted that by applying a \textit{per se} approach, antitrust liability would automatically attach once the non-statutory exemption was forfeited.\textsuperscript{144} In the court's terms, this was "a \textit{per se} approach with a vengeance."\textsuperscript{145} The court interpreted \textit{Jewel Tea} as requiring an

\textsuperscript{138} 543 F.2d 606 (8th Cir. 1976), \textit{cert. denied}, 434 U.S. 801 (1977).
\textsuperscript{139} \textit{Id.} at 619.
\textsuperscript{140} 553 F.2d 793 (2d Cir. 1977).
\textsuperscript{141} \textit{Id.} at 801.
\textsuperscript{142} \textit{Id.} at 801-02.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.} at 802 n. 8.
\textsuperscript{145} \textit{Id.}
application of the "Rule of Reason" to cases in this area. Judge Fienberg in *Commerce Tankers* stated, "A fair reading of *Jewel Tea* satisfies me that the Court intended there to be a full scale rule of reason inquiry on every instance in which a non-exempt activity is claimed to be a violation of antitrust.”

The rejection by courts of the use of the *per se* illegality test in judging activities in the labor/management area is not the only reason why the "Rule of Reason" should be applied in this area. Courts would have little or no difficulty in applying the "Rule of Reason" to collusive union activity because the "Rule of Reason" analysis is similar to the weighing process laid out in *Pennington*, *Jewel Tea*, and *Connell*. The "Rule of Reason" requires a court to weigh the restraint of trade imposed upon the market by the particular conduct against the reasonableness of the restraint and its necessity.

In the weighing process of *Pennington* and its progeny, a court must weigh the union interest in the subject against the restraint that is imposed on the market by union conduct. Both processes thus require the court to balance the injury done to free competition against another factor, either the reasonableness of the restraint or national labor policy. Because of their familiarity with the weighing process, courts are well equipped to use the "Rule of Reason" in situations involving collusion among labor groups.

**CONCLUSION**

Resolving the conflict between national labor law and the policy behind it and the Sherman Act's ban on anticompetitive behavior has long been the bane of the American judicial system. United States courts have been saddled with the task of reconciling two fundamentally conflicting bodies of law.

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146 Id.
151 *Jewel Tea*, 381 U.S. at 691.
into a cohesive, workable legal doctrine. On the one hand is the Sherman Act which is directed at anti-competitive activity, and on the other hand are the national labor laws, which foster, encourage and protect the very type of activity proscribed by the Sherman Act in order to further a different national policy. The fact that both of these laws and the policies behind the enactment and enforcement of each are deeply entrenched in the social and political fiber of this country makes the task of the courts a difficult one.

It would be difficult to predict how a court would decide a case presenting either of the hypothetical situations. On initial reflection, one is inclined to doubt if a court would find such activity to fall outside the labor exemption to antitrust laws. The fact remains that the unions in the posed situations are merely acting in their own interests. It is labor acting on the behalf of labor and no one else. Despite the decline in recent years of membership in organized labor unions, the idea that workers need to be given some protection in their pursuit of legitimate goals is still strong. Even in recent decisions imposing antitrust liability on unions, courts have reaffirmed the concept that such union activity should be protected. The strength of that idea suggests that a court would not impose antitrust liability on the union.

Society's interest in maintaining a free market system is just as deeply entrenched in America's social and political institutions as are the policies behind the national labor law. However, it remains that the unions have combined to restrain trade in a manner which would normally be considered to violate the Sherman Act. The form of the combination should be unimportant. The labor exemption is given to a single union acting alone in the interests of its members. The exemption should not be extended to exempt multiple union anti-competitive conduct from antitrust liability. Also, the fact that the labor exemption is an exemption to the general antitrust laws suggests that the exemption should be read narrowly.

The Supreme Court in recent years has moved away from giving labor a broad exemption from the antitrust laws. The
recent trend has been to scrutinize labor activity which is anti-competitive, even if it is in a collective bargaining agreement on mandatory subjects. Since the non-statutory exemption has evolved into a weighing process, the outcome of such a suit could be determined by the policy which society feels at the time is most important.