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New Dimensions of the Union-Antitrust Conflict

statutory exemption; the marital deduction;[124] the relationship between assignor and assignee; the preparedness of the employee to relinquish all control over the policy; and the estate questions peculiar to the state in which the employee is domiciled. If estate planning dictates that the proceeds of group life insurance should be removed from the employee's potential estate, there is then no alternative to an assignment of the policy. It cannot be said with complete assurance that the Commissioner would acquiesce to the exclusion of the proceeds or that the courts will invariably sustain the estate's position. But it is safe to say that the exclusion of the proceeds from the decedent's estate does not frustrate the purpose for which section 2042 was enacted.

NEW DIMENSIONS OF THE UNION-ANTITRUST CONFLICT

I. Introduction

Our declared congressional policy, reflected in the antitrust laws, is to foster and protect competition. Juxtaposed with this is the essential interest of unions to stifle competition in order to achieve better working conditions for its members. Recognizing the conflict which has existed in our economic policy since the passage of the Sherman Act in 1890,[1] the Supreme Court, in *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*,[2] stated:

> [W]e have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.[3]

Despite seventy-five years of judicial and legislative attempts to find a basis for coexistence between unions and antitrust laws, many problems continue to arise. In two recent decisions, *UMW v. Pennington*[4] and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,[5] the Court showed itself to be divided into three factions, each with a different concept of the proper relationship between unions and the antitrust laws.[6]

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124. Int. Rev. Code of 1954, § 2056.

1. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).
2. 325 U.S. 797 (1945).
3. Id. at 806.
4. 381 U.S. 657 (1965).
5. 381 U.S. 676 (1965).
6. Mr. Chief Justice Warren and Justices White and Brennan represent, more or less, the central viewpoint of the Court. Mr. Justice White wrote for the Court in Pennington, with Mr. Chief Justice Warren and Mr. Justice Brennan concurring. In the Jewel Tea Co. case, where there was no majority opinion, Mr. Justice White wrote an opinion in which these same Justices joined. Mr. Justice Douglas, in agreement with Justices Clark and Black, con-

Mr. Justice White would find a union guilty under the antitrust laws only if it were proven that the union had conspired with a non-labor group to effect some direct market restraint. Absent proof of such a conspiracy, restraints of trade which result from contracts involving proper subjects of collective bargaining would be exempt from the antitrust laws.

On the other hand, the Douglas faction of the Court, it is submitted, would hold that, whenever a collective bargaining contract resulted in a direct market restraint, that contract itself could suffice to establish a "conspiracy" and, therefore, an antitrust violation.

Finally, the Goldberg group would free a union entirely from the regulation of the antitrust laws where the contract involved a mandatory subject of collective bargaining, such as wages, even when, as in *Pennington*, a conspiracy was shown between labor and business groups to effect direct restraints on competition.

The issues which these decisions raise, the implications for future Court policy, and the conflict within the Court itself call for a reanalysis of the rules of union liability and an evaluation of the impact of these decisions upon the status of unions today.

A. *The Conflict*

Labor unions and the antitrust philosophy are inherently antithetical. The Sherman Act and subsequent legislation have attempted to maintain a competitive economy by providing easy access to markets and by fostering competition within those markets.[7] Unions, however, in their purpose and goals, oppose competition as a form of economic organization.[8]

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curred with the Court in the Pennington decision (union guilty) and dissented in Jewel Tea Co. (union not guilty). From the views expressed, these Justices favor a very limited exemption for unions. Mr. Justice Goldberg, with Justices Harlan and Stewart concurring, wrote an opinion which agreed with the Jewel Tea Co. result, and dissented from Pennington. This group would give the unions a very wide exemption.

7. 1955 Att'y. Gen. Nat'l Comm. Antitrust Rep. 1-3; Mason, Preface to Kaysen & Turner, Antitrust Policy at xiii (1959). An extensive listing of various regulatory statutes passed by Congress, which manifest a strongly pro-competitive policy, can be found in H.R. Rep. No. 3236, 81st Cong., 2d Sess. 94-95 (1951), and H.R. Doc. No. 599, 81st Cong., 2d Sess. 3 (1950). Immunities from antitrust are granted, however, in some circumstances. Labor unions, agricultural cooperatives, and certain regulated industries enjoy exemptions from antitrust laws for certain of their activities. For a detailed discussion of the nature and extent of these exemptions, see 1955 Att'y. Gen. Nat'l Comm. Antitrust Rep. ch. VI.

8. Gregory, Labor and the Law 525 (1961); McKie, Collective Bargaining and the Maintenance of Market Competition, in The Public Stake in Union Power 90 (Bradley ed. 1959); Simons, Economic Policy for a Free Society 103 (1948). Simons makes the strongest statement regarding the antithesis between unions and competition when he declares that "labor . . . distrusts all free-market ideas. It wants tariffs; it wants complete freedom from the Sherman Act; and, in fact, it wants employers who can fix their selling prices collusively too. American trade and industrial unionism makes sense only . . . as a part of a tight cartelization of industries where it is strong. It wants no competition from abroad and none at home, either in its own markets or in those of its employers." Ibid.

1. Union Activity in the Labor Market

In the labor market,[9] unions exist to destroy competition, since workers organize into unions for the express purpose of controlling the consideration for which, and conditions under which, they will sell their labor or services.[10] In this respect, they combine to restrain labor market trade.

Furthermore, organized labor must have, as one of its prime goals, the elimination of product market[11] competition based on differentials in labor market standards.[12] Where a firm is more strongly unionized than its rivals, the union can obtain from that firm higher wages, shorter hours, etc., than it gets from other firms. The result is that the unionized firm will have a substantially higher labor cost than its competitors. The pressures of competition will then come into play and force the unionized employer to attempt to eliminate this competitive disadvantage by destroying the union.[13] A union must, therefore, seek to organize all firms dealing in a given product market, thereby eliminating all competition from non-union made goods. The union must seek further to negotiate similar contracts with those firms, thereby destroying any product market competition derived from one of the primary cost factors of production, that of labor.[14] Although the above described activity centers in the labor market, the primary effect is aimed at, and achieved in, the product market.

2. Union Activity in the Product Market

The unions are also a strongly anti-competitive influence centered in the product market itself. Whenever a union enforces any economic sanction against an employer, it either reduces the flow of the employer's goods into commerce, or reduces the trade in those goods once they have reached the market. Since the achievement of either of these aims is a restraint of trade, whenever a union strikes or boycotts an employer for any cause, it violates

9. The "labor market" refers to the market in which employees sell their services or work to employers, i.e., the employment market. The "product market" refers to the employer's marketing his product or service, produced through the work of his employees, to consumers. There is an essential relationship between the two in that the price which an employer must pay in the "labor market" is normally a major factor in the price which he must charge in the "product market."

10. Gregory, op. cit. supra note 8, at 525; McKie, op. cit. supra note 8, at 95; Comment, 30 Fordham L. Rev. 759, 760 (1962).

11. See note 9 supra.

12. Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940); McKie, op. cit. supra note 8, at 104; Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L.J. 14, 19 (1963).

13. This is precisely the situation which led to the famous Coronado cases: UMW v. Coronado Coal Co., 259 U.S. 344 (1922), and Coronado Coal Co. v. UMW, 268 U.S. 295 (1925). Union mines, unable to compete advantageously with non-union operations, attempted to eliminate the closed shop. The union, which struck the mines, was held to have violated the antitrust laws, largely because it was proved that the intent was to eliminate the competition from non-union coal.

14. Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940).

the *principle* of antitrust.[15] In addition to these indirect product market restraints, the unions are a further anti-competitive influence insofar as they have an interest in completely eliminating product market competition by direct restraints, such as price-fixing and collusive allocation of business.[16] In this type of non-competitive market, employer incentive to resist union demands is considerably diminished. Market-wide concessions may be granted without detriment to the competitive position or the profit margin of any firm. Any cost increase can be passed on to consumers through market-wide price increases. Therefore, unions frequently have an interest similar to business groups in destroying competition and enforcing direct market restraints.

B. *The Resolution*

In view of this union-antitrust conflict, some basis of accommodation had to be found which would protect the right of unions to exist and function in achieving legitimate goals for workers and, at the same time, preserve the competitive nature of the economy.

1. Labor Market

In 1914, with the passage of the Clayton Act, Congress removed the labor market from antitrust coverage.[17] On the principle that the labor of a human being is not an article of commerce, restraints on competition among workers for jobs were declared not to be a basis for antitrust prosecution.[18] Thus, union activities in the labor market, organizing workers into unions and bargaining collectively instead of individually, were given a total immunity.[19]

15. Lieberman, Unions Before the Bar 163 (1960); Cox, Labor and the Antitrust Laws —A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 255 (1955).

16. McKie, op. cit. supra note 8, at 90-93; Simons, op. cit. supra note 8, at 103. "[T]here is no limit on union incentive, and frequently on union power, to impose monopoly on product markets. . . . It would seem then that unions have almost no stake in the maintenance of competition between employers." Winter, supra note 12, at 21. The theory is borne out by the facts. Unions have, on numerous occasions, sought to attain and enforce such direct restraints, and it is logical to assume that, but for the fact that they are now illegal, the unions would have continued to do so. Consider the following cases: Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797 (1945); Local 167, Int'l Bhd. of Teamsters v. United States, 291 U.S. 293 (1934); United States v. Brims, 272 U.S. 549 (1926); United States v. Gasoline Retailers Ass'n, 285 F.2d 688 (7th Cir. 1961); United States v. Minneapolis Elec. Contractors Ass'n, 99 F. Supp. 75 (D. Minn. 1951).

17. 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

18. Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964), states that "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 . . . ."

19. See notes 9-12 supra and accompanying text. Thus, it is pointed out in Gregory, op. cit. supra note 8, at 267, that, if unions were not permitted to eliminate price differentials based on wage differentials, "virtually all of national unionism [would be] . . . one gigantic and wholesale offense under the Sherman Act."

The courts were slower to concede to unions the right to eliminate product market competition based on differences in labor market standards. In the *Second Coronado Case*,[20] in 1925, the fact that a union sought to unionize the Coronado Company to prevent it from putting non-union coal into competition with the union-mined product was held to constitute an antitrust violation. This case threatened the very existence of unions, for no union, as pointed out above, can operate effectively if it cannot seek to eliminate labor market costs as a source of product market competition. Finally, in 1940, the Supreme Court, in *Apex Hosiery Co. v. Leader*,[21] held that unions had the right to seek to eliminate all labor market competition, even when this affected the product market as well, as this "has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."[22]

2. Product Market

The Clayton Act also exempted any union which may be "lawfully carrying out" its "legitimate" objectives.[23] In phrasing the statute in these terms, however, Congress failed to define precisely the scope of the immunity to which unions were entitled in their product market activities, and thus left to the courts the development of policy on this fundamental issue.[24]

The courts recognized early in the battle between unions and antitrust that, if unions were to be allowed the use of any economic weapons in collective bargaining, some restraints of trade would have to be tolerated. However, since they were reluctant at first to give the unions too much freedom, the courts developed a distinction between direct restraints on the distribution of goods, such as boycotts, which were illegal,[25] and restraints on production and manufacture, such as strikes, which were legal since they involved only incidental, indirect, and remote restraints of trade.[26] Then, in 1941, the

20. Coronado Coal Co. v. UMW, 268 U.S. 295 (1925).

21. 310 U.S. 469 (1940).

22. Id. at 503-04.

23. 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964). See note 18 supra.

24. Some commentators and the unions have suggested that the courts have been in error in finding unions guilty of antitrust violations after the passage of the Clayton Act, on the ground that this was intended to give the unions total immunity. However, Congress has had full opportunity, both at the time of, and subsequent to, the passage of the Clayton Act, to exempt the unions totally from the antitrust laws, but has always refused to do so. See Frankfurter & Greene, The Labor Injunction 139-44 (1930); Boudin, The Sherman Act and Labor Disputes, 39 Colum. L. Rev. 1283 (1939), 40 Colum. L. Rev. 14 (1940) (presenting the case for total immunity under the Clayton Act). However, in Steffen, Labor Activities in Restraint of Trade: The Apex Case, 50 Yale L.J. 787, 812-20 (1941), there is a complete analysis of the relevant provisions of the Clayton Act and of the congressional debates, both at the time of, and subsequent to, its passage, all of which points to an intent to grant a limited immunity and a reluctance to define that immunity too precisely.

25. Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Loewe v. Lawlor, 208 U.S. 274 (1908).

26. Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933); United Leather Workers v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924); UMW v. Coronado Coal Co., 259 U.S.

decision of *United States v. Hutcheson*[27] broadened the scope of legitimate union activities by permitting any restraint of trade, direct or indirect, so long as it resulted from a legitimate labor dispute and did not involve a combination with non-labor groups. As a result, unions are not to be held in violation of antitrust laws for those restraints of trade which *necessarily* result from a strike, boycott, or other exertion of economic pressure. Only when that pressure is exerted in a manner specifically circumscribed, as in combination with non-labor groups, will the union exemption be forfeited.[28]

Thus, in some respects, the union-antitrust conflict has been settled. However, the problem of direct interference by unions in the product market is as yet unresolved. Although the general rules of union liability were formulated twenty years ago, the *Pennington* and *Jewel Tea Co.* decisions indicate that there is no consensus as to the proper interpretation and application of these rules. The crucial question remains: What means may a union legally employ to achieve its aims? To understand the present position of the Court, it is necessary to examine in some detail the union-antitrust conflict from the judicial standpoint, with special emphasis on the evolution and meaning of "labor dispute" and "combination with non-labor groups."

II. The Hutcheson-Allen Bradley Rule

A. United States v. Hutcheson[29]

In 1941, by the *Hutcheson* decision, the unions were given almost total immunity from the antitrust laws. The case involved a jurisdictional dispute in which the union employed strikes, picketing, and a boycott. The Court chose to define the labor exemption in terms of a synthesis of the Clayton[30] and Norris-LaGuardia Acts.[31] The Court derived from the passage of the latter a congressional intent to revitalize the Clayton grants of immunity which had been restricted by Supreme Court interpretation.[32] Infusing the Norris-LaGuardia definition of a "labor dispute" into the Clayton Act,[33]

344 (1922). What appears in retrospect to be a clear distinction was not so definite at the time; and if the Second Coronado Case, 268 U.S. 295 (1925), is to be deemed anything but an aberration, there is absolutely no logical distinction in these cases. For excellent analyses of this early history of the union-antitrust conflict, see Cavers, Labor v. The Sherman Act, 8 U. Chi. L. Rev. 246 (1941); Gregory, The Sherman Act v. Labor, 8 U. Chi. L. Rev. 222 (1941); Landis, The Apex Case, 26 Cornell L.Q. 191 (1941).

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

28. Id. at 232.

29. 312 U.S. 219 (1941).

30. 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

31. 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-10, 113-15 (1964).

32. Bedford Cut Stone Co. v Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

33. "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Norris-LaGuardia Act § 13(c), 47 Stat. 73 (1932), as amended, 29 U.S.C. § 113(c) (1964). As hereinafter used, the term "labor dispute" will refer to this definition,

the Court held that no union engaged in a valid labor dispute would be subject to the antitrust laws.[34] The decision dispensed with such considerations as direct versus indirect restraints of trade, and with purpose or motive as determinants of liability,[35] and recognized that union interests extended through the labor market to a direct involvement with the product market.[36] Unions were thus free to pursue their economic self-interest so long as that interest was founded on a "labor dispute."[37]

The wide extent of this new freedom has been clearly demonstrated in decisions subsequent to *Hutcheson*, in which severe restraints of trade have been sanctioned by the courts. In *United States v. American Fed'n of Musicians*,[38] the union was prosecuted for attempting to prevent the use of "canned" music in place of live musicians. In the words of the indictment, the union was " 'destroying all manufacture and sale in interstate commerce of phonograph records and electrical transcriptions . . .' " and " 'eliminating all competition between music produced by mechanical means and music produced by live

which was made a criterion for union exemption from antitrust laws by the Hutcheson case. 312 U.S. at 234-35.

34. While this rule was new in the sense that it first became controlling law in this decision, Mr. Justice Brandeis, dissenting from the Court's opinions in Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 56 (1927), and Duplex Printing Press Co. v. Deering, 254 U.S. 443, 479 (1921), expounded very similar ideas. In the latter case, he stated: "[The Clayton Act] declared that, when these acts [specified in § 20] were committed in the course of an industrial dispute, they should not be held to violate any law of the United States." Id. at 486.

35. See notes 25 & 26 supra and accompanying text.

36. 312 U.S. at 232-33.

37. This method of interpretation and the rule derived thereby were subjected to severe and apparently valid criticism at the time. Cavers, And What of the Apex Case Now?, 8 U. Chi. L. Rev. 516 (1941); Gregory, The New Sherman-Clayton-Norris-LaGuardia Act, 8 U. Chi. L. Rev. 503 (1941). Gregory's attack was on three bases: (1) The new formulation was unnecessary as the Apex rule was sufficient to hold that the union in Hutcheson had not violated the antitrust laws; (2) The new formulation was erroneous because the Norris-LaGuardia Act was an anti-injunction statute, and, although it may have abrogated the power of the courts to enjoin the unions, it did not immunize them from civil or criminal liability under the Sherman Act. Mr. Justice Frankfurter's analysis of the reasons why forbidding the issuance of injunctions constituted an exemption from criminal prosecution is especially interesting. While he was still a professor at Harvard Law School, he had written an analysis of the Norris-LaGuardia Act which specifically emphasized that this merely denied the injunctive remedy, while "all other remedies in federal courts and all remedies in state courts remain available." Frankfurter & Greene, op. cit. supra note 24, at 220; (3) The new formulation was dangerous because it gave labor too much freedom.

If, however, there were legal fallacies in the opinion of the Court, it must be recognized that the opinion was in tune with the social philosophy prevalent at the time and controlling today as to the role which unions should play and the power which they should be permitted to exercise in our economic system. And the logic, suggested at note 24 supra, that Congress never intended a total immunity for unions because it never passed specific legislation to that effect, applies to the Hutcheson case—if the immunity therein is too broad, Congress at least has never attempted to limit it.

38. 47 F. Supp. 304 (N.D. Ill. 1942), aff'd per curiam, 318 U.S. 741 (1943).

musicians . . . .' "[39] The court held that, since the union was seeking a closed shop, excluding machines as well as men, the restraint of trade resulted from a legitimate labor dispute and was, therefore, immune.

In *Adams Dairy Co. v. St. Louis Dairy Co.*,[40] a union plan clearly aimed at eliminating price competition was upheld. The Adams Dairy Company had developed a new means of packaging milk which enabled it to be sold through retail stores at prices substantially below what the local dairies charged for home delivery. To counteract the significant competitive advances being made by Adams, the union revised its wage-commission scale for dairy drivers in a way which drastically increased Adams' wage costs without affecting the costs of the other companies in the market.[41] There was no combination with a non-labor group other than the employers signing the revised contract. Since the means employed by the union, e.g., wage bargaining, was within the scope of a Norris-LaGuardia labor dispute, this action of forcing up prices and thereby eliminating competition was held to be within the area of exempt activities.

This liberal interpretation of the *Hutcheson* rule was supplemented by the liberal construction given by the courts to the term "labor dispute." In *Local 24, Int'l Bhd. of Teamsters v. Oliver*,[42] a union was permitted to negotiate concerning the price which would be charged for the rental of owner-driven trucks, as this was found to have a direct and immediate relationship to the wages paid to non-owner drivers. The Court held:

> [T]he point of the Article is obviously not price fixing but wages. The regulations embody not the 'remote and indirect approach to the subject of wages' . . . but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract.[43]

Similarly, in the garment industry, the courts have upheld union control over contracts between manufacturers and jobbers on the basis that the manufacturer-jobber contract was the direct and immediate source of wages for the employees of jobbers.[44] Without such union control, the fierce competition in the industry would make it impossible to maintain the union wage scale.[45]

39. 47 F. Supp. at 306.

40. 260 F.2d 46 (8th Cir. 1958).

41. The union scale was based on a point system, under which drivers were given a number of points dependent upon the amount of milk delivered. As Adams' men delivered huge amounts at a few stops, they had points substantially higher than any other drivers. The union revised the wage rates for high point drivers only, with the result that only Adams' wages were affected. The effect was drastic: Adams was forced to split its delivery routes to double the number of drivers it used. Id. at 48-51.

42. 358 U.S. 283 (1959).

43. Id. at 294.

44. Greenstein v. National Skirt & Sportswear Ass'n, 178 F. Supp. 681 (S.D.N.Y. 1959); California Sportswear & Dress Ass'n, 54 F.T.C. 835 (1957).

45. In the cases cited note 44 supra, the union was controlling the contract between manufacturers and jobbers, compelling the manufacturers to charge a price sufficient to cover wages at the union rate plus a reasonable amount for overhead. Labor was the major cost factor, and, with the intense competition in the garment industry, it was impossible to maintain the

In the interest of job security, unions have been given wide latitude to control the advance of automation.[46] This interest was extended, in the decision of *Order of R.R. Telegraphers v. Chicago & Nw. Ry.*,[47] to permit unions to bargain concerning the railroad's plan to curtail operations in some towns, since the result would be the closing of certain stations and the elimination of union members' jobs.

Unions have even been allowed to contract for the power to restrict production directly by controlling the ability of manufacturers to purchase new plant facilities.[48] Such restraints were held necessary to protect the union standards because of the management's inclination to establish non-union shops in outlying areas where it was difficult for the union to control the activities. In addition, due to the nature of the garment industry, it was easy to divert large amounts of work to these distant shops.[49]

The *Hutcheson* decision proved to be labor's long awaited Magna Charta.[50] A wide range of activities was brought within the shelter of the union exemption, as union self-interest, replacing the subjective philosophies of the members of the judiciary, became the criterion of legitimate union action.[51]

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union wage scale among jobbers' employees without union intervention in the manufacturer-jobber contract. The findings of the Hearing Examiner, in California Sportswear & Dress Ass'n, 54 F.T.C. 835, 837-87 (1957), contain an extensive analysis of the situation.

46. United States v. Bay Area Painters & Decorators Joint Comm., 49 F. Supp. 733 (N.D. Cal. 1943); 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); United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill.), aff'd per curiam sub nom. United States v. International Hod Carriers, 313 U.S. 539 (1941). For a discussion of union featherbedding techniques under antitrust laws, see Cox, supra note 15, at 272-75.

47. 362 U.S. 330 (1960).

48. California Sportswear & Dress Ass'n, 54 F.T.C. 835 (1957). These non-union plants are called "runaway shops."

49. California Sportswear & Dress Ass'n, supra note 48. The weight to be given this aspect of the case should be tempered by a consideration of the specific circumstances. The garment industry, before, during, and after the contracts in question, was highly competitive, both within the Los Angeles market and between the local people and other cities. The result of the contract was to control competition derived from different labor standards, rather than to effect an actual restraint on production.

50. In 1914, the unions had looked to the Clayton Act to free them from the antitrust laws. At that time, Samuel Gompers had called the act labor's "Magna Charta." 21 American Federationist 971 (1914). The "Magna Charta" did not materialize, however, until 1941, when it could be said that "the New Freedom of 1914, so rudely throttled by the Supreme Court in the twenties, has now been reborn by the New Deal of the forties." Landis, supra note 26, at 212F.

51. One of the major criticisms of the Apex and pre-Apex rules of union liability under antitrust was that they required ad hoc judgments by the courts as to whether a particular act was "too much" of a restraint, and, therefore, a violation of such determinations inevitably reflected the personal opinions of the individual. Landis, supra note 26, at 212D; Winter, supra note 12, at 44-45.

B. Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers[52]

The *Allen Bradley* case completed the framework establishing labor's liability under antitrust, by defining the narrow area in which unions are not exempt from prosecution. The New York Electrical Workers Union, facing declining membership and poor wage standards, moved to take direct control of the electrical goods market. It directed its attack at manufacturers and contractors, forcing them to sign contracts in which they agreed to work only with goods manufactured by the members of Local No. 3. Gradually, this was expanded into a scheme for price-fixing, rigging of bids, and market allocation—a complete elimination of competition.[53]

The Court held that this was the type of situation envisioned by the *Hutcheson* reference to combination with non-labor groups,[54] and the union, therefore, was not entitled to immunity from antitrust liability. The union had not merely sought an agreement restricting goods which a firm could handle, but had conceived, initiated, and enforced a large scale plan to "monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level."[55] This scheme was held to constitute the antitrust violation.

To understand the *Allen Bradley* conception of a "combination with non-labor groups,"[56] three significant features of the opinion must be considered. First, although the Court stressed the idea of unions "aiding and abetting" non-labor groups, and of businessmen "using" unions to achieve restraints of trade as the basis for union liability,[57] the facts of *Allen Bradley* were exactly contrary to this. The initiative and impetus for the scheme came not from the business groups, as the language of the Court would suggest, but from the union. The union, acting in its own interests, and not in the interests of management, compelled all the electrical goods manufacturers and contractors to join in its scheme by using the threat of strikes, boycotts, etc.[58] Thus, despite the language of the

52. 325 U.S. 797 (1945).

53. The full findings of the Special Master, containing a detailed presentation of all the facts, showing the immense scope of the scheme which the union was enforcing, are to be found in Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 41 F. Supp. 727, 728-43 (S.D.N.Y. 1941).

54. 312 U.S. at 232. The Hutcheson Court footnoted a reference to United States v. Brims, 272 U.S. 549 (1926), as an instance of a union combining with a non-labor group. Id. at 232 n.3. The Brims case, as well as Local 167, Int'l Bhd. of Teamsters v. United States, 291 U.S. 293 (1934), involved restraints similar to the Allen Bradley situation.

55. 325 U.S. at 809.

56. An understanding of this concept is critical, because most prosecutions of unions for antitrust violations since 1945 have been for combining with business groups. See notes 66-70 infra and accompanying text.

57. 325 U.S. at 801 passim.

58. The lower court decision detailed the methods used by the union to enforce its scheme. Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 41 F. Supp. 727, 728-42 (S.D.N.Y. 1941). In fact, two-and-one-half pages of the opinion are under the heading "Power of Union." Id. at 741-43.

Court, the essence of the violation was the conspiracy, regardless of who initiated it.

Secondly, the Court, while finding the union guilty of a violation, refused to enforce the district court injunction, which would have declared unlawful all union activities in the New York market, even where the union did not act in concert with business groups and did engage in activities which were specifically exempted from the antitrust laws by Section 20 of the Clayton Act.[59] The court of appeals, reviewing a revised draft of the injunction on remand, held that only those activities "carried on in combination and conspiracy with non-labor groups . . . to control prices and markets for such equipment by stifling competition in aid and furtherance of the combination and conspiracy . . ." were to be enjoined.[60]

Lastly, there is the statement by the Court that, if the union in *Allen Bradley* had negotiated separate agreements with contractors and manufacturers intending to accomplish the restraints which were in fact accomplished, and if the union had not been a party to the scheme of market control, it would not have violated the antitrust laws, despite the severe restraint of trade which would have been effected.[61]

These factors indicate that, for the *Allen Bradley* Court, the essential element of a violation is an agreement—a specific, collateral agreement—with a business group to effect a restraint of trade for the direct benefit of the business group. A collective bargaining agreement which results in a restraint is insufficient to qualify as a conspiracy with a non-labor group.

Although, on occasion, courts or commentators have suggested a different interpretation of the *Allen Bradley* case,[62] the majority of decisions since 1945 have followed this line in demanding clear proof of a conspiracy aimed at direct market control as a prerequisite to union antitrust liability. Thus, the most common factual situation in which a violation has been found has involved a large and complex program of market domination of the type considered in *Allen Bradley*. Price-fixing arrangements,[63] market allocation and rigging of bids,[64] and similar schemes have been involved in most prosecutions.[65] A comparison of *Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n*[66]

59. 325 U.S. at 811-12.

60. 164 F.2d 71, 74 (2d Cir. 1947).

61. 325 U.S. at 807-09.

62. For a summary and brief analysis of some of the suggested alternative interpretations, see Bernhardt, The Allen Bradley Doctrine: An Accommodation of Conflicting Policies, 110 U. Pa. L. Rev. 1094, 1097-1101 (1962).

63. United States v. Gasoline Retailers Ass'n, 285 F.2d 688 (7th Cir. 1961).

64. Local 175, Int'l Bhd. of Elec. Workers v. United States, 219 F.2d 431 (6th Cir.) (per curiam), cert. denied, 349 U.S. 917 (1955); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), cert. denied, 348 U.S. 817 (1954).

65. United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); United Bhd. of Carpenters v. United States, 330 U.S. 395 (1947); United States v. Minneapolis Elec. Contractors Ass'n, 99 F. Supp. 75 (D. Minn. 1951). "No union has been convicted under the Allen Bradley doctrine without an explicit mention of direct price fixing as one of the elements of the offense." Bernhardt, supra note 62, at 1100 n.30.

66. 155 F.2d 799 (3d Cir. 1946).

with *Adams Dairy Co. v. St. Louis Dairy Co.*[67] exemplifies what the courts require for a conspiracy within the *Allen Bradley* rule. In the *Philadelphia Record Co.* case, one company was underselling its rivals by engaging in extensive night work, which was not covered by a union contract, a situation very similar to that found in the *Adams Dairy Co.* case. However, the union in *Philadelphia Record Co.* did not take any action until the association of other companies suggested that it do something to stop the night work. Then, the union bargained with and struck Philadelphia for a contract outlawing night work.[68] This would have been legitimate and exempt from liability, as in *Adams Dairy Co.*, but for the fact that the union acted upon the request of the business group.[69] Unions can, therefore, restrain trade through "labor dispute" bargaining, so long as it is not done pursuant to an agreement with a non-labor group.[70]

The rule of the *Allen Bradley* and *Hutcheson* cases is that unions are free to restrain trade, even directly, if the restraint is in the course of a Norris-La-Guardia labor dispute, *i.e.*, concerning the terms and conditions of employment, and it is not achieved through combination with non-labor groups. To find a combination of this type, the courts will look for some type of collateral agreement in addition to a simple collective bargaining contract in which the union and the employer agree that the union will use its power to effect a direct market restraint.[71]

III. *UMW v. Pennington*[72]*—Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[73]

In the *Pennington* and *Jewel Tea Co.* decisions, the controlling middle group of the Court[74] applied the *Hutcheson-Allen Bradley* rule in accord with the interpretation outlined above. However, the other two factions, purportedly proceeding under the same rule, showed a clear disagreement as to the criteria for union liability under the antitrust laws.[75]

67. 260 F.2d 46 (8th Cir. 1958).

68. 155 F.2d at 802-03.

69. See id. at 804.

70. In Philadelphia Record Co., the court referred twice to a "supplemental agreement" between the union and the association. Id. at 802. The court held: "As the case stands it reveals a combination of labor and business instigated by the latter to put an end to night commercial work by the plaintiff which, under the facts, would put the plaintiff out of the entire commercial photo-engraving field. The association had two reasons for so doing. The first was plaintiff's lower prices. The second was that there was not enough work to go around or, in other words, the elimination of a competitor." Id. at 803.

71. The essential element of Allen Bradley and subsequent decisions is that the combination is not, as has been suggested by some commentators, a collective bargaining contract which results in a restraint of trade. See Winter, supra note 12, at 46-47. It is, rather, a collective bargaining contract with a supplemental agreement between the union and the employer to effect a restraint of trade.

72. 381 U.S. 657 (1965).

73. 381 U.S. 676 (1965).

74. See note 6 supra and accompanying text.

75. It is interesting to note that, in reaching very different positions as to the general rules

In the *Pennington* case, the United Mine Workers Union was implementing its established policy of seeking uniform high wages, fringe benefits, and good working conditions. The union acted upon the belief that

> the existence of marginal operators who cannot afford these high wages, fringe benefits, and good working conditions does not serve the best interests of the working miner but, on the contrary, depresses wage standards and perpetuates undesirable conditions.[76]

The union, therefore, chose to enforce a wage scale beyond the ability of these producers to pay, in an attempt to drive them out of business.[77] The large producers, whose interests were clearly identical with those of the union in this situation,[78] agreed to a high wage scale provided that the same scale would be enforced industry-wide.[79] The Court held that such a provision respecting union activity outside the bargaining unit was not a valid subject of a "labor dispute" and that this agreement constituted a combination within the prohibitions of *Allen Bradley*.[80]

The *Jewel Tea Co.* case concerned the hours of operation for meat sellers in Chicago. The union sought to restrict all sales of meat to the hours between 9:00 A.M. and 6:00 P.M. Jewel Tea Company, a large chain supermarket, contended that this was an attempt to prevent them from utilizing their self-service meat counters to gain a competitive advantage over the smaller stores.[81] It contended that the union could properly control only the hours of butchers' work and not the hours of the sale of meat, and accused the union and the smaller stores of a conspiracy to restrain competition.[82] The Court held for the union, predicating its decision on a narrow issue of fact. The union had proved

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for union liability under antitrust laws and as to the extent of immunity which should be granted in these cases, all three factions of the Court claim to be applying the rule of the Hutcheson and Allen Bradley cases. See UMW v. Pennington, 381 U.S. 657, 661-63 (1965) (White, J.); id. at 672-75 (Douglas, J., concurring); Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 735-38 (1965) (Douglas, J., dissenting); id. at 705-10 (separate opinion of Goldberg, J.).

76. Id. at 698 (separate opinion of Goldberg, J.).

77. 381 U.S. at 664. See also Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L.J. 14, 53-54 (1963).

78. See Baratz, The Union and the Coal Industry 62-74 (1955); Winter, supra note 77, at 29-30.

79. 381 U.S. at 659-61.

80. Id. at 661-63; see Winter, supra note 77, at 51-55. For a historical view of this union policy, which can be traced back to the 1920's, see Baratz, op. cit. supra note 78, at 69-70. He states the union theory to be as follows: "The union's strategy, then, is to eliminate all wage-rate differentials. The level of wage rates will at the same time be pushed up. The effect of the two policies will be the encouragement of mechanization, the cost benefits of which will be 'shared' with the miners. At the same time, rising costs will slowly force the relatively inefficient mines out of the industry. This will mean that the remaining firms will absorb that part of the market which has been served by the deceased mines, enabling the survivors to operate on a more regular schedule. Product prices will be 'firmed up' by the elimination of those mines which seek to survive by selling 'below [total] cost.'" Id. at 70.

81. 381 U.S. at 682 (opinion of White, J.).

82. Id. at 692 (opinion of White, J.).

that, for the Jewel Tea Company to sell meat after 6:00 P.M., either the butchers would have to do more work during the day, or non-union laborers would have to do butchers' work at night.[83] Therefore, this agreement relating to the hours of meat sales was held to be immediately related to legitimate butcher concerns, and, as there was no proof of a conspiracy, the Court held that there was no antitrust violation.

The nature of a labor dispute and of a combination within the *Hutcheson-Allen Bradley* rule is the basic issue in both the *Pennington* and *Jewel Tea Co.* cases. The extreme divergence of the views expressed in these cases is significant, not only from the academic standpoint, as representative of the various possible interpretations of that rule, but, very practically, because of the severe shift of policy which would result should there be any major change in the make-up of the Court or in the thinking of some of the Justices.

In his opinion, Mr. Justice White was attempting to follow the established rule of union liability. Thus, in applying the *Hutcheson* concept of "labor dispute,"[84] it was held that the Pennington contract provision respecting wages to be paid by firms outside the bargaining unit was not a proper subject for bargaining, whereas the Jewel Tea regulation of the hours of the sale of meat was a legitimate "dispute," since it was directly tied to the hours of work of the butchers. In framing the issue in the *Jewel Tea Co.* case, Mr. Justice White stated that "the crucial determinant is not the form of the agreement—*e.g.*, prices or wages—but its relative impact on the product market and the interests of union members."[85] In this respect, the Court followed the ideas advanced in *Local 24, Int'l Bhd. of Teamsters v. Oliver*[86] and *Greenstein v. National Skirt & Sportswear Ass'n*,[87] considered above,[88] in giving a reasonably liberal interpretation to the concept of labor dispute.

Respecting the "combination" aspect of the cases, the opinion of the Court is also within the rule of precedent. In *Pennington*, it was found that there was an agreement between the union and management to eliminate competition from the industry.[89] Regardless of the fact that in fulfilling the agreement the union bargained with all coal producers about terms that were legitimately a "labor dispute"—*i.e.*, wages—the conspiracy destroyed the union exemption.

The fact that no conspiracy was found in *Jewel Tea Co.* is significant to an understanding of Mr. Justice White's thinking. The contract in that case was strongly anti-competitive, as it enforced uniform hours throughout Chicago for the sale of meat, a provision which was very beneficial to the smaller stores. These stores signed the union contract, without objection, knowing that the union intended to impose the same terms on Jewel Tea.[90] But beyond the signing of

83. Id. at 694 (opinion of White, J.).
84. See note 33 supra.
85. 381 U.S. at 690 n.5 (opinion of White, J.).
86. 358 U.S. 283 (1959).
87. 178 F. Supp. 681 (S.D.N.Y. 1959).
88. See notes 42-45 supra and accompanying text.
89. 381 U.S. at 663-66.
90. 381 U.S. at 680-82 (opinion of White, J.).

the contract, there was no proof of a conspiracy,[91] and the Court held that the anti-competitive effect of the contract, and the resulting benefit to the smaller stores, was insufficient to constitute a conspiracy within *Allen Bradley*. Thus, absent a "conspiracy," an industry-wide contract which restrains trade will not be held to be an antitrust violation by Mr. Justice White and those members of the Court who are in accord with his views.

The position of the Douglas faction would severely restrict the economic influence of unions. Mr. Justice Douglas has asserted that an industry-wide agreement which exceeded the financial ability of some employers to pay, and which was intended to force these employers out of business, would be prima facie evidence of an antitrust violation.[92] Since unions and employers which are engaged in collective bargaining both understand the economic position of an industry and of the individual firms within that industry, it may fairly be said that, when the result of a collective bargaining contract is the elimination of some member of an industry, or the effectuation of any other market restraint,[93] the union and the employers who joined in that contract, insofar as they knew that this restraint would occur, intended it to occur.[94] Thus, it would seem that Mr. Justice Douglas' reasoning would lead to the conclusion that any contract which results in a severe restraint of trade was intended to achieve that restraint, and would, therefore, be a violation of the antitrust laws.[95]

91. Id. at 688 (opinion of White, J.).

92. UMW v. Pennington, 381 U.S. 657, 673 (1965) (Douglas, J., dissenting). The basis of the asserted violation is that the collective bargaining agreement would be a "conspiracy with non-labor groups" within the Allen Bradley rule.

93. The fact that Mr. Justice Douglas applies this same theory to the Jewel Tea Co. case indicates that he does not intend to limit his approach to restraints in the form of driving employers out of business, but would include all types of direct market control. See 381 U.S. at 737 (dissenting opinion).

94. Radio Officers' Union v. NLRB, 347 U.S. 17, 44-45 (1954).

95. In a footnote to his opinion in Pennington, Mr. Justice Douglas discusses the concept of antitrust liability based on separate action by competitors who participate in a plan which effects a restraint, even though there has been no previous agreement to effect such a restraint. 381 U.S. at 673 n. (dissenting opinion). The implication is clear that the mere signing of a collective bargaining contract which would result in a substantial restraint of trade—the type of contracts proposed in Pennington and Jewel Tea Co.—would, for Mr. Justice Douglas, be an antitrust violation.

Consider, for example, the New York newspaper industry. Could the New York Times and the Daily News, to avoid a strike, sign an agreement, knowing that the terms would be beyond the financial ability of the other newspapers, and knowing also that, by signing this agreement, they would preclude a holdout by these other papers? Under the Allen Bradley rule, the Times and the News should be able to sign even with the intent to thereby eliminate their competitors, provided that there was no agreement that the unions propose such terms industry-wide. On the other hand, it is suggested that the Douglas opinion would admit of holding the Times and the News guilty even if their only motive in signing was to avoid a strike which would prove extremely costly to them, because they knew that the restraint would result and, therefore, intended it to result.

The only alternative to this would be for Mr. Justice Douglas to distinguish restraints of trade on the basis of primary and secondary intent, i.e., to say that in some cases the primary intent was to achieve the restraint, and that the contract is, therefore, illegal, whereas in other

This rule, deriving a conspiracy with non-labor groups from a collective bargaining contract which results in a restraint of trade, is a clear departure from the concepts of *Allen Bradley*, which insisted upon some supplementary agreement to effect a restraint, and not merely a contract which has this result.[96] If, for example, uniformity of contract terms, where firms are aware that a restraint will result, is to be sufficient to qualify as a conspiracy, unions and businessmen could be subject to antitrust prosecution whenever they engage in industry-wide bargaining, or when, as in the automobile industry, similar contracts are separately negotiated. If this opinion were carried a step further, it could be used to deny a union the right to seek uniform standards in the labor market through uniform contract terms, on the basis that an elimination of competition would be intended and achieved.[97] This would relegate unions to the position that they occupied before the *Apex Hosiery Co.* case, and hold them guilty of an antitrust violation whenever their actions were intended to affect product market competition in any way.[98]

Mr. Justice Goldberg has moved to an opposite extreme, and would greatly expand the antitrust immunity of the unions.[99] He clearly stated, in relation to the *Pennington* decision, that "unions and employers are exempt from the operations of the antitrust laws for activities involving subjects of mandatory bargaining . . . ."[100] He suggested, and at least two authorities are in accord,[101] that, since wage bargaining is traditionally exempt from antitrust liability, and since *Pennington* involved wage bargaining, the Court should not have found a violation.[102] This reasoning, however, overlooks two important factors. First, *Pennington* did not involve traditional wage bargaining. If the United Mine

cases the primary intent was to achieve a legitimate benefit, with the restraint being intended only secondarily, as an incident of that benefit, and that, therefore, this restraint is not a violation. The subtlety of the distinctions which would have to be drawn, and the problems of proof which this rule would pose, as well as the opportunity for extremely restrictive application upon the unions, make this a problematic and undesirable approach to the question of union-antitrust liability.

96. See text accompanying notes 62-71 supra. As applied to the Jewel Tea Co. case, the established concept of Allen Bradley would require proof of a specific agreement between the union and the smaller firms to have the union impose the marketing restrictions on Jewel Tea. Only then could the union be held to have "conspired with a non-labor group."

97. It would not require any extreme interpretation to reach this position from the rule suggested by Mr. Justice Douglas. If the union in the Jewel Tea Co. case, instead of seeking direct marketing control, had imposed absolute restrictions on the hours during which butchers could work and the amount of work which they could do during those hours, and had absolutely prohibited anyone other than butchers from doing butchers' work, the anti-competitive effect on the market would have been the same. The parties could also be said to have had the same purpose, and the anti-competitive effect would be the same. This effect and purpose should be sufficient to constitute a violation for Mr. Justice Douglas, even though bargaining related strictly to labor market activities.

98. See notes 20-22 supra and accompanying text.

99. 381 U.S. at 697 (separate opinion of Goldberg, J.).

100. Id. at 735 (separate opinion of Goldberg, J.).

101. Feller & Anker, Analysis of Impact of Supreme Court's Antitrust Holdings, 59 Lab. Rel. Rep. 238 (1965).

102. 381 U.S. at 711-12 (separate opinion of Goldberg, J.).

Workers and the employers had been bargaining for the wages to be paid within the bargaining unit, this, as a mandatory subject of collective bargaining, would be a valid "labor dispute" and, therefore, within the *Hutcheson* exception.[103] The basis of the violation in the *Pennington* case, however, was that the union and the employers, in addition to setting wage terms for members of the bargaining unit, agreed as to the wages which the union would exact from outside firms.[104] While this is bargaining concerning wages, it is not within the concept of "wage bargaining" as a mandatory subject of collective bargaining, and is, therefore, not a valid "labor dispute" entitled to antitrust immunity.[105] However, even if this were a mandatory subject of bargaining, the presence of the conspiracy between unions and the large producers to drive the marginal operators out of business would destroy the union exemption.

Mr. Justice Goldberg apparently felt that, regardless of how overt the conspiracy, even as in *Pennington* where there was an agreement to drive some employers out of business, there could be no antitrust liability because wage bargaining was involved. This is not the rule of *Allen Bradley*, which held conspiracies illegal. It is not the rule of *Hutcheson*, which exempted contracts concerning "labor disputes" so long as there was no combination with non-labor groups. It is not the rule of the cases subsequent to *Hutcheson* and *Allen Bradley*, in which the courts have consistently held illegal any combination of union and non-union groups directed at restraining trade.

Mr. Justice Goldberg further objected to the fact that the *Pennington* Court permitted the conspiracy to be inferred from "indirect evidence,"[106] and suggested that, absent direct proof, no union should be held to have violated the antitrust laws.[107] It seems highly unlikely, however, that conspirators would

103. The concept of a "labor dispute" as defined in the Norris-LaGuardia Act, and the definition of "mandatory subjects of collective bargaining" within the National Labor Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964), are the same. Both are limited to bargaining concerning the terms or conditions of employment. For the full Norris-LaGuardia definition, see note 33 supra. For analysis of the scope of "mandatory subjects of collective bargaining," see NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958). Thus, as long as a union is within the mandatory subjects of bargaining, it is immune from antitrust prosecution, provided, as enunciated in Hutcheson, that there is no conspiracy with non-labor groups.

104. 381 U.S. at 660, 664-66.

105. See id. at 664-66, where Mr. Justice White's discussion of the problems entailed in harmonizing the antitrust policy with the national labor policy relating to collective bargaining reaches the conclusion that "there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry." Id. at 666. This same analysis would seem to refute the contention of Mr. Justice Goldberg that unions and management are permitted to bargain and strike concerning the issues in Pennington, but would not be able to sign a contract for fear of the antitrust laws. See 381 U.S. at 711-12 (separate opinion). The illegality in the Pennington case—the agreement to charge uniform wages for all producers—was not a mandatory subject of bargaining, and it is highly doubtful if it would be held by any court to be a legitimate basis for a strike.

106. Id. at 720 (separate opinion of Goldberg, J.).

107. Id. at 715-20 (separate opinion of Goldberg, J.).

reduce the terms of their conspiracy to writing. Hence, in most antitrust cases, the conspiracy will have to be inferred. It would seem that this faction is motivated by a fear that agreements providing for union action outside the bargaining unit might be loosely inferred from uniform contracts signed by all the members of an industry. Applied to the opinion of Mr. Justice Douglas, this would be a valid concern. However, the opinion of Mr. Justice White indicates a clear intent to preclude any such loose interpretation. In *Jewel Tea Co.*, proof of a conspiracy above and beyond the collective bargaining contract itself was specifically demanded;[108] and the *Pennington* opinion emphasized that clear proof of a conspiracy had been presented.[109] However, even if this objection were meritorious, the solution would not be to abandon the principles of *Allen Bradley*, but to reaffirm them and to demand proof of a supplementary conspiracy for an antitrust violation.

In his opinion, Mr. Justice Goldberg suggested that unions should have the right to bargain concerning the hours of sale of meat in all stores, even where it does not relate to the hours of work in all stores. He reasoned that, to allow self-service stores to operate at night, even without butchers, would hurt the competitive position of the other stores which are unable to operate at night. Pressure would then be created to let butchers from these smaller stores work at night, and, as the union has a legitimate interest in limiting the night work of its members, it should be able to contract for a universal ban on the nighttime sale of meat.[110] In sum, Mr. Justice Goldberg reasoned that, since unions are interested in preserving the jobs of members, and since some jobs in an industry would be threatened by one firm gaining a significant competitive advantage, the union should have the power to enforce direct market restraints on the successful firm to preserve the competitive status quo.[111]

This represents a significant advance from the precedents cited in the opinion as justifying this proposition. In these cases, the Court had sanctioned direct market control only where that control was directly related to the terms and conditions of employment within the bargaining unit. In seeking these direct restraints, the union was in fact directly bargaining within the definition of a "labor dispute."[112] The established rule, set forth by Mr. Justice White, is that,

108. Id. at 688-89 (opinion of White, J.).

109. 381 U.S. at 665-66.

110. 381 U.S. at 727-29 (separate opinion of Goldberg, J.).

111. Id. at 727-28 (separate opinion of Goldberg, J.).

112. The first case cited by Mr. Justice Goldberg in support of this proposition is Order of R.R. Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330 (1960). As discussed at text accompanying note 47 supra, this case permitted unions to bargain concerning an employer's plan to close some stations. The Court upheld the union right to bargain on this issue because "the employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations." Id. at 336.

In Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 291-95 (1959), unions were permitted to bargain concerning the rental payments made to owner-drivers of trucks because in actual practice, when the union did not maintain control over these payments, employers were able to circumvent the union wage scale. There was a direct and immediate relation between the direct control bargained for and wages.

so long as there is a direct relation between hours of work and hours of the sale of meat, a union may legitimately bargain for this restriction.[113] But to say, as Mr. Justice Goldberg does, that, even if there were no such relation, the "legitimate interest [of the union] in keeping service markets competitive so as to preserve jobs"[114] should enable that union to exercise direct market control, is to effectively withdraw unions from the antitrust laws altogether. If this argument were accepted, a union would be able to exercise direct market control whenever one firm in an industry achieved any competitive advantage over one or more of its rivals, regardless of the source of the advantage, *i.e.*, whether it came from more efficient management, more money, better equipment, etc. When the advantage reached the point where it could be said to pose a threat to the jobs of union members at the other firms, Mr. Justice Goldberg's reasoning would sanction the union's exercise of direct control to eliminate that advantage. If, in *Jewel Tea Co.*, a union could enforce restrictions on hours of store operation, even where this is unrelated to hours of work in those stores,[115] it would seem that a union could enforce price restrictions[116] or control the amount of business which any firm could do, or achieve any other type of direct control which it deems to be in its interest.[117]

IV. Conclusion

The *Pennington* and *Jewel Tea Co.* decisions represent the first major re-evaluation of the position of unions under the antitrust law since the *Allen Bradley*

United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill.), aff'd sub nom. United States v. Int'l Hod Carriers Dist. Council, 313 U.S. 539 (1941), involved a contract which provided that employers could not use labor-saving devices, or, if they did use them, no members of the union would be dismissed. Again, there was a direct relationship here between the restraint sought and job security—a direct relationship which was not present in the case posited by Mr. Justice Goldberg.

113. 381 U.S. at 689-91 (opinion of White, J.).

114. Id. at 728 (separate opinion of Goldberg, J.).

115. This is the premise upon which this argument of Mr. Justice Goldberg is based. See id. at 727-28 (separate opinion).

116. See id. at 689, where Mr. Justice White seems to draw the same parallel between the right of a union to fix hours of selling when this is unrelated to hours of work, and a union's right to fix prices.

117. In Republic Prods., Inc. v. American Fed'n of Musicians, 59 L.R.R.M. 2904 (1965), the only decision at this time interpreting the Jewel Tea Co. and Pennington decisions, the analysis of the court was similar to that expressed here. The opinion pointed out that the essential basis of liability in Pennington was the employer-union conspiracy of the Allen Bradley type, i.e., more than just a collective bargaining contract with anti-competitive results. Id. at 2908. Further, the Jewel Tea Co. case was taken to mean that the issues of bargaining were "sufficiently related to wages, hours and working conditions so that the union's successful attempt to secure the employers' agreement to this clause 'falls within the protection of the national labor policy . . . .'" Id. at 2909. The contract should be exempt from the Sherman Act. On this basis, the court held that an agreement individually negotiated by the union with major motion picture producers restricting the use of films on television was entitled to exemption. Despite anti-competitive effects, there was no conspiracy, and the issue was sufficiently related to the mandatory subjects of bargaining to be a legitimate "labor dispute."