

Labor Law—Antitrust Law—Exemption of Labor Union from Sherman Act.—*UMW of America v. Pennington*,¹ *Local 189 Amalgamated Meat Cutters v. Jewel Tea Co.*²—In the first of these two cases, trustees of the UMW Welfare and Retirement Fund brought suit against Phillips Coal Company to recover royalty payments due the fund under a wage agreement between Phillips Coal and the UMW. Phillips Coal filed a cross-claim, alleging that the UMW and the larger coal companies had concluded a wage agreement in 1950, the ultimate purpose of which was to eliminate the smaller companies and consequently leave a larger market for those remaining. Phillips specifically alleged that the union had initially promised to curtail its opposition to rapid mechanization and to impose the same wage scale on all the companies without regard to their degree of mechanization or their ability to pay. The larger companies had promised increased wages and greater royalty payments into the fund as productivity increased with automation; and the union, in turn, had further bound itself to impose these increases in wages and fund payments on all other companies. Phillips claimed that this agreement was in violation of the Sherman Act.³ The jury returned a verdict for Phillips, and the trial court awarded treble damages to Phillips against the union. The court of appeals affirmed⁴ and the Supreme Court granted certiorari. HELD: The union lost its exemption from the Sherman Act when it agreed with one set of employers to impose a certain wage scale on other bargaining units.⁵

In the *Jewel Tea* case, after prolonged negotiations, seven affiliate members of Amalgamated Butchers and Associated, representing a substantial number of retail meat dealers in the Chicago area, concluded an agreement which prohibited the sale of fresh meat before nine a.m. and after six p.m. Threatened with a strike, Jewel Tea signed a contract containing the same restriction and shortly thereafter brought suit against the union and Associated under the Sherman Act⁶ to invalidate this restrictive provision. The complaint alleged that Associated and the union had conspired to prevent the sale of fresh meat at retail after six and that the Jewel Tea markets were particularly restricted by the provision since they were primarily self-service stores that kept open after six without butchers. The trial judge found no evidence of a conspiracy and no unreasonable restraint of trade. After the court of appeals reversed on the ground that a conspiracy could be inferred from the contract between the union and Associated,⁷ the Supreme Court

¹ 85 Sup. Ct. 1585 (1965).

² 85 Sup. Ct. 1596 (1965).

³ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1964).

⁴ *Pennington v. UMW of America*, 325 F.2d 804 (6th Cir. 1963).

⁵ Actually, the Court reversed, first, on the grounds that evidence was admitted to the effect that the conspiracy was accomplished by influencing the decisions of the Secretary of Labor and certain TVA officials and "joint efforts to influence public officials do not violate the anti-trust laws even though intended to eliminate competition." *Supra* note 1, at 1593, citing as controlling *Eastern R.R. Presidents Conf. v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961). Second, the trial court had erroneously instructed the jury to include in its verdict the damages Phillips sustained as a result of the Secretary of Labor's action.

⁶ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1964).

⁷ *Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters*, 331 F.2d 547 (7th Cir. 1964).

granted certiorari and HELD: The union did not lose its exemption from the Sherman Act.

In *Pennington*, the Court felt that the agreement between the union and the large coal companies was contrary to the policy of the National Labor Relations Act and the policy of the anti-trust laws. In the first place, the Court found nothing in the labor policy which expressly allowed a union and one set of employers to bargain about the wage scale of another bargaining unit. In fact, the labor policy compelled the Court's decision since it would be in the best interests of collective bargaining for the union to retain its ability to respond to each individual situation. Secondly, the policy of the anti-trust laws was clearly opposed to an agreement whereby a union promised one set of employers to impose higher wages on another bargaining group; the Court feared that upholding the present agreement would require enforcement of such an arrangement. The Court in *Jewel Tea*, although reversing 6-3, split evenly three ways in their reasoning, thus presenting no authoritative opinion.⁸

The *Pennington* and *Jewel Tea* cases represent the Supreme Court's most recent efforts to harmonize the conflicting interests of the national labor policy and the anti-trust laws. This is not an easy task, for the two principal legislative enactments involved—the Sherman Act and the National Labor Relations Act⁹—make no provision for situations in which they conflict, and congressional intent in the matter is far from clear.¹⁰

The lack of a solid policy in the legislative branch of the Government as to labor's exemption from the Sherman Act¹¹ caused the Court from 1890 to 1930 to establish and follow its own doctrines in that area.¹² In the early 1930's Congress successfully resolved the ambiguities of the Clayton and Sherman Acts by passing a series of labor relations acts¹³ which established a national labor policy and created guidelines for the Court. Soon afterward,

⁸ The three opinions are considered individually, *infra* pp. 164-65.

⁹ 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-66 (1964).

¹⁰ Winter, *Collective Bargaining and Competition*, 73 Yale L.J. 14, 28-29 (1963).

¹¹ Several times the House, attempting to banish the confusion surrounding the Sherman Act, passed anti-trust bills containing labor exemptions, but each time, after bitter and prolonged debates, these bills died in the Senate. See Frankfurter & Greene, *The Labor Injunction* 139-41 (1930). Even passage of the Clayton Act in 1914 did not represent a solid congressional doctrine for the Court to follow. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1964).

With a legislative history like that which surrounds the Clayton Act, talk about the legislative intent as a means of construing legislation is simply repeating an empty formula. The Supreme Court had to find meaning where Congress had done its best to conceal meaning.

Frankfurter & Greene, *supra* at 145.

¹² See, e.g., *Loewe v. Lawlor*, 208 U.S. 274 (1908); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1920); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927). See generally Winter, *supra* note 10, at 30-38; Frankfurter & Greene, *supra* note 11, at 167-76.

¹³ Principally, the Norris-Laguardia Act, 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1964); National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-66 (1964).

in the *Apex*¹⁴ and *Hutcheson*¹⁵ cases, the Court resolved that it would protect labor's immunity to anti-trust prosecution and cease making its own evaluations of union behavior. With the landmark *Allen Bradley*¹⁶ decision, however, the Court formulated the principal limitation to labor's exemption from the Sherman Act: a union cannot "aid and abet business men to do the precise things which the Act prohibits."¹⁷ The Court in *Pennington* expands this limitation beyond the specific fact situation of *Allen Bradley* and, in so doing, threatens the integrity of collective bargaining by placing the shadow of a Sherman Act conspiracy over any agreement reached by the negotiators.

In *Allen Bradley* the Court dealt primarily with the problem of business groups using labor unions as a shield from anti-trust prosecution.¹⁸ Treating the non-labor groups as the originators of the conspiracy,¹⁹ the Court reasoned that although the union, acting alone, could have legitimately pursued the same policies, when it acted for the benefit of the conspiring employers, it joined them in liability under the Sherman Act.²⁰ That the union by itself could have gone so far as to purposely drive someone out of business was upheld that same day in *Hunt v. Crumbock*.²¹ This reading of *Allen Bradley* is supported by *United States v. Women's Sportswear*,²² handed down four years later by substantially the same Court, in which the case was cited for the proposition that "benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the anti-trust fires."²³

In at least one passage, the *Pennington* Court appears to be reading the facts as an *Allen Bradley* situation:

One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it

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

¹⁵ *United States v. Hutcheson*, 312 U.S. 219 (1941).

¹⁶ *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945).

¹⁷ *Id.* at 801.

¹⁸ The Court stated:

[I]f business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price-fixing by business groups themselves. . . . We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act.

Id. at 810-11.

¹⁹ One of the major sources of confusion surrounding application of the *Allen Bradley* doctrine is the Court's treatment of the non-labor groups as the dynamic force of the conspiracy. The Special Master's report, quoted in part in the district court opinion, unmistakably designates the union as the motivating force of the alignment:

"It appears clearly . . . that the local manufacturers were forced by the economic power of the local union to consent to the signing up of all their employees by the defendant local, obviously in consideration of their obtaining the exclusive market for their products in the metropolitan area . . ."

Allen Bradley Co. v. Local 3, IBEW, 41 F. Supp. 727, 732 (1941).

²⁰ See note 18 *supra*.

²¹ 325 U.S. 821 (1945).

²² 336 U.S. 460 (1949). For other interpretations which have received substantial support, see generally Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. Pa. L. Rev. 1094, 1097-1101 (1962).

²³ *United States v. Women's Sportswear*, *supra* note 22, at 464.

becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry.²⁴

The holding and reasoning of the Court, however, go far beyond *Allen Bradley*, designating the union a party to the conspiracy merely from its promise to seek uniform wages.

The *Allen Bradley* Court realized that there was a paradox in its holding that the union had a perfect right to follow certain policies but could not promise that it would do so.²⁵ However, the Court qualified its holding and avoided the paradox by restricting its ruling to the fact situation in which non-labor groups have already embarked on, or at least laid plans for, the anti-competitive conspiracy. In the *Pennington* case, since there was no allegation of a previous employer conspiracy, the Court has recreated the earlier paradox: the principal transgression of the UMW is that it promised the one bargaining unit to impose a uniform wage scale on competitors, a program it could have legitimately followed anyway.²⁶ Without addressing itself to the paradox, the Court justifies its prohibition of such promises on two main grounds: (1) the union has lost its flexibility in subsequent bargaining situations; and (2) the promise is prima-facie evidence of an anti-competitive arrangement between labor and management.

In line with the first of these two reasons, the Court stresses the importance of the flexibility of union bargaining groups. The primary purpose of the National Labor Relations Act is the "friendly adjustment of industrial disputes"²⁷ through effective collective bargaining, and the Court seeks to protect this goal by insisting that the union negotiators enter the bargaining room unencumbered by promises made to other non-labor groups. By such promises, reasons the Court, the "union surrenders its freedom of action,"²⁸ and is "strait-jacketed by some prior agreement with the favored employer."²⁹ However, when the Court decides how "the union's obligation to its members would . . . [be] best served,"³⁰ it is being overly solicitous of the union's welfare. If the union has decided that a particular wage program would be in its best interests, the Court should not evaluate its methods of implementing that program, if they are otherwise lawful. The union should be free to surrender a little temporary flexibility for resultant benefits. Union policy usually provides for just such sacrifices to achieve desired ends.³¹ The NLRA and the board created thereby offer sufficient protection for both labor and manage-

²⁴ Supra note 1, at 1591.

²⁵ *Allen Bradley Co. v. Local 3, IBEW*, supra note 16, at 810-11. See dissenting opinion of Mr. Justice Murphy, id. at 820.

²⁶ Supra note 1, at 1590.

²⁷ National Labor Relations Act § 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

²⁸ Supra note 1, at 1592.

²⁹ Id. at 1591.

³⁰ Ibid.

³¹ Strikes are an example. Also, it has long been the policy of the UMW to sacrifice greater employment for increased wages. See Baratz, *The Union and The Coal Industry* 62-74 (1955).

ment,³² and the Court has promised never to assess the "wisdom or unwisdom, rightness or wrongness, selfishness or unselfishness"³³ of union policies.

As to the Court's second argument, there is no satisfying reason why the union's promise must reflect a Sherman Act conspiracy rather than an independent union program. It is a primary policy of any labor union to obtain uniformity of labor standards; the Supreme Court has recognized this in the *Apex* case,³⁴ and it is implied in the Wagner Act.³⁵ Initially, it was essential to the union's bargaining power that it fill the industry with union employees; then it became necessary to standardize wages along market-product lines so that they would not become an element of price competition. If a manufacturer could cut costs by paying lower wages, all wages in the industrial area would gravitate toward that level, for competitive reasons.³⁶ Thus, it became increasingly evident to the UMW that the small, unmechanized coal companies were preventing a rise in wages. It was also evident that, to successfully implement their high-wage policy with a minimum of conflict, the union would have to assure the original negotiators that this was to be an industry-wide program. As in the past, such assurance was an effective tool in collective bargaining.³⁷

Juxtaposed to union policies is the employer's desire not to undermine his competitive position by acceding to unreasonable union demands. The conflict between wage demands and competitive ability to meet these demands is a "commonly considered factor in wage negotiations,"³⁸ with the bargainers seeking an effective compromise. When, as in the *Pennington* case, the union's policies coincide with the competitive requirements of one set of employers and this naturally ends their dispute, a third party should not be allowed to attack the agreement reached as a Sherman Act conspiracy. The uniform

³² Principally, the National Labor Relations Act § 8, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (1964). Furthermore, it is unreasonable for the Court to worry that "one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers" *Supra* note 1, at 1592. As the NLRB cases cited by the Court itself illustrate, the union need never submit to such demands. *Id.* at 1591-92. And, of course, there is always present the nagging proof problem of whether the union acted independently or at the behest of some employer group. See, e.g., *Adams Dairy Co. v. St. Louis Dairy Co.*, 260 F.2d 46 (8th Cir. 1958).

³³ *United States v. Hutcheson*, *supra* note 15, at 232.

³⁴ *Apex Hosiery Co. v. Leader*, *supra* note 14, at 503.

³⁵ National Labor Relations Act § 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964):

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and effects the flow of commerce . . . by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

³⁶ See Winter, *supra* note 10, at 19; Gregory, *Labor and The Law* 178 (rev. ed. 1949); Cox, *Labor and The Anti-Trust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 277 (1955).

³⁷ Winter, *supra* note 10, at 22, 50.

³⁸ *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956).

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wage program of the union was formed before the negotiations began,³⁹ not at the insistence of the employers; the UMW's promise to standardize wages does not represent its contribution to an anti-competitive scheme of management, but is merely an expression of long-standing policy. Moreover, the Wagner Act's insistence on "good faith"⁴⁰ bargaining means that the negotiators candidly discuss their requirements in a genuine effort to reach a settlement. Yet, if a conspiracy can be inferred from such concerted effort, mere candid bargaining may well be the road to a *Pennington* violation.

From the discussion above, it would seem at least as reasonable to infer an independent union policy from the promise to impose uniform wages as to infer an anti-competitive conspiracy with a group of employers. Yet the majority of the Court insists on accepting the latter inference, despite the inherent limitation on collective bargaining. Implicit in Mr. Justice Douglas' concurring opinion in *Pennington*, and explicit in his dissenting opinion in *Jewel Tea*, is the fact that at least three Justices⁴¹ are willing to carry this inference a step further. As they state in *Jewel Tea*: "in the circumstances of this case the collective agreement itself . . . was evidence of a conspiracy among the employers with the unions."⁴² Assuming the "circumstances" to be the fact that Jewel Tea operated mostly self-service stores, employing less butchers and staying open later at night, the dissenters are inferring an anti-competitive conspiracy merely because one competitor is adversely affected by a union program. This inference goes one step beyond *Pennington*, because in that case there was at least a clear showing of a union promise to demand uniform wages. In *Jewel Tea*, no such promise is clearly established, only a normal collective agreement. In other words, these three Justices have gone beyond inferring a conspiracy from a promise and are ready to infer the promise itself. Such a willingness to draw damaging inferences could mean, in the future, that a union which has secured a particular wage scale from one set of employers cannot seek the same wage scale from another group of employers without "becoming a party to the conspiracy." And since some competitors are always hurt when the union implements a successful, industry-wide program, this might be sufficient proof that some employer (probably the first to yield)⁴³ conspired to violate the Sherman Act.

³⁹ Mr. Justice Goldberg, who is former chief counsel of the AFL-CIO and former Secretary of Labor, states in his dissent from the *Pennington* opinion:

[I]t is no secret that the United Mine Workers, acting to further what it considers to be the best interests of its members, espouses a philosophy of achieving uniform high wages, fringe benefits, and working conditions. As the quid pro quo for this, the Union is willing to accept the burdens and consequences of automation. Further, it acts upon the view 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. This has been the articulated policy of the Union since 1933.

Supra note 2, at 1608. See Brief for the AFL-CIO as Amicus Curiae, p. 14, supra note 1.

⁴⁰ National Labor Relations Act § 8(d), 49 Stat. 452 (1935), 29 U.S.C. § 158(d) (1964).

⁴¹ Justices Douglas, Black, and Clark.

⁴² Supra note 2, at 1606.

⁴³ Winter, supra note 10, at 50 (citing cases).

The *Jewel Tea* case could have been much more significant than it in fact is, if the Court had presented a clear majority answer to the principal question involved. That question is whether a union may impose a particular restriction on an employer, not to protect union members in his employ, but to protect those in the employ of his competitors. Three members of the Court suggest one answer, another three offer a second solution, and a third group barely addresses itself to the problem.

Mr. Justice White, speaking for three members favoring reversal, finds that the effect on competition resulting from the union's restriction of marketing hours is "apparent and real."⁴⁴ However, this restraint is exempt from Sherman Act prosecution because "operating hours . . . constitute a subject of immediate and legitimate concern to union members."⁴⁵ White rests this conclusion on the trial court's finding that, even in self-service stores such as *Jewel Tea*, "it is impractical to operate without either butchers or other employees."⁴⁶ He qualifies this ruling by stating that the union's exemption would disappear if *Jewel Tea* proved it did not need butchers after six p.m.:

For then the obvious restraint on the product market—the exclusion of self-service stores from the evening market for meat—would stand alone, unmitigated and unjustified by the vital interests of the union butchers which are relied upon in this case.⁴⁷

Mr. Justice Goldberg feels that more attention should be paid to the overall general effect of the union activities, rather than their narrow relation to one employer. Writing for three Justices also favoring reversal, he strongly upholds the union's restriction on self-service stores, even if they could operate without butchers after six.⁴⁸ He reasons that, if the self-service stores stay open, their competitors—who do need butchers—must also keep open, and this will mean longer working hours for union members. Thus, the union has a legitimate interest in *Jewel Tea's* operating hours.⁴⁹ Earlier in his opinion, Mr. Justice Goldberg said that the union is not exempt from anti-trust prosecution when it acts in behalf of an employer group and receives only indirect benefits.⁵⁰ But he then proceeds to justify the marketing-hours restriction on self-service stores on the ground that "service markets would not be able to operate at night and thus would be put at a competitive dis-

⁴⁴ *Supra* note 2, at 1603.

⁴⁵ *Ibid.*

⁴⁶ *Id.* at 1604.

⁴⁷ *Id.* at 1603.

⁴⁸ *Id.* at 1624.

⁴⁹ Mr. Justice Goldberg's position is apparently very logical and is consistent with his belief that "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the anti-trust laws." *Id.* at 1614-15. Such a broad viewpoint is very fine for labor unions, but fails to take into account the economic power unions now wield, a power which enables them to exert the "same arbitrary dominance over the economic sphere which they control that labor, so long, so bitterly, and so rightly asserted should belong to no man." *Hunt v. Crumboch*, *supra* note 21, at 831 (dissenting opinion of Roberts, J.). For Goldberg's feelings on labor power during his term as attorney for the AFL-CIO, see Goldberg, *Unions and the Anti-Trust Laws*, 7 *Lab. L.J.* 178 (1956).

⁵⁰ *Supra* note 2, at 1614.

advantage."⁵¹ The union's interest in keeping service markets competitive, says Goldberg, is based on their desire for job security. Certainly, then, the union's benefit from imposing an operating-hours restriction on Jewel Tea, if Jewel Tea would not use union men after six, is indirect. Goldberg's expansive interpretation of the union's "direct interest" could just as easily lead to the conclusion that a union has the right to impose a similar restriction on a store that does not even sell meat simply because it might competitively affect their employers. Such a viewpoint is a dangerous enlargement of labor strength.⁵²

Writing for the three dissenters, Mr. Justice Douglas focuses on establishing a conspiracy against Jewel Tea.⁵³ Then he passes to a brief disagreement with Goldberg's argument, apparently implying that he would agree with Mr. Justice White's view that the union can only impose demands on employers for whom they work.⁵⁴ Yet his treatment of this subject is so short and vague as to leave the Court without any real authoritative position on this important issue.

The *Pennington* and *Jewel Tea* cases represent new limitations on the union's exemption from Sherman Act prosecution. The *Pennington* doctrine is far more expansive and significant since it limits "what a union or an employer may offer or extract in the name of wages."⁵⁵ *Jewel Tea* merely restates the relationship which must exist between a labor union and an employer group before the former can impose demands on the latter. Assuming the dissenters would agree with Mr. Justice White in a subsequent case, it might be said that *Jewel Tea* defines the circumstances in which negotiators may enjoy the privilege of unrestricted collective bargaining, and *Pennington* establishes what the Court really means by "unrestricted." This redefinition of terms could very likely signify that labor unions have grown to a stage when their lawful activities might once again be judicially evaluated as "economically and socially objectionable."⁵⁶

LAWRENCE A. KATZ

Trade Regulation—Imitation Foods—Effect of Labeling.—*Coffee-Rich, Inc. v. Commissioner of Pub. Health*.¹—Coffee-Rich, a non-dairy product conspicuously labeled as such, is used primarily to enrich and sweeten coffee. Sold at retail from frozen food chests, it is a wholesome, vegetable product. Under Chapter 94, Section 187 of the Massachusetts General Laws,² a food product is misbranded if it is "in imitation or semblance of any other food," unless it is conspicuously labeled an imitation. The statute is even more strict with regard to foods for which statutory standards have been

⁵¹ Id. at 1624.

⁵² See note 49 supra.

⁵³ See text accompanying notes 41-43 supra.

⁵⁴ See the last paragraph of Mr. Justice Douglas' dissent, supra note 2, at 1607.

⁵⁵ Supra note 1, at 1591.

⁵⁶ Duplex Printing Press Co. v. Deering, supra note 12, at 486.

¹ 1965 Mass. Adv. Sh. 155, 204 N.E.2d 281.

² Mass. Gen. Laws ch. 94, § 187 (1932), as amended, St. 1948, ch. 598, § 2.