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Connell: Broadening Labor's Antitrust Liability While Narrowing Its Construction Industry Proviso Protection

Robert G. Conway

COMMENT

CONNELL: BROADENING LABOR'S ANTITRUST LIABILITY WHILE NARROWING ITS CONSTRUCTION INDUSTRY PROVISO PROTECTION

"The applicability of the Sherman Act to union activities has been one of the most disputed legal issues of this century."[1] Undoubtedly, Professor Winter in penning this statement foresaw a continuing controversy around this issue. The Supreme Court's most recent incursion into this area has done little to extinguish the controversy. Through its 1975 decision in *Connell Construction Co. v. Plumbers Local 100*,[2] the Court revived the apparent anomaly of applying an act to prevent restraints of trade against organizations whose effectiveness lies in their ability to impose such restraints.

The nature of the problem can be simply formulated:

> A central aim of the antitrust laws is the promotion of competition. A central aim of collective bargaining is the elimination of competition—According to classical trade union theory, the elimination of wage competition among all employees doing the same job in the same industry. Given these disparate aims, the antitrust laws and collective bargaining will almost invariably tend to clash. To harmonize them, the type of competition which the law is intended to foster must be carefully distinguished from the type of competition which union-employer bargaining can properly displace.[3]

Accommodation of the national policy favoring collective bargaining embodied in the labor laws and the national policy favoring competition and efficiency embodied in the antitrust laws, has been one of the most

1. Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 14 (1963).

2. 421 U.S. 616 (1975).

3. St. Antoine, *Collective Bargaining and the Antitrust Laws*, 115 PITT. LEGAL J. 25 (1967).

difficult and delicate tasks facing the Court. The Court's handling of the problem in the past has been inconsistent and often at odds with congressional intent. The *Connell* decision reflects a concern for the growing power of unions to affect the commercial affairs of business organizations through secondary pressures. This concern resulted in a substantial narrowing of labor's exemption from the antitrust laws and a narrowing of the construction industry proviso.[4]

Connell is primarily an antitrust decision and much of the commentary has tended to treat it as such.[5] This approach, however, overlooks the important changes *Connell* has thrust upon the course of law under the National Labor Relations Act (NLRA) and, in particular, the construction industry proviso in section 8(e).[6] This Comment examines not only *Connell*'s impact on the regulation of union activity under the antitrust laws but also its effect on the course of law under the NLRA.

I. EARLY APPLICATION OF THE ANTITRUST LAWS TO UNION ACTIVITIES

With the passage of the Sherman Act in 1890, Congress declared illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade."[7] Although a provision excluding labor unions from the Act was eliminated in the course of major revision of the bill in committee,[8] this did not mean that the Sherman Act was to be applied to anticompetitive union activities. Indeed, the Act was largely directed toward business monopolies and trade restraints.[9] In the early 1900's, however, the courts proceeded to hold unions liable for antitrust violations to the same extent as manufacturers or distributors if they restained interstate commerce.[10]

4. The construction industry proviso is an exemption for construction industry unions carved out of § 8(c)'s ban on secondary "hot cargo" agreements. 29 U.S.C. § 158(e) (1970). "Hot cargo" agreements are those in which the union agrees with an employer not to handle the goods of another employer.

5. Monaghan, *The Supreme Court 1974 Term*, 89 HARV. L. REV. 1 (1975); Comment, *Labor's Antitrust Immunity After Connell*, 25 AM. U.L. REV. 971 (1976); Comment, *Congress and the Court at Cross Purposes: Labor's Antitrust Exemption*, 7 LOY. CHI. L.J. 782 (1976); Note, *Antitrust Liability of Labor Unions*, 17 B.C. INDUS. & COM. L. REV. 217 (1976); Note, *Labor-Antitrust Law After Connell Construction Co.*, 35 FED. B.J. 133 (1976); Note, *Labor's Antitrust Exemption After Connell*, 36 OHIO ST. L.J. 852 (1975). Notable exceptions are: Bartosic, *The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Law Policy*, 62 VA. L. REV. 533 (1976); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976).

6. 29 U.S.C. § 158(e) (1970).

7. Sherman Act, § 1, 15 U.S.C. § 1 (1970), (original version at ch. 647, 29 Stat. 209 (1890)).

8. *See* E. BERMAN, LABOR AND THE SHERMAN ACT 3-54 (1930).

9. *Id.*

10. *See* A. MASON, ORGANIZED LABOR AND THE LAW 133-65 (1925).

The Supreme Court's initial reading of the Sherman Act was a literal one: The Act applied to and pronounced illegal every contract or combination in restraint of trade among the several states; no exception or limitation could be adduced without writing into the Act what Congress had omitted.[11] This approach was evident in *Loewe v. Lawlor*,[12] the famous *Danbury Hatters* case, in which the Sherman Act was held applicable to a union's secondary activity in urging a consumer boycott against a struck hat manufacturer. Although the legislative history of the Sherman Act implied that the Act was not to be applied to labor unions in order to compel their possible elimination,[13] that was what the Court nearly accomplished.[14] The Court had applied the Act literally, declaring that the combination of union members had acted to restrain interstate trade.[15] The Court, therefore, embarked on a policy of deciding which labor activities would be subject to the antitrust laws.

II. Establishing Labor's Exemption from the Antitrust Laws

In belated recognition of the problem of subjecting peaceful union activity directed against the primary employer to the prohibitions of the Sherman Act, Congress passed the Clayton Act which sought to protect certain labor activities from the reach of the Sherman Act.[16] However, in *Duplex Printing Press Co. v. Deering*,[17] the Court dispelled any notion that all collective bargaining and peaceful concerted activities would be exempted from the antitrust laws. The Court narrowly restricted the statutory exemption to disputes between employers and their immediate employees, thus removing "stranger" picketing from its reach.[18] In his

11. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312, 326-29 (1897).

12. 208 U.S. 274 (1908).

13. Note, *Antitrust Laws and Union Power*, 16 U. Fla. L. Rev. 103, 105 (1963).

14. *See id.* Three years after this decision, the danger became critical when the Court in Standard Oil Co. v. United States, 221 U.S. 1 (1911), held that combinations judged to restrain trade illegally could be dissolved by the government's prosecution under the Sherman Act.

15. 208 U.S. at 300-01.

16. Clayton Act §§ 6, 20, ch. 323, 38 Stat. 730, 738 (1914), 15 U.S.C. § 17, 29 U.S.C. § 52 (1970). Section 6 provides 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; nor shall such organizations . . . be held to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

15 U.S.C. § 17 (1970). The Clayton Act provided the first exemption from the antitrust laws.

17. 254 U.S. 443 (1921).

18. *Id.* at 472-74. This distinction between primary and secondary activity seems to have originated with Loewe v. Lawlor, 208 U.S. 274 (1908).

dissent, Justice Brandeis chided the Court for having overridden the intention of Congress to remove the federal courts from the adjudication of antitrust claims arising from peaceful concerted activities.[19] In subsequent cases involving refusals by union members to handle or work on goods furnished by another employer which the union was seeking to organize, the Court relied on *Duplex* to find antitrust violations.[20]

The enactment of the Norris-LaGuardia Act[21] in 1932 and the Wagner Act[22] in 1935 marked the inception of the present national policy with respect to labor-management relations. The Norris-LaGuardia Act, in particular, represented a further statutory development of labor's exemption from the antitrust laws. Although it was arguable that the passage of this Act and the complementary Wagner Act indicated a congressional intent to deprive the federal courts of the power to affect national labor policy,[23] the Supreme Court in *Apex Hosiery Co. v. Leader*,[24] indicated that a violation of the antitrust laws would be found if a union engaged in conduct which had or was intended to have an appreciable effect upon the price or supply of goods in interstate commerce.[25]

19. 254 U.S. at 485-87. In effect, Justice Brandeis was asserting that the union's interest in self-preservation justified the secondary activities. The *Duplex* majority effectively dismantled §§ 6 & 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52 (1970), by declaring that the Act only codified existing case law. Section 20 was construed to apply only if a dispute over "terms and conditions of employment" existed between the employer and his immediate employees. *Id.* at 470-72. *See* Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 665 (1965).

20. *E.g.*, Bedford Cut Stone Co. v. Stone Cutters' Ass'n, 274 U.S. 37 (1927). In United States v. Brims, 272 U.S. 549 (1926), the Court considered the union's strike of the primary employer an indirect burden on interstate commerce, and the union's far less effective appeals campaign to the public for a consumer boycott violative of the antitrust laws. In the first *Coronado Coal Co.* case, (UMW v. Coronado Coal Co., 259 U.S. 344 (1922)), the Court reevaluated its prior determination following the introduction of facts demonstrating that the union's specific objective was to prevent Coronado Coal from entering interstate marketing arteries. *Id.* at 410-11. Thus, a primary strike would violate the antitrust laws if the union specifically intended to restrain the entry of nonunion products into the market.

21. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1970), drastically limits the power of federal courts to issue injunctions in both primary and secondary labor disputes.

22. The National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (current version at 29 U.S.C. §§ 151-168 (1970)), gives affirmative protection and encouragement to union organization and collective bargaining.

23. When read together, the two statutes may be interpreted as enunciating a general intent to establish a comprehensive federal regulatory scheme for labor relations. It has been argued that since the judicially administered antitrust laws may be utilized to thwart the institution of collective bargaining protected by the labor acts, the regulatory scheme contemplated by Congress could best be effectuated by withholding the conduct of labor regulation from the jurisdiction of the courts. For a general background in this area, see F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 231-78 (1930).

24. 310 U.S. 469 (1940).

25. *Id.* at 492-97.

The Court held that a union did not violate the Sherman Act by engaging in a violent primary sit-down strike. Further, Justice Stone noted that the Sherman Act was aimed only at "some form of restraint upon commercial competition in the marketing of goods or services"[26] and against contracts "for the restriction or suppression of competition in the market."[27] The Court noted that labor unions inevitably restrain competition among employees regarding the price at which their labor is sold, but held this not to be the kind of market restraint at which the Sherman Act was aimed.[28] The Court, however, stopped short of according unions a broad immunity, noting that the union's obstructions to interstate commerce had not affected price and had not been so intended.[29] This reservation indicated that an obstruction of interstate commerce of sufficient degree could subject unions to the antitrust laws.[30] Thus the Court retained the power to judge when the union's efforts were too successful. Since such success would tend to arise only in the larger industries, the Court's approach threatened to subvert the objective of the labor statutes in establishing a balance of power between unions and big business.[31]

A hoped for exemption for labor from the Sherman Act failed to materialize completely, though the Court failed to enunciate any clear principle of when antitrust liability would attach.[32] It did note that application of the Sherman Act would be confined to labor activities affecting the product market and not the labor market.[33]

Subsequently, in *United States v. Hutcheson*,[34] the Court seemingly shifted its focus from the effect of union activity on the market to the

26. *Id.* at 495.

27. *Id.* at 497.

28. *Id.* at 502-03. The Court stated that the Sherman Act was not directed at "an elimination of price competition based on differences in labor standards." *Id.* at 503.

29. *Id.* at 501-02. Moreover, the Court refused to vary liability based upon whether the alleged unlawful activity was committed by the union or management. *Id.* at 512.

30. *Id.* at 511, 512.

31. *See* Meltzer, *supra* note 19, at 667.

32. The *Apex* opinion expressed two divergent concepts. First, the Court acknowledged that strikes by an organization were the traditional means for achieving benefits at least for conventional objectives, such as wages, and were not to be considered unlawful. Secondly, the Court also noted the lack of an effect on prices. These notions, buttressed by language throughout the opinion indicating that the Sherman Act was aimed solely at business combinations and trusts, revealed a Court floundering in an area in which case law and statutes conflicted. *See* 310 U.S. at 492, 493 n.15, 494, 497.

33. Drawing a line between the markets can be a difficult process, and the difficulty is compounded by the fact that the impact of wage costs on supply and price invariably results in an intertwining of the two markets. *See* Meltzer, *supra* note 19, at 667-68.

34. 312 U.S. 219 (1941).

nature of the activity itself. *Hutcheson* involved a criminal prosecution against officials of the carpenters' union who, in support of work-assignment demands conflicting with those of machinists working for the Anheuser-Busch brewery in St. Louis, precipitated picketing, a strike of carpenters doing construction work for other companies on the property, and a boycott of Anheuser-Busch beer. Discarding the *Apex* approach of whether the strike and boycott were illegal restraints upon the product market, the Court read section 20 of the Clayton Act[35] and section 4 of the Norris-LaGuardia Act[36] as establishing an exemption from antitrust liability for peaceful concerted activity.[37] The Court held these concerted activities exempted under the Clayton Act and additionally noted that the Norris-LaGuardia Act was intended by Congress to override prior judicial narrowing of the Clayton Act's sweep.[38] In an oft-quoted passage, the Court declared:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[39]

Thus, labor's exemption was carved out by a judicial decree. So long as these requirements are met, the dispute is within the statutory exemption created by the Clayton and Norris-LaGuardia Acts, and a party to such a dispute is immune from liability under the antitrust laws even if its actions impose restraints on competition in the product market.

In *Allen Bradley Co. v. Local 3, IBEW*,[40] the Court was faced with a union-employer combination which had achieved price and market controls.[41] The union had agreed with the New York City electrical equipment manufacturers and contractors that all electrical contractors would buy exclusively from local unionized manufacturers. In return, the union would use its economic weaponry to insure the expediency of local manufacture.[42] This case was clearly within the proscriptions set

35. 29 U.S.C. § 52 (1970).

36. 29 U.S.C. § 104 (1970).

37. 312 U.S. at 232-36.

38. *Id.* at 235-36. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." *Id.*

39. *Id.* at 232.

40. 325 U.S. 797 (1945).

41. *Id.* at 799-800.

42. The effect of the agreement was to bar the sale of electrical equipment produced outside the city to contractors in the city, thus leading to an extraordinary increase in the

forth in *Apex* and *Hutcheson* and the Court had little difficulty holding that the combination of manufacturers and contractors violated the Sherman Act.[43] In dictum, however, the Court sought to retain a broad immunity for a union acting within the reach of the Norris-LaGuardia Act. The opinion noted that a "labor dispute" existed; a peaceful strike, therefore, in support of a union-initiated boycott would not have been illegal or enjoinable by a federal court, since such conduct would have been clearly protected by the Clayton and Norris-LaGuardia Acts.[44] Standing alone, therefore, the employers' compliance with the collective bargaining agreement's boycott provision might also be protected.[45]

At the time of the Taft-Hartley amendments[46] to the National Labor Relations Act, *Apex, Hutcheson*, and *Allen Bradley* could be read, with a degree of certainty, to indicate that a union's activity is immune from antitrust liability if it is in furtherance of the union's "self-interest" and not a knowing part of a larger business combination designed to increase price or regulate supply in the product rather than labor market.[47]

Against this backdrop of case law, in 1947 Congress amended the NLRA to curb what it considered to be abuses of union power, including the use of "secondary" pressures imposed on firms dealing with an employer with which the union has a dispute.[48] Prior to the passage of the Taft-Hartley Act, Congress considered and rejected proposals for broadening labor unions' antitrust liability. Indeed, the original House version of the Act would have subjected unions to antitrust liability but was deleted prior to final enactment.[49] Instead, Congress made unlawful

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business of the New York manufacturers, a dramatic increase in the price of their electrical equipment, increased profits for both the manufacturers and contractors, and an increase in wages for electricians. *Id.*

43. 325 U.S. at 807, 810.

44. *Id.* at 809-10.

45. *Id.*

46. Ch. 120, 61 Stat. 136 (1947) (codified in scattered sections of 18, 29 U.S.C.).

47. Hunt v. Crumboch, 325 U.S. 821 (1945), exemplifies the broad extent of a union's exemption at this time. In that case, a Teamsters' local had imposed a secondary boycott on an employer's principal customers primarily out of spite. Although the employer ultimately lost the customers' business as a result of the boycott, the Court found the union's activity not within the parameters of the federal antitrust laws. The Court declared: "That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations." *Id.* at 825 n.1.

48. 29 U.S.C. § 158(b) (1970).

49. *See* H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 65 (1947), *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1135. The Conference Committee Report noted that the bill

> contained a provision amending the Clayton Act so as to withdraw the exemption of labor organizations under the antitrust laws when such organizations engaged

certain coercive secondary labor activities (including secondary boycotts), subjected them to injunctions,[50] and provided for private recovery of damages resulting from secondary activities.[51]

III. SETTING THE STAGE FOR *CONNELL*: *PENNINGTON*, *JEWEL TEA*, AND UNION INTERESTS

The interests which the unions seek to protect in any labor dispute are usually much the same. Unions traditionally seek better wages, better working conditions, and job security for their members. Pursuit of these interests was generally protected under the *Allen Bradley* doctrine. Under that doctrine, certain methods of protecting the interests of union members were prohibited because they involved use of the labor exemption to protect management schemes which violated the antitrust laws.[52] Under *Hutcheson*, the union could still seek to prevent the use of nonunion labor, in order to put nonunion employers out of business and to dispense with technological innovation which would reduce the number of employees needed. In *UMW v. Pennington*,[53] and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,[54] the Court reopened the practice abandoned in *Hutcheson* of judicially determining the legitimacy of these labor objectives and interests.[55]

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in combination or conspiracy in restrain[t] of commerce where one of the purposes or a necessary effect of the combination or conspiracy was to join or combine with any person to fix prices, allocate costs, restrict production, distribution, or competition, or impose restrictions or conditions, upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any unlawful concerted activity.

93 CONG. REC. 6380 (1947). The Committee report then explained the omission of such provisions. "Since the matters dealt with in this section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement." 93 CONG. REC. 6380 (1947).

Commentators have disagreed over congressional intent in abandoning proposals which would have eliminated the Clayton Act's labor exemption. *See* Winter, *supra* note 1, at 70-73 (Professor Winter argues that rejection of the antitrust provisions indicates that Congress, in making secondary activities violative of the labor laws, intended the labor law remedies to be exclusive). *But see* Meltzer, *supra* note 19, at 701. (Professor Meltzer expresses the same theory as Justice Powell expresses in *Connell*, that the application of the antitrust laws was not precluded by enactment of labor law remedies).

50. 29 U.S.C. § 160(*l*) (1970).

51. 29 U.S.C. § 187 (1970).

52. For instance, the *Allen Bradley* principle forbids the union to further the interests of its members by helping an employer group to gain monopoly power in a product market through non-competitive allocation of contracts and rigged bidding. *See* Local 175, IBEW v. United States, 219 F.2d 431 (6th Cir.), *cert. denied*, 349 U.S. 917 (1955).

53. 381 U.S. 657 (1965).

54. 381 U.S. 676 (1965).

55. The Court split into three groups of three in *Pennington* and *Jewel Tea*, with Justices White, Goldberg, and Douglas writing the opinion for their respective groups with

In *Pennington*, the Court found that the United Mine Workers forfeited their nonstatutory exemption by agreeing with the large mine owners in a multiemployer unit to impose a certain wage scale on small owners, even though the terms imposed were subject to mandatory bargaining. The union, which had invested in certain mines, had compromised its demands against mechanization and control of working time in order to obtain industry-wide wage increases. The facts showed a pattern of union-owner cooperation to drive small owners out of the coal market. The major defect in the multiemployer agreement with the union was the agreement to impose "specified labor standards outside the bargaining unit . . . [f]or the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy."[56]

The conspiracy aspect of *Pennington* made *Hutcheson*, for the most part, inapplicable. However, one could argue that the union's desire to eliminate competition based on differences in labor standards brought the case within the parameters of the *Apex* decision. Implicit in this argument is the concept that the purpose of the agreement is irrelevant to the consideration of whether the agreement qualifies for the labor exemption. That argument was too extreme for the Court. Justice White, speaking for the Court, noted that a union has a duty to bargain over mandatory subjects such as wages, and conceded that even an agreement with a multiemployer bargaining unit would not violate the antitrust laws.[57] However, the union had undertaken to join with employers for the predatory purpose of eliminating competitors from the industry, thus invoking the proscriptions of *Allen Bradley*. Furthermore, Justice White asserted the relatively novel idea that the statutory duty to bargain exists only on a unit-by-unit basis.[58] By binding itself in an agreement with the large operators to make certain wage demands upon employers in a different bargaining unit, the UMW forfeited its exemption.[59]

Justice Douglas, joined in his dissent by Justices Black and Clark, understood the Court to premise a finding of antitrust liability on the existence of a predatory purpose. His opinion, however, indicates that it

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Justice White's opinion being adopted as that of the Court in both cases. This is significant, for in *Connell* it is Justice White who provides the critical fifth vote.

56. 381 U.S. at 668.

57. *See id.* at 665 & n.2.

58. *Id.* By determining that a duty to bargain existed only within a unit, the Court apparently ruled out the possibility of a union establishing standards outside a unit. *See* St. Antoine, *supra* note 5, at 609.

59. 381 U.S. at 665. The union, however, could achieve the same predatory purpose on a unit-by-unit basis according to Justice White's reasoning.

is immaterial whether the condemned agreement results from successive or joint negotiations; if there is consciously parallel conduct, an industry-wide agreement with a wage scale exceeding the ability of some operators to pay would be prima facie evidence of such illegal intent.[60] Justice Goldberg, speaking for Justices Harlan and Stewart in dissent, would have held the agreement exempt by granting broad immunity to union-employer agreements covering mandatory subjects of bargaining.[61] Since the agreement covered wages and mechanization, it fit squarely within the terms and conditions of employment about which unions and employers must bargain. Moreover, the blanket condemnation of extra-unit agreements ignored the realities of collective bargaining and represented, according to Justice Goldberg, an unwarranted intrusion into the machinery of collective bargaining, since such an intrusion would presumably be based on the judge's own social and economic predilections.[62] A conflict, therefore, existed since unions traditionally seek to excise competition from the dictation of wages by imposing uniform labor standards on competitors and by extending the scope of organization. All the Justices apparently agreed that an agreement even between a single union and single employer setting the price (and not wages) at which the employer was to sell its goods would constitute a direct restraint on the product market and violate the antitrust laws.

Setting the stage for *Connell, Pennington* raised serious doubts about the extra-unit union-employer agreements including "most favored nation" clauses.[63] Such clauses protect a favored employer's competitive position by guaranteeing that more favorable terms will not be accorded another employer unless extended to the favored employer. In effect, the clauses restrain the labor market and "impose a certain wage scale on other bargaining units."[64] Under such a clause, the union forfeits its ability to bargain collectively with successive employers according to

60. 381 U.S. at 735-36 (Douglas, J., with Black and Clark, JJ., dissenting). Justice Douglas, by invoking the "conscious parallelism" doctrine of Interstate Circuit v. United States, 306 U.S. 208 (1939), would infer an antitrust conspiracy from evidence of a multiemployer collective bargaining agreement and injury to an employer group. 381 U.S. at 735-36.

61. *Id.* at 731-35 (Goldberg, J., with Harlan and Stewart, JJ., dissenting but concurring in the result). Justice Goldberg wrote only a single opinion for both *Pennington* and *Jewel Tea*.

62. *Id.*

63. "Most favored nation" clauses are fairly common in labor contracts, especially those of the construction industry. *See* Feller & Anker, *Analysis of Impact of Supreme Court's Antitrust Holdings*, 59 L.R.R.M. 103 (1965). Such a clause was considered relevant in determining Local 100's liability in *Connell*.

64. 381 U.S. at 665-66.

individual circumstances.[65] The "most favored nation" clause would seem to lack antitrust immunity except that Justice White indicated that only predatory intent subjected the clause to the antitrust laws.[66] The contractual clause in *Pennington* provided that the union would impose upon all other coal operators in the area the terms of the agreement without regard to their ability to pay.[67] A "most favored nation" clause, on the other hand, is designed to assure that the previous employer could be relieved of any disadvantage if the union negotiated more favorable wage and benefit levels.[68]

The National Labor Relations Board has held that "most favored nation" clauses are a mandatory subject of bargaining.[69] Simply because a union and an employer must bargain over a subject does not mean they can lawfully reach an agreement that is intended to restrain competition in the product market. The NLRB has no power to dictate the subject matter or substantive terms of an agreement. The NLRB may decide whether collective bargaining took place, but it may not determine what should or should not have been included in the union contract.[70] If the NLRB decides that a demanded clause concerns a mandatory bargaining subject, the question for decision is not whether agreement on the proposed clause would violate the antitrust laws, but whether rejection of the demand was made in good faith. Therefore, a union agreement containing a mandatory subject cannot, by itself, be the basis for an exemption from the antitrust laws.[71]

Pennington indicated that a violation of the antitrust laws might be found when a union-employer agreement covering wages has as its

65. *Id.* at 666.

66. *Id.* at 665-66.

67. *Id.* at 665. Because of the union's substantial investment in the larger firms charged with the predatory price-cutting, the union easily benefited by such a clause. *See generally* Note, *Conflict of Interest Problems Arising From Union Pension Fund Loans*, 67 COLUM. L. REV. 162 (1967).

68. The NLRB said as much in Dolly Madison Indus., Inc., 182 N.L.R.B. 1037, 1038 (1970). The Board went on to hold that "most favored nation" clauses were mandatory subjects of bargaining upon which an employer could insist, absent a predatory purpose. *Id.*

69. See note 68 *supra*.

70. Consumers' Research, Inc., 2 N.L.R.B. 57, 74; 1 L.R.R.M. 457, 469 (1936). Though it expresses the general policy of the NLRB, the proposition is not strictly accurate, since by NLRB decisions employers and unions may not include in their contracts provisions that are not in accordance with federal laws. Southern S.S. Co. v. NLRB, 316 U.S. 31, 46-47 (1942). *See also* American News Co., 55 N.L.R.B. 1302, 1309; 14 L.R.R.M. 54, 68-69 (1944).

71. The union in *Pennington* argued that an agreement with one group of employers restraining freedom of the union to deal with other employer groups was sanctioned by existing national labor policy if the subject matter of the agreement was a mandatory subject of bargaining. 381 U.S. at 665.

purpose the elimination of competition.[72] In *Jewel Tea*,[73] the Court was faced with a labor contract that forbade supermarkets to open between the hours of 6:00 p.m. and 9:00 a.m. for the purpose of selling butchered meat. Justice White, announcing the judgment of the Court, dismissed the conspiracy issue, holding that it was not properly before the Court since the trial court had discovered no evidence to sustain Jewel Tea's conspiracy charges, nor had this issue been considered on appeal.[74] Moreover, he could not establish a *Pennington*-type liability since the operating restriction was not the "result of a bargain between the unions and some employers directed against other employers, but [was] what the unions deemed to be in their own labor interests."[75] The Court observed that if the company could not market meat at night without affecting the daytime hours or assigned tasks of the union butchers, the marketing hours restriction could constitute a legitimate concern of the members within the unit.[76] Considering the union's interest, the Court held that the marketing hours restriction was not like the fixing of product prices but was rather "intimately related to wages, hours, and working conditions."[77] This "immediate and direct" concern of union members would be protected if the terms imposed by the union could be said to be "intimately related" to legitimate union interests, and those terms went no further than necessary in protecting those interests. In this posture, the interests of the union members would outweigh the relative impact of the agreement on the product market. If the relationship between the contract restriction and the workload of the butchers was minimal, the contract would fall outside the labor exemption and would be scrutinized to determine whether it constituted a substantive violation.[78]

In *Jewel Tea*, Justice White reemphasized that a union acting alone and not at the behest of any employers was entitled to the labor exemption.[79] In combination with the predatory intent language in *Pennington*, this

72. *Id.* at 665-66.
73. 381 U.S. 676 (1965).
74. *Id.* at 681-83.
75. *Id.* at 688.
76. *Id.* at 690.
77. *Id.* at 689-90.
78. *Id.* at 689-91. In formulating the issue in *Jewel Tea*, Justice White ignored the trial court's finding that the collective bargaining agreement provided that "the unions agree not to enter into a contract with any other employer designating lower wages, or longer hours, or any more favorable conditions of employment." *See* 215 F. Supp. 839, 842 (N.D. Ill. 1963). This finding clearly brings *Jewel Tea* within the parameters of the extra unit bargaining admonition of *Pennington*.
79. 381 U.S. at 688-90.

factor indicates that the identity of the initiator of a particularly suspect clause in a labor contract is an important factor in determining whether the union was pursuing solely its self-interest. *Allen Bradley* buttresses this conclusion by indicating that a union is liable if it joins a preexisting conspiracy of employers to restrain the product market.[80] Thus, extremely fine evidentiary points may prove crucial to the union's retention of an exemption under the antitrust laws.

Justice White also reintroduced the heavily criticized process of judicial balancing of labor interests and antitrust law enforcement stating that the "crucial determinant" was not the agreement's form but its relative impact on the product market balanced against the interest of union members in obtaining it.[81] The danger of such an approach is that judges are thrust into the inappropriate role of usurping legislative prerogatives in economic policymaking.[82]

Reading the *Allen Bradley, Pennington*, and *Jewel Tea* cases together, some general principles can be discerned. If a union joins an existing employer conspiracy to fix prices, allocate customers, or exclude entry into the product market under the guise of a collective bargaining agreement, *Allen Bradley* clearly dictates that both employers and the union violate the antitrust laws.[83] The tainted clauses will be unenforceable and illegal, and union concerted activity to implement the clauses will be unlawful and enjoinable. *Pennington* indicates that the existence of a collective bargaining agreement does not alter the legality of such an agreement, since the agreement designedly extended into and affected the product market.[84]

There will be instances, however, particularly in multiemployer bargaining units, in which these principles will not be conclusive, even though no specific conspiracy to tinker with competition in the product market exists, but the anticompetitive effects flowing from an agreement are foreseeable. Since the reduction in competition results from union conduct which is lawful on its face, *Apex* would appear to govern and warrant the application of a labor exemption. A useful example is presented in *Adams Dairy Co. v. St. Louis Dairy Co.*,[85] a case in which a dairy sought to compete with other large dairies making house-to-house

80. *See* notes 40-47 & accompanying text *supra*.
81. 381 U.S. at 690 n.5.
82. *See* Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 272 (1955).
83. *See* notes 40-45 & accompanying text *supra*.
84. *See* notes 56-68 & accompanying text *supra*.
85. 260 F.2d 46 (8th Cir. 1958).

deliveries by making bulk deliveries to supermarkets. The union representing the dairy employers negotiated a wage provision which so sharply increased the earnings of the employees making supermarket deliveries, that this form of competition was made economically unfeasible.[86] The Eighth Circuit, finding no conspiracy by the union with the employers, concluded that the union acted alone in seeking legitimate labor objectives, and sustained the agreement against antitrust attack by the affected dairy.[87]

Deep uncertainties remained after the Court's opinions in *Pennington* and *Jewel Tea* concerning how and when liability would attach to particular union conduct. In *Pennington*, the Court had condemned extra-unit bargaining about wages and working conditions, since it was motivated by a predatory purpose, but in *Jewel Tea* it upheld a marketing restriction because its purpose related to and protected a legitimate union concern. These uncertainties were further complicated by the Court's five-four decision ten years later in *Connell*—a case which raises perplexing questions concerning the reach of the labor exemption.

IV. MODIFYING *PENNINGTON* AND *JEWEL TEA*: THE *CONNELL* DECISION

The facts underlying the *Connell* decision were fairly simple. Plumbers Local 100 had requested Connell Construction Company, a general contractor, to restrict subcontracts for its plumbing and mechanical work to firms that had a collective bargaining agreement with the Local.[88] When Connell refused, a lone picket was placed at the construction site forcing construction to a halt.[89] Connell brought suit in a Texas state court to enjoin the picketing as a violation of the state's antitrust laws. Local 100 removed the case to federal court and, under protest, Connell signed the agreement and amended its complaint to assert violations of sections 1(a) and 2 of the Sherman Act.[90] The district court found the agreement authorized by section 8(e) of the National Labor Relations

86. *Id.* at 48-49.

87. *Id.* at 55.

88. Local 100, in turn, was a party to a multiemployer collective bargaining agreement with the Mechanical Contractor's Association of Dallas, a group representing 75 mechanical contractors. 421 U.S. at 619-20.

89. *Id.* at 620. The union, however, had no intention of organizing Connell's employees and therefore could not claim that its picketing was protected by § 8(b)(7) of the NLRA, 29 U.S.C. § 158(b)(7) (1970), which covers recognitional and organizational picketing.

90. 421 U.S. at 620-21. Because the union had ceased its picketing, the Supreme Court found it unnecessary to address Connell's requests for injunctive relief. *Id.* at 637 n.19.

Act (NLRA)[91] and thus exempt from the antitrust laws.[92] The Fifth Circuit Court of Appeals affirmed the lower court's result without reaching the section 8(e) issue.[93]

The Supreme Court reversed, five to four,[94] on the question of antitrust liability of the union and remanded[95] for a consideration of the Sherman Act claims. The precise issue before the Court was twofold. First, was the union subject to the federal antitrust laws when, without conspiratorial intent or combination with a nonlabor group, it forced a nonunionized general contractor to agree to restrict its subcontracting to multiemployer bargaining agreement signatories? Second, was the agreement with the general contractor protected by the construction industry proviso to section 8(e) and, if not, were damage remedies provided exclusively by the NLRA?

Writing for the majority, Justice Powell declared that the union's agreement was not exempt from the antitrust laws since it directly restrained the product market and indiscriminately excluded nonunion subcontractors from a portion of that market.[96] The agreement was also held outside the ambit of the section 8(e) proviso, which the Court interpreted as authorizing secondary boycott agreements only within the context of a collective bargaining relationship and possible common-situs relationships on particular jobsites.[97] Finally, the Court found that

91. 29 U.S.C. § 158(e) (1970). Section 8(e) outlawed "hot cargo" agreements, in which the employer agreed not to do business with certain other employers except in the garment and construction industries. The construction industry proviso states, in pertinent part: "[N]othing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction . . . ."

92. 78 L.R.R.M. 3012, 3014 (N.D. Tex. 1971). The district court also found that the Texas antitrust laws were preempted by federal legislation, *id.*, and its finding was affirmed on appeal. 483 F.2d 1154, 1175 (5th Cir. 1973).

93. 483 F.2d 1154 (5th Cir. 1973). The court looked to Justice White's opinion in *Jewel Tea* and determined that since the union did not conspire with a nonlabor group and acted pursuant to its own self-interest, it was immunized from antitrust liability. *Id.* at 1166. In effect, the union had demonstrated a "legitimate union interest."

94. 421 U.S. 616 (1975). Justice Stewart wrote a dissenting opinion in which Justices Douglas, Brennan, and Marshall joined. *Id.* at 638. In his brief dissent, Justice Douglas stated that the absence of a viable conspiracy unalterably excluded application of the antitrust laws to a union-employer agreement. *Id.*

95. *Id.* at 637.

96. *Id.* at 623. The majority noted that the restrictive agreements were designed to force nonunion subcontractors out of the market, "even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods." *Id.*

97. *Id.* at 633. The union had argued that the agreement was lawful under a literal reading of the construction industry proviso. The parties involved were an employer and a

the NLRA did not provide the exclusive remedies for a violation of section 8(e).[98]

In the Court's view, a clearly anticompetitive agreement without any redeeming employee-employer relationship brought the agreement within the antitrust laws. While the Court recognized that labor policy required a tolerance for the lessening of business competition based on differences in wages and working conditions,[99] this policy apparently did not extend to union organizing.[100]

In perhaps its most important statement, the majority declared that the Connell agreement was not exempt under the antitrust laws because it imposed a direct restraint on the business market in ways which did not "follow naturally from elimination of competition over wages and working conditions."[101] At first glance, the phrase seems similar to Justice White's "intimately related" test.[102] Upon closer examination, however, that phrase is far broader and more ambiguous than the "intimately related" test. The "intimately related" test provided a circle of areas in which questionable union activities might gain antitrust immunity if it could be demonstrated that the means used were intimately related to a valid union interest. The majority's "natural effects" test[103] appears to follow that course by retaining the need to show elimination of competition over wages and working conditions but dropping the intimate relations concept. The "follow naturally" phrase indicates that a definite line separates exempt and nonexempt union activities, while the "intimate relation" test provided a much preferred balancing approach presenting the union with some leeway in the type of activities it could utilize. Without offering any definition of the phrase, the majority seemed to be propounding the existence of a per se liability, if, in the absence of a collective bargaining relationship, union activity fails

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labor organization; they were "in the construction industry"; and the agreement applied to the subcontracting of work "to be done at the site of construction." *Id.* at 626-27.

98. Since there was no indication that Congress sought to preclude antitrust liability for unlawful secondary boycott agreements, the Court held that the union's activity was not subject exclusively to either the actual damages provision of § 303(b), 29 U.S.C. § 187(b) (1970), or the injunctive relief provision of § 10(*l*) of the NLRA, 29 U.S.C. § 160(*l*) (1970). 421 U.S. at 634.

99. *Id.* at 623.

100. Although it was presumptively lawful for the union to seek to organize subcontractors, the means used to attain that goal were questionable. *Id.* at 625.

101. *Id.* at 635.

102. *See* notes 77-78 & accompanying text *supra*.

103. *See* Note, *Labor Law—Antitrust Liability of Labor Unions—Connell Construction Co. v. Plumbers Local 100*, 17 B.C. INDUS. & COM. L. REV. 217, 224 (1976).

to "follow naturally" from the elimination of competition over wages and working conditions.[104]

The majority went on to state that the agreement would indiscriminately exclude from the market both subcontractors who had efficient operating methods and those offering substandard wages and working conditions.[105] The Court, however, afforded no explanation of how that result would occur. Instead, it merely proceeded to find that the union's multiemployer agreement was relevant to that issue because it contained a "most favored nation" clause. The clause prescribed the exact terms the union could seek in bargaining with newly organized subcontractors.[106] Thus, as the union expanded its membership to new subcontractors who were forced to unionize, competition between the subcontractors would be lessened, since all would be bound by the same terms. Presumably the lessening of competition would extend not only to wages, hours, and working conditions but to terms unrelated to those labor conditions.[107] Thus, a lawful construction industry proviso signatory agreement would also be subject to antitrust liability because it would restrict subcontracting on subjects unrelated to wages and working conditions.

The agreement would also have the impermissible effect of creating a geographical enclave for local contractors by prohibiting subcontracting not only with nonunion firms but with any firm not having a current bargaining contract with the local.[108] Yet every lawful signatory clause presumably has this effect; and the Court noted that it might have been lawful if included in a collective bargaining agreement.[109]

In a further modification of the "intimately related" standard, the majority incorporated into its new test the consideration of potential as

104. Liability would attach only if the agreement was concluded outside both the construction industry and a collective bargaining relationship. *See* Note, *Labor-Antitrust Law After Connell Construction Co.*, 35 FED. B.J. 133, 141 (1976), in which the author argues that the absence of a collective bargaining agreement renders a union ineligible per se for a nonstatutory exemption from the antitrust laws. The absence of a collective bargaining relationship, however, is insufficient, standing alone, to deny an exemption. Simply by inquiring whether the union-Connell agreement was entitled to the exemption, the Court indicated a willingness to extend the nonstatutory exemption to all union-employer agreements. The limitation on this extension would be an agreement creating a market restraint of the magnitude created by the union-Connell agreement. *See* 421 U.S. at 625-26.

105. *Id.* at 623.

106. *Id.* at 623 & n.1. *See generally* Comment, *Antitrust Law: Most Favored Nation Clause and Labor's Antitrust Exemption*, 19 J. PUB. L. 399 (1970).

107. 421 U.S. at 623-24.

108. *Id.* at 624.

109. *Id.* at 625-26.

well as actual anticompetitive effects.[110] Accordingly, the Court was willing to consider whether the subject agreement was entitled to the nonstatutory exemption even though the record was devoid of facts indicating that the union was using or might use the agreement to control market access.[111] This is significant to the extent that Justice White's test focused more on the union's interest and its legitimacy than on the means chosen to that end. The conclusion is inescapable that the Court will strip a union of its exemption if an agreement may potentially restrain competition in ways that do not follow naturally from elimination of competition over labor conditions.

The Court's willingness to pave new legal ground was not limited to the antitrust issue but extended, in a rather conclusory fashion, to the question of congressional intent with regard to the section 8(e) issue.[112] The union had argued under the construction industry proviso to section 8(e) that the agreement could not be violative of the antitrust laws absent *Allen Bradley* collusion or *Pennington* conspiracy and predatory intent. Indeed, the literal requirements of the proviso were evident: the parties were an employer and a labor organization engaged in the subcontracting of work at the site of construction. Eschewing a literal reading, the majority, on what at best was ambiguous legislative history,[113] asserted that Congress could not have meant the proviso to protect an agreement concluded outside the context of a collective bargaining relationship.[114]

The precise question of whether Congress intended the construction industry proviso to apply to signatory agreements concluded outside the context of a collective bargaining relationship had not been previously considered by any court or the NLRB.[115] However, the NLRB's General

110. *Id.* at 623-25.

111. *Id.* at 624-25.

112. 29 U.S.C. § 158(e) (1970).

113. *See* text accompanying notes 144-45 *infra*.

114. 421 U.S. at 633. The majority summarized its position by declaring that Congress could not have intended to leave open the type of agreement sought by the union. *Id.* This conclusion regarding congressional intent represents an about face from the Court's position in Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958). In *Sand Door*, the Court had spotted a glaring loophole in the secondary boycott provisions but refused to fill it without specific legislative guidance.

115. The Board, however, appeared to be aware of the problem. For instance, in Northeastern Indiana Bldg. & Constr. Trades Council (Centelivre Village Apartments), 148 N.L.R.B. 854, 57 L.R.R.M. 1081, *enf't denied on other grounds*, 352 F.2d 696 (D.C. Cir. 1964), the general contractor did not have a collective bargaining relationship with the union seeking an agreement that he would subcontract only signatories of the agreement. The Board nevertheless assumed that the proviso applied to the agreement since neither party disputed the point. 148 N.L.R.B. at 856 n.11, 57 L.R.R.M. at 1082 n.11. In Church's Fried Chicken, 183 N.L.R.B. 1032, 74 L.R.R.M. 1669 (1970), the question before the

Counsel appeared to address the very issue raised in *Connell*[116] and determined that a collective bargaining relationship was not a prerequisite for proviso protection even though "the contractor did not employ employees of the craft represented by the union . . . ."[117] The General Counsel, therefore, declined to issue complaints in cases raising that issue.[118]

The majority added a caveat to the collective bargaining requirement by extending the proviso's possible protection to common-situs relationships on particular jobsites.[119] In summarizing the elements necessary for proviso protection, the majority declared: "[T]hat . . . which is outside the context of a collective-bargaining relationship and not restricted to a particular job site . . . , may be the basis of a federal antitrust suit."[120] The majority therefore left unclear whether a signatory clause would have to be limited to a particular jobsite, thus requiring the clause to be negotiated site-by-site. In a naked assertion of economic policy, the majority declared that if the proviso were interpreted to authorize subcontracting agreements with stranger general contractors, unions would have an almost unlimited organizational weapon with which to coerce nonunion subcontractors.[121]

Board was whether it was unlawful under § 8(b)(4) for a union to require an employer to sign a subcontracting agreement violative of § 8(e). No § 8(e) violation was found, even though Church had no collective bargaining relationship with the union.

116. The General Counsel stated the issue as follows:

> A number of cases have raised the issue of whether a construction union violates sections 8(b)(4)(A) and/or 8(e) when it seeks or obtains by picketing an otherwise valid on-site construction subcontracting clause under the 8(e) proviso from a contractor who does not himself employ employees of the craft represented by that union.

NLRB General Counsel Memorandum, Release No. R-1343 at 1 (July 2, 1974), *reprinted in* LAB. REL. YEARBOOK 298, 298 (1974) [hereinafter LAB. YEARBOOK].

117. *Id.* at 298, 306. The issue framed by the General Counsel was narrower than the one presented in *Connell* and addressed only the situation in which the general contractor has no employees represented by the particular craft union. Implicit in that issue was an understanding that the general contractor could have had unionized employees. In *Connell*, however, the contractor's employees were nonunion and thus the craft-union distinction would not have applied.

118. *See, e.g.*, Plumbers Local 100 (Hagler Constr. Co.), N.L.R.B. Case No. 16-CC-447 (1975). This refusal to issue complaints of this nature has been called a "clear case of administrative abuse of power." *See* Janofsky & Peterson, *The Exercise of Unreviewed Administrative Discretion to Reverse the U.S. Supreme Court: Ponsford Brothers*, 25 LAB. L.J. 729, 735 (1974).

119. 421 U.S. at 633.

120. *Id.* at 635.

121. *Id.* at 631. The Court found it "highly improbable" that Congress would have intended to grant unions such economic power, since "[o]ne of the major aims of the 1959

The dissent, led by Justice Stewart, sidestepped the proviso question by pointing to compelling evidence of congressional intent that labor remedies be exclusive for any injury caused by union secondary activities and agreements.[122] This interpretation, Justice Stewart noted, was clearly warranted by the pertinent legislative history which indicated that on three prior occasions Congress had rejected proposals which would have extended antitrust remedies to cover unlawful secondary activities by unions.[123] The original House version of the Taft-Hartley Act would have subjected unions to antitrust liability,[124] but was rejected in favor of Senator Taft's proposal[125] providing compensatory damages for injured parties.[126] Senator Griffin declared that "[t]here is no antitrust law provision in [the Landrum-Griffin amendments]."[127] Congress, in effect, evinced a clear intent to preclude antitrust liability for all secondary activities[128] and to provide an effective private damages reme-

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Act was to limit 'top-down' organizing . . ." *Id.* at 632. The congressional proponents of the common-situs bill, S. 1479 & H.R. 5900, 94th Cong., 1st Sess. (1976), enacted by Congress but vetoed by the President, 12 WEEKLY COMP. OF PRES. DOC. 16 (Jan. 5, 1976), expressly disagreed with the majority's interpretation. *See* S. REP. NO. 438, 94th Cong., 1st Sess. 12 (1975); H.R. REP. NO. 371, 94th Cong., 1st Sess. 10 (1975). The passage of the common-situs legislation would not have had any appreciable effect on a *Connell*-type agreement since the union did not represent any of the construction site employees.

122. 421 U.S. at 640-46. Justice Stewart did note that "[i]f, contrary to the Court's conclusion, . . . Congress intended what it said in the proviso to section 8(e), then the subcontracting agreement is valid . . ."; that picketing to obtain it would be lawful; and that "[i]t would seem necessarily to follow that conduct specifically authorized by Congress . . . could not by itself be the basis for federal antitrust liability." *Id.* at 648 n.8.

123. *Id.* at 639.

124. H.R. 3020, 80th Cong., 1st Sess. § 301 (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 92-94 (1948), [hereinafter cited as 1947 LEGIS. HIST.]; *see* 421 U.S. at 640-46.

125. 29 U.S.C. § 187 (1970).

126. Congress also amended § 303, 29 U.S.C. § 187 (1970), to provide a private right of action for violations of § 8(e). Section 303 was amended to incorporate by reference the new § 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A) (1970), which makes union pressure to obtain agreements in violation of § 8(e) an unfair labor practice. If the union's agreement was not within the § 8(e) proviso, its picketing to secure that agreement was a violation of § 8(b)(4)(A), and therefore remediable under § 303. 421 U.S. at 648 (Stewart, J., dissenting); *see* II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 1472 [hereinafter cited as 1959 LEGIS. HIST.].

127. 105 CONG. REC. 15535 (1959). During House consideration of the Landrum-Griffin Act, specific amendments for extending antitrust liability to labor unions were rejected. *See* 421 U.S. at 650-53.

128. Proposals to impose antitrust sanctions were made by Senator McClellan and by Congressmen Hoffman and Alger. *See* 1959 LEGIS. HIST., *supra* note 126, at 1100, 1482-83, 1568-71, 1685, 1705-08. Congressman Griffin, architect of the bill ultimately adopted, emphasized that his bill was a minimum compromise and contained no antitrust provision. *See id.* at 1571-72.

dy for those activities.[129] The Court's extension of antitrust liability to secondary agreements[130] renders labor remedies superfluous since employers presumably will seek treble damage recovery under the antitrust laws.[131]

The Court's application of antitrust remedies to section 8(e) violations indicates that it considered the labor remedies inadequate. This approach ignores the fact that Congress amended section 8(b)(4)(A) to make it an unfair labor practice for a union to force an employer to enter into an agreement violative of section 8(e).[132] Therefore, parties injured by the implementation or enforcement of the agreement could recover all actual damages under section 303.[133] The Court also left open the possibility of injunctive relief under the Sherman Act.[134] This possibility is clearly unnecessary because section 10(1) of the NLRA[135] empowers the Board to hold an expedited proceeding and petition for injunctive relief in cases involving secondary activity.[136]

V. Narrowing The Construction Industry Proviso

In analyzing the union's statutory exemption claims, the Court first considered whether the agreement was protected by the construction industry proviso of section 8(e) of the Landrum-Griffin Act.[137] It found that the agreement fell within the letter but not the spirit of that law.[138] Although by its terms the proviso protects all agreements between unions and employers concerning work to be done at the jobsite, the Court noted that Congress had also intended to outlaw "top-down" organizing

129. The *Connell* majority, however, sharply contrasted § 8(b)(4) and § 8(e). The majority suggested that if Connell had not signed the agreement, the labor laws would have provided the exclusive remedies, but, in this instance, the mere signing by Connell removed the union's antitrust immunity. It is doubtful that Congress intended to place such a powerful weapon in the hands of employers.

130. 421 U.S. at 634.

131. *See* Monaghan, *supra* note 5, at 239.

132. *See* note 126 *supra*.

133. Enforcement of such an agreement would be violative of § 8(b)(4)(B) of the NLRA, 29 U.S.C. § 158(b)(4)(B) (1970). The NLRA does not, however, allow an injured party to recover damages suffered as a result of an unlawful agreement into which the employer voluntarily entered. Nevertheless, normal Board remedies remain. *See* text accompanying note 135 *infra*.

134. 421 U.S. at 637 n.19.

135. 29 U.S.C. § 160(*l*) (1970).

136. Until the Court resolves this issue, lower courts are likely to find a *Connell*-type situation within the Norris-LaGuardia definition of a "labor dispute," thus prohibiting an injunction. *See* Utilities Serv. Eng'r, Inc. v. Colorado Constr. & Trades Council, 549 F.2d 173, 176 (10th Cir. 1977).

137. 29 U.S.C. § 158(e) (1970).

138. 421 U.S. at 628.

campaigns of the type used by Local 100 and could not have included such a "glaring loophole" in its general ban on this tactic.[139]

The Court found that the hot-cargo agreement between the union and Connell could not receive the protection of section 8(e) because Congress had meant to limit that section's applicability to situations in which a collective bargaining relationship existed.[140] The purpose of the statute, the Court pointed out, was to reduce the possibility of jobsite friction which often would occur when union and nonunion men work side by side. In *Connell*, however, the union had used the hot-cargo agreement for the entirely different purpose of organizing nonunion subcontractors and eliminating job and wage competition in the subcontracting market. Therefore, the agreement could not claim the protection of the construction industry proviso and thus violated section 8(e).[141] In concluding that the proviso should be narrowly construed, the Court further reasoned that in contrast to the full exemption given employees by the garment industry proviso to section 8(e),[142] the exemption created by the construction industry proviso was far more limited.[143]

The Court's conclusion that proviso protection required a collective bargaining relationship does not appear to be supported by the legislative history of the construction industry proviso. Senator John F. Kennedy, the floor manager of the bill in the Senate, discussed at length the effects the proviso would have on labor relations in the construction industry.[144] Nowhere did he mention either the collective bargaining or particular jobsite requirements set by the *Connell* Court. The House Conference

139. *Id.* at 633.

140. *Id.*

141. *Id.* at 633-35. Opinions by both the NLRB and the various circuit courts have also concluded that § 8(e) applies to all hot-cargo agreements concerning jobsite work done in the construction industry. *See, e.g.*, Suburban Tile Center v. Rockford Bldg. Trades Council, 354 F.2d 1, 3 (7th Cir. 1966), *cert. denied*, 384 U.S. 960 (1966); Los Angeles Bldg. & Constr. Trades Council (B & J Inv. Co.), 214 N.L.R.B. 562, 563, 87 L.R.R.M. 1424, 1426 (1974).

142. 29 U.S.C. § 158(e) (1970). *See* Danielson v. Joint Bd., ILGWU, 494 F.2d 1230, 1233-39 (2d Cir. 1974).

143. 421 U.S. at 628-30.

144. Senator Kennedy explained the proviso as follows:

> The first proviso . . . is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project. . . .
>
> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under § 8(e). 105 CONG. REC. 17900 (1959), *reprinted in* 1959 LEGIS. HIST., *supra* note 126, at 1439.

Report discussing the proviso also did not support the Court's view.[145] However, the Court's only reference to the statements of Senator Kennedy and the House Conferees was in a footnote.[146]

The *Connell* Court's limitation of proviso protection to collective bargaining relationships appears to be contrary to congressional intent of preventing jobsite friction. Certain general contractors in the construction industry will invariably subcontract an entire job so that none of its employees will be on a particular jobsite. The subcontractor may, however, have union employees who would be unwilling to work alongside nonunion workers. The representative of the subcontractor's union employees would be unable, under the collective bargaining restriction, to obtain a restrictive subcontracting clause preventing subcontracting to nonunion firms. A clear result of this situation would be work disruption arising from jobsite friction. The Court may have envisioned this situation when it suggested that the proviso might extend not only to agreements "in the context of [a] collective-bargaining relationship" but "possibly to common-situs relationships on particular jobsites as well."[147]

The Court's handling of the proviso issue also overlooked the District of Columbia Circuit's pronouncement in *Dallas Building & Construction Trades Council v. NLRB*,[148] that the type of organizational picketing in which Local 100 engaged would have been lawful under section 8(b)(7)[149] of the NLRA had the agreement been "limited to the type of work which is never performed by the general contractor's own employees."[150] The court of appeals recognized that section 8(e) and section 8(b)(7) are aimed at "wholly different problems"[151] and thus undercut the *Connell*

145. The Report was stated in similarly inclusive terms:

> The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement . . . . To the extent that such agreements are legal today under section 8(b)(4) . . . , the proviso would prevent such legality from being affected by section 8(e).

H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959), *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2503, 2511; 1947 LEGIS. HIST., *supra* note 124, at 943.

146. 421 U.S. at 629 n.8.

147. *Id.* at 633. It should be noted that the former General Counsel took this position in a case raising the same issue and refused to issue a complaint thereon. *See* BCTC of Orange County (Compath), Case No. 21-CC-1678 (Aug. 1975).

148. 396 F.2d 677 (D.C. Cir. 1968).

149. 29 U.S.C. § 158(b)(7) (1970). Section 8(b)(7) is aimed at preventing organizational or recognitional picketing by an uncertified union and prohibits picketing carried on for more than thirty days without the filing of a representation petition under § 9(c), 29 U.S.C. § 159(c) (1970).

150. 396 F.2d at 682 n.8.

151. *Id.* at 682.

Court's fear that the union's proviso arguments would undermine section 8(b)(7)'s prohibition of "top-down organizing."[152]

The new requirements set forth by the Court for proviso protection are ostensibly aimed at preventing "top-down organizing" by labor organizations.[153] Yet those same requirements permit a degree of such organizing in situations in which the general contractor has unionized employees and the negotiated subcontracting agreement provides subcontracting only to firms having a collective bargaining agreement with that particular union. Under the Court's requirements, the agreement is lawful as executed within a collective-bargaining relationship and limited to a common-situs relationship on a particular jobsite. The unhealthy aspect of the agreement, in light of the "top-down organizing" prohibition, is that it encourages subcontracting firms, whether union or nonunion, to sign collective bargaining agreements with a particular union in order to obtain a subcontracting award. This type of agreement not only encourages "top-down organizing,"[154] but also inhibits the exercise of employees' section 7 rights to choose their bargaining representative.[155]

VI. Striking the Balance Between Antitrust and Labor: Per Se or Rule of Reason Approach

A. Application of Antitrust Rules to Union-Employer Agreements

The Sherman Act contains no standards to guide its application. The difficult task of developing rules to determine what conduct it renders illegal has invariably been thrust upon the courts. After an initial, literal application of the Act to union activities,[156] the Supreme Court developed the "rule of reason": The Sherman Act embraced only acts, contracts, agreements, or combinations that operated to the prejudice of the public interest by unduly restricting competition, obstructing commerce, or injuriously restraining trade.[157]

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152. 421 U.S. at 632-33.

153. *See* note 139 & accompanying text *supra*.

154. Such an agreement strongly implies that the signatory union's aim is to encourage collective bargaining recognition by subcontracting firms and, hence, effect "top-down organizing."

155. *See* 29 U.S.C. § 157 (1970).

156. The Act applied to and pronounced illegal every contract or combination in restraint to trade among the several states. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312, 326-29 (1897). *See* text accompanying notes 7-15 *supra*.

157. United States v. American Tobacco Co., 221 U.S. 106, 175-80 (1911). *See generally* Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23 (1964) (the author concludes that both the rule of reason and the per se rule are mere procedural devices and should not be allowed to overshadow the true issue of antitrust regulation which is one of social policy).

Whether a given practice or agreement constituted an unreasonable restraint of trade required both a judicial consideration of the facts peculiar to the business to which the restraint was applied and an investigation into the nature and effect of the restraint, its history, and the goal sought to be achieved by imposing it. This determination thus required the evaluation of a multitude of facts for each case. In response to this evidentiary problem, courts have developed the rule of per se illegality, under which certain agreements or practices are presumed to be unreasonable without inquiry into the factual circumstances of each case.[158] Among the practices and agreements held to be illegal per se, "because of their pernicious effect on competition and lack of any redeeming virtue,"[159] are price fixing,[160] division of markets,[161] group boycotts,[162] competitor exclusion,[163] and tying arrangements.[164]

As already indicated, the existence of a combination or conspiracy to restrain a particular market is difficult to prove and courts therefore have developed evidentiary rules that permit their existence to be inferred from "things actually done."[165] An example of this approach is the doctrine of "conscious parallelism" announced in *Interstate Circuit, Inc. v. United States*:[166] "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."[167]

158. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-18 (1940). The per se rule is applied to those restraints which, over a period of time, have been found inimical to a competitive system. This rule not only aids in predicting what conduct is permissible but also acts as a deterrent in that no reason or explanation will excuse or justify conduct which is subject to the rule. The application of such a standard frees the court of the burden of extensive factfinding analysis and of the different economic examinations inherent in the application of the rule of reason. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. 2)*, 75 YALE L. J. 373, 380-84 (1966). *See generally* United States v. Topco Assocs., Inc., 405 U.S. 596, 606-12 & n.10 (1972).

159. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

160. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-18 (1940).

161. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 295-96 (1898), *aff'd*, 175 U.S. 211 (1899).

162. *See* Fashion Originators' Guild v. FTC, 312 U.S. 457, 467-68 (1941).

163. *See* International Salt Co. v. United States, 332 U.S. 392, 396 (1947).

164. *See id.* at 398.

165. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914).

166. 306 U.S. 208 (1939).

167. *Id.* at 227.

Finally, in determining whether a particular restraint is unlawful, the defendant's motive, intent, or purpose is generally irrelevant under the rule of reason[168] and absolutely immaterial when a per se violation is charged. Proof of bad purpose may condemn an otherwise reasonable restraint, but in all other cases the requisite intent is presumed from the existence of unlawful effects.[169]

These rules were designed to facilitate the enforcement of a national antitrust policy directed toward the elimination of anticompetitive arrangements among business entities and were developed in cases that involved no countervailing national policy. The establishment of a national labor policy raises the question whether traditional antitrust rules should be applied to test the lawfulness of union-employer agreements. At the very least, it calls into question the efficacy of applying the per se rule to such agreements.

The national labor policy, embodied in the National Labor Relations Act,[170] is directed toward the achievement of industrial peace through collective bargaining. To maintain industrial peace, labor policy requires the negotiation of agreements between labor and management. As a natural consequence of these agreements, competition is generally lessened not only in the labor market but the product market as well.[171] Because antitrust policy is concerned with maintaining competition, the rules developed pursuant thereto are extremely important for the continued vitality of union-employer negotiation and agreement. The structure and application of a rule, in effect, will determine whether a particular union-employer agreement is lawful. In that regard, a rule of reason standard or modification thereof is appropriate in judging the legality of these agreements. Any stricter standard would do immeasurable harm to the system of collective bargaining.[172]

168. *See* Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).

169. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 621-23 (1953).

170. 29 U.S.C. §§ 151-68 (1970).

171. Should a union organize all the firms in a particular industry, the adoption of uniform labor standards would result in the elimination of competition within the labor market. Any price competition in the product market based on differences in labor costs would also be eliminated.

172. The rule of reason is particularly appropriate since it protects those contracts and combinations which are basic to our economic system by allowing an examination of all their effects so that they will not be struck down without an enlightened balance of their relative benefits and evils. *See generally* Board of Trade v. United States, 246 U.S. 231, 238 (1918). For a discussion of the rule of reason, see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. 1)*, 74 YALE L. J. 775, 781-847 (1965).

A related point involves a determination by the National Labor Relations Board on particular practices, clauses, or agreements. In cases in which the Board has determined that a particular practice or agreement is lawful under the NLRA, two things should occur in a later antitrust proceeding: A rule of reason approach should apply; and antitrust liability should not attach unless there is a *Pennington*-type predatory purpose and substantial restraint on the product market.

First, a positive Board determination would indicate that the matter is protected or lawful under the NLRA. Thus the parties believed they were acting lawfully. Second, if the preceding approach is not utilized, the parties are faced with a negotiating dilemma. For instance, if the Board held that a proposed bargaining topic was a mandatory one,[173] but agreement upon that subject would raise the possibility of an antitrust violation, a negotiating party faces several choices. If he refuses to bargain, he risks committing an unfair labor practice, since the NLRB cannot decide whether the antitrust laws apply to such an agreement. If he bargains but refuses to agree, he risks a strike or lockout that cannot be enjoined.[174] And, of course, if he signs the agreement, he risks antitrust liability.

The approach advocated above does not rest on exempting mandatory subjects of bargaining from antitrust scrutiny. This would unnecessarily provide negotiating parties with an easy avenue to circumvent the antitrust laws. Furthermore, the Board might eventually be forced into the role of considering the antitrust implications of particular bargaining subjects, a role for which the Board is untrained.

B. Connell: Rule of Reason Approach

The *Connell* Court never directly addressed the question of whether a rule of reason approach would be appropriate to the facts of that case. Its opinion did indicate, in several ways, that the rule of reason approach was preferred over a per se standard.[175] The per se rule was applicable, if at all, only to the question of whether the union had forfeited its exemption, not whether it had committed a substantive violation under the

173. *See generally* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964). In general, if a proposal concerns wages, hours, and working conditions, it is a mandatory subject of bargaining. Sections 8(a)(5), 8(b)(3), and 8(d) require employers and employees to bargain over mandatory subjects. 29 U.S.C. §§ 158(a)(5), (b)(3), (d) (1970). *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

174. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1970), drastically limits the power of federal courts to issue injunctions in both primary and secondary labor disputes.

175. *See* text accompanying notes 189-93 *infra*.

antitrust laws. The question of whether a substantive violation had been committed was remanded to the district court for determination.[176]

The Court placed primary reliance upon Justice White's opinions in *Pennington* and *Jewel Tea*. In *Pennington*, the Court, per Justice White, found the union's conduct, in combining with a nonlabor group, within the *Hutcheson-Allen Bradley* principle and thus not exempt from the antitrust laws. Employing a rule of reason balancing test, Justice White asserted that the national labor policies offered no protection for union-employer agreements within a single "bargaining unit" that attempted to establish standards for other units. Thus the UMW agreement was not entitled to an exemption.[177] Nonexemption, however, was not to be equated with a substantive violation of the antitrust laws. Thus a per se violation would not attach upon loss of exemptive status but would require the establishment of a conspiracy with "predatory intent." Indeed, Justice Douglas understood the Court to require a finding of a joint purpose of union and large owners to destroy certain of their competitors to establish an antitrust violation.[178] For example, an industry-wide agreement with a wage scale exceeding the ability of some operators to pay would be prima facie evidence of such illegal intention.

In *Jewel Tea*, Justice White clarified the *Pennington* Court's suggestion that the question of labor's exemption is considered separate from whether a substantive violation of the antitrust laws has been committed.[179] In the absence of a *Pennington*-type conspiracy, Justice White indicated that the Court would engage in a rule of reason balancing approach to determine whether the union was entitled to an exemption.[180] The crucial determinant was not the subject matter of the agreement, but rather its relative impact on the product market weighed against the interests of union members.[181] However, a finding of not "intimately related" would not automatically give rise to a substantive violation of the antitrust laws.[182] A further determination would have to

176. 421 U.S. at 637; *see* note 93 *supra*.

177. 381 U.S. at 666.

178. *Id.* at 672-75 (Douglas, J., concurring).

179. Justice White stated that "the issue before us is not the broad substantive one of a violation of the antitrust laws . . . but whether the agreement is immune from attack by reason of the labor exemption from the antitrust laws." 381 U.S. at 688-89.

180. *Id.* at 691.

181. *Id.* at 690 n.5.

182. Justice White noted that "[w]hether there would be a violation of §§ 1 and 2 would then depend on whether the elements of a conspiracy in restraint of trade or an attempt to monopolize had been proved." *Id.* at 693. It could be argued that a competitive restraint deemed sufficient to overrule labor's exemption would most likely be held an antitrust violation. *See* Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742, 757-59 (1966).

be made that the restraint was unreasonable.[183] In *Jewel Tea*, that determination was properly made by the lower court, since the reasonableness of an operating-hours restraint was supported by the record.[184] Had there been no relationship between the contract restriction and the workload of the butchers, the contract would fall outside the labor exemption and be subjected to the usual scrutiny, including the rule of reason, to determine whether it constituted a substantive antitrust violation.[185]

Reading *Pennington* and *Jewel Tea* together, two principles can be gleaned: First, if a union-employer conspiracy exists with a predatory intent, the Court will, in all likelihood, impose a per se rule to deny an exemption.[186] Second, if a conspiracy is not alleged, or exists without a predatory intent, the Court will remand for a full rule of reason analysis[187] of the alleged anticompetitive activity.[188]

While the *Connell* Court did not suggest a significant alternative approach to that presented in *Pennington* and *Jewel Tea*, it did offer some modifications. The Court noted the absence of any evidence of a conspiracy with the members of the multiemployer bargaining group.[189] Thus, the *Allen Bradley-Pennington* situation was not present. But the Court was not above scrutinizing Local 100's agreement with the multiemployer bargaining unit to determine the effect of the agreement between Connell and Local 100 on the product market. In the Court's

183. 381 U.S. at 693 & n.6.

184. *Id.* at 694-97.

185. *Id.* at 692-93.

186. Both *Allen Bradley* and *Hutcheson* support this conclusion: *Hutcheson* granted a broad per se exemption to unions acting in their self interest and not combining with a nonlabor group. *Allen Bradley*, on the other hand, indicated that the Court would have little trouble finding an antitrust violation if a conspiracy is found.

187. This would include an investigation into whether the particular restraint on the product market was unreasonable.

188. Justice White stated that a union "forfeits" its exemption when it is "clearly shown" that it has agreed with one group of employers "to impose a certain wage scale on other bargaining units." 381 U.S. at 665. Moreover, a union is "liable" if it becomes a party to an employer conspiracy to eliminate competitors, even though the union's role is limited to securing wages, hours, and working conditions from other employers. *Id.* at 665-66. Based upon the latter statement, the trial court, on remand, concluded that the Court's opinion "teaches that it is necessary to find predatory intent to drive small coal operators out of business in order to hold the employer and Union for a violation of the Sherman Act." Lewis v. Pennington, 257 F. Supp. 815, 829 (E.D. Tenn. 1966), *aff'd*, 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968).

Similarly, it has been held that a "most favored nation" clause in a collective bargaining agreement does not per se violate the antitrust laws; it can be held to do so only if there is proof of a predatory purpose on the part of the signatory union and employer to force some other employer out of business. Associated Milk Dealers, Inc. v. Milk Drivers Local 753, 422 F.2d 546 (7th Cir. 1970).

189. 421 U.S. at 625 n.2.

view, Local 100 had used direct restraints on the commercial market to achieve its concededly lawful organizational objective.[190] Furthermore, the Court enunciated the rule that restraints on the business market which do not follow naturally from the elimination of competition over wages and working conditions will not be antitrust exempt.[191] Here the Court, rather cryptically, reasserted the balancing element of Justice White's *Jewel Tea* analysis,[192] but abandoned, for the most part, the "intimate relation" test.[193] In its place, the Court asserted a per se type analysis focusing on the existence of a collective bargaining relationship and the magnitude of the restraint on the product market. The per se analysis explains the Court's ambivalent attitude toward Local 100's organizing goal inasmuch as intent or motive would be irrelevant under this approach.[194]

VII. *CONNELL*: SIGNALLING A STIFFER STANDARD

The *Connell* Court's invalidation of the agreement between Connell and the union rested on two findings. First, it emphasized that the agreement had anticompetitive effects unrelated to wages, hours, and working conditions. Second, the potential magnitude of the restraint was such that the Court could not say whether the agreement would have been protected had there been a collective bargaining relationship.[195] This statement suggests that the Court will look beyond the facade of a collective bargaining relationship to the magnitude of the restraint on the product market. This position is buttressed by the Court's analytic focus

190. *Id.* at 625.

191. *Id.*

192. The meaning of the phrase "follow naturally from the elimination of competition over wages and working conditions" is never made clear by the Court. Certainly more concrete guidance is given by Justice White's "intimately related" test or *Hutcheson's* "self-interest" test and both are preferable. Consequently, the *Connell* test allows judges greater freedom in applying their own notions of the proper balance of industrial power.

193. The balancing test appearing in *Connell* bears little, if any, resemblance to that test purportedly applied in American Fed'n. of Musicians v. Carroll, 391 U.S. 99 (1968). The *Carroll* Court applied Justice White's balancing test and held that a union had a legitimate interest in imposing price lists and other direct restraints upon band leaders. The divergent results produced by the legitimate union interest test in this case suggests that the test is incapable of consistent and rational application through the judicial process. *See generally* Di Cola, *Labor Antitrust: Pennington, Jewel Tea, and Subsequent Meandering*, 33 U. PITT. L. REV. 705 (1972).

194. Since neither the district nor the circuit court had considered whether the agreement actually restrained trade within the meaning of the Sherman Act, and since the issue was not fully briefed or argued before the Court, the case was remanded for a finding of whether the agreement was an unreasonable restraint and therefore violated the Sherman Act. 421 U.S. at 637.

195. *Id.* at 625-26.

on the anticompetitive effects of the agreement in lieu of evidence of subjective intent.[196] This statement also suggests that the Court will, on the basis of the record before it, determine whether there is such a potential for restraint in a particular market that the agreement or activity should not be entitled to an exemption.

The Court's "natural effects" test also places a different onus on the parties claiming an exemption than existed under the "intimate relation" test. Rather than simply having the burden of showing that its activities or agreements are intimately related to wages, hours, and working conditions, the union must also demonstrate that the activities or agreements do not have effects unrelated to the elimination of competition over wages and working conditions. This difference becomes more pronounced if a court finds the agreement relates to wages and working conditions but also has anticompetitive effects unrelated to their elimination. If that is the case, under *Connell*, a court would focus on the magnitude of the restraint.

Beyond the particular aspects of the construction industry, *Connell* undoubtedly signals a stiffer standard for determining what is related to and constitutes wages and working conditions within the nonstatutory exemption.[197] The Court can be expected to strictly scrutinize any claimed exemption if there is a significant impact on the product market.

Certain agreements between a union and employer appear to be prime candidates for future antitrust litigation. Within the construction industry, there is a good probability that a union signatory clause will be found outside labor's antitrust exemption unless it is both part of a collective bargaining agreement and is limited to a particular jobsite. But it is possible that only one of the two requirements will have to be met due to the proviso itself and the ambiguity of the Court's opinion in this area.[198] Agreements outside the construction industry which, in all likelihood, will be held outside the labor exemption include a "most favored nation" clause[199] and a union signatory agreement including subjects beyond wages, hours, and working conditions.[200] A clause restricting sale of a business only to an employer who will assume the collective bargaining

196. *Id.* at 623.

197. *See* St. Antoine, *supra* note 5, at 630. The Court's reluctance to discern a relationship between union organizing and wages and working conditions clearly supports this point.

198. *See* text accompanying notes 119-21 *supra*.

199. *See* note 106 *supra*. *Connell* clearly indicated that such clauses were incompatible with antitrust principles. *See* text accompanying notes 105-07 *supra*.

200. *See* text accompanying notes 106-07 *supra* & note 212 *infra*.

agreement may be found outside the exemption.[201] A "union standards" clause will be held within the exemption unless it is coupled with an unlawful purpose.[202]

VIII. The Problem Of Lower Court Application

For all the fervor generated by the *Connell* decision, very little in the way of substantive antitrust litigation has transpired involving labor activity. Two decisions since *Connell* have addressed the complex problem of interpreting and applying the *Connell* guidelines.[203]

In *Mackey v. NFL*, an action had been brought by players challenging the NFL's enforcement of the Rozelle Rule, which allowed the League Commissioner to require clubs acquiring free agents to compensate the free agent's former club. The district court held that the defendant's enforcement of the Rozelle Rule constituted a concerted refusal to deal and a group boycott, and was, therefore, a per se violation of the Sherman Act.[204] On appeal, the NFL argued that it was entitled to a labor exemption from the antitrust laws. The Eighth Circuit agreed that a nonlabor group could assert and be entitled to a labor exemption,[205] but

201. Normally, a successor employer can be required to bargain with an incumbent union. *See* NLRB v. Burns Int'l Security Services, 406 U.S. 272 (1972). However, the Board has held that the union may not insist upon a "successors and assigns" clause requiring the current employer to sell the business only to a purchaser who will agree to be bound by the then current contract and to hire the incumbent work force. National Maritime Union (Commerce Tankers Corp.), 196 N.L.R.B. 1100, *enforced*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974). *See also* LAB. REL. YEARBOOK 296, 296-97 (1974). This type of clause could result in the union's loss of its exemption. *See* notes 211-17 & accompanying text *infra*.

202. A union standards clause generally provides that subcontracted employers must be willing to comply with the prevailing union wages and working conditions. Such a clause has the effect of preserving the bargaining unit's interest in maintaining wages and working conditions and not just the union's interest in preserving its existence. *See* note 212 *infra*.

203. Commerce Tankers Corp. v. National Maritime Union, 553 F.2d 793 (2d Cir.), *cert. denied*, 98 S. Ct. 400 (1977); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed per stipulation*, No. 76-932 (U.S. Sept. 12, 1977). A tangential question in *Commerce Tankers* was whether an unlawful § 8(e) clause's inclusion in a lawful collective bargaining agreement might save it from antitrust scrutiny. 553 F.2d at 801-02. In *Mackey* the court was faced with an employer group claiming a nonstatutory exemption because of the alleged inclusion of the specific clause (Rozelle Rule) in a collective bargaining agreement.

204. 407 F. Supp. 1000, 1007 (D. Minn. 1975). *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (an agreement constituting a group boycott is illegal per se under § 1 of the Sherman Act).

205. 543 F.2d at 612. "Since the basis of the nonstatutory exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, the benefits of the exemption logically extend to both parties of the agreement." *Id.*

ruled that the exemption applied only to a collective bargaining agreement clause that was the product of bona fide arm's length bargaining.[206] Further, the unusual circumstances of this case did not compel the use of a per se approach.[207] Also, from a practical standpoint, a per se analysis was unnecessary since the district court had already engaged in a lengthy inquiry into the operation of the industry in question.[208]

The *Mackey* decision is noteworthy in underscoring the importance of arm's length bargaining. Certainly *Pennington* emphasized that a collective bargaining agreement, at least with a multiemployer group, would not grant immunity in and of itself and *Connell* did not indicate otherwise.[209] Moreover, *Mackey* involved an employer group that was seeking a nonstatutory exemption and the suit had been brought by the labor group that would have been the source of the exemption. The *Mackey* court's perusal of *Pennington, Jewel Tea*, and *Connell* reveals that courts must look beyond the facade of a collective bargaining agreement and into both the nature of the bargaining relationship and the magnitude of the restraint on the product market. Of equal importance is the court's understanding that the Supreme Court's triad of labor-antitrust decisions

206. *Id.* at 614. The court gleaned certain principles from prior Supreme Court decisions concerning the proper accommodation of labor and antitrust.

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. [Citing *Connell*, 421 U.S. at 625-26]. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. [Citing *Jewel Tea*, 381 U.S. at 697]. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's length bargaining. [Citing *Jewel Tea*, 381 U.S. at 697].

543 F.2d at 614 (footnotes & citations omitted).

The Court found that the Rozelle Rule was a mandatory subject of bargaining because it restricted a player's ability to move from one team to another and depressed wages. It was, however, not the product of arm's length bargaining but had been foisted on the union by the NFL. *Id.* at 615-16.

207. *Id.* at 619. The court noted that the line of per se cases generally concerned agreements between business competitors in the traditional sense. In this case, the NFL assumed some of the characteristics of a joint venture in that each member has a stake in the success of the other teams. Moreover, the alleged restraint did not completely eliminate competition for players' services. *Id.*

208. *Id.* at 619-20. One of the underpinnings of the per se analysis is the avoidance of lengthy and burdensome inquiries into the operation of an industry. Thus, the instant case lacked much of the basis for the application of the per se doctrine.

209. The Court in *Connell* merely left open the question of whether a collective bargaining agreement could immunize an allegedly unlawful clause stating that, "[t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement." 421 U.S. at 625-26.

indicated that a rule of reason approach is appropriate in cases in which the questionable clause is contained in an agreement between a union and a multiemployer group.[210]

In *Commerce Tankers Corp. v. National Maritime Union*,[211] the Second Circuit examined a restrictive clause contained in a lawful collective bargaining agreement developed through arm's length bargaining. To make matters more difficult, the NLRB had already determined that the National Maritime Union's (NMU) enforcement of a restraint-on-transfer clause in the collective bargaining agreement with Commerce violated section 8(e) of the NLRA and the Second Circuit had granted enforcement of the Board's order.[212] In this action, Commerce argued that the restraint-on-transfer clause would not be exempt from the antitrust laws under the standards established by *Connell* and that the agreement constituted a per se illegal group boycott under section 1 of the Sherman Act.[213] The district court had already determined that the clause was not the result of a conspiracy between NMU and the large shipping companies to enhance their competitive position.[214] The court of appeals correctly realized that this finding did not preclude a full examination of the group boycott claim. Citing *Connell* for support, [215] the court noted

210. In Smith v. Pro-Football, 420 F. Supp. 738 (D.D.C. 1976), the district court found that the employers' association could not claim the labor exemption to the antitrust laws since the restrictive player draft was not part of a lawful collective bargaining agreement at the time the plaintiff signed. Moreover, a scheme advantageous to employers cannot come within the labor exemption until it becomes part of a collective bargaining agreement negotiated by the union in its own self-interest. *Id.* at 742. The court found that the player draft had no redeeming characteristics and thus was a per se violation of the antitrust laws as a group boycott and refusal to deal.

211. 553 F.2d 793 (2d Cir. 1977).

212. 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974). The court found convincing the Board's distinction between a union signatory clause and union standards clause. The former had the effect of preserving the union's interest whereas the latter preserved the bargaining unit's interest in maintaining wages and working conditions. Buttressing the court's conclusion was the evidence of the practice of NMU to strip a vessel of its seamen whenever it is sold and to have those jobs available only through its hiring hall. *Id.* at 913-14. Thus the beneficiaries of the union's clause would not be the members employed on the vessel but the membership as a whole.

213. 553 F.2d at 801.

214. 411 F. Supp. 1224 (S.D.N.Y. 1976), *aff'd in part & rev'd in part*, 553 F.2d 793 (2d Cir. 1977).

215. 553 F.2d at 802. The court noted that in *Connell*, "[t]here was no evidence that Local 100's organizing campaign was connected with any agreement with members of the multiemployer bargaining unit . . . ." *Id.* at 802 n.10 (quoting *Connell*, 421 U.S. at 625 n.2). But the Supreme Court nonetheless considered the multiemployer bargaining agreement relevant in determining the effect that the agreement would have on the business market. 421 U.S. at 623. Thus the lack of a conspiracy element clearly did not end further inquiry into the group boycott claim. It did dispense with any notion of a per se approach. Without the establishment of a *Pennington*-type conspiracy with predatory intent, *Connell* indicates that a remand for a full rule of reason inquiry is appropriate.

that on remand the district court would have to evaluate the agreement between NMU and the shipping companies for its effect on the relevant product market.[216] The court viewed *Jewel Tea* as requiring a full scale rule of reason inquiry in every instance in which a nonexempt labor activity is alleged to violate the anti-trust laws.[217]

The important question of whether the inclusion of the clause in a lawful collective bargaining agreement sheltered NMU because of the federal policy favoring collective bargaining was left unanswered.[218] Instead, the court predicated union liability on the existence of a "direct restraint on the business market . . . that would not follow naturally upon the elimination of competition over wages and working conditions."[219] This is troublesome since the Supreme Court in *Connell* faced a restrictive subcontracting agreement not contained in a lawful collective bargaining agreement. Local 100 had no intention of organizing or representing Connell's employees, and its efforts were directed at securing jobs for its members who would be newcomers to the construction site. In *Commerce*, NMU represented employees presently on the ship in question, and negotiated at arm's length over that which, in essence, was a mandatory subject of bargaining with the direct employer. Additionally, the union acted pursuant to its own self-interest and not in complicity with a nonlabor group. Disregarding these distinguishing factors, the court focused instead on the *Connell* Court's ambiguous "natural effects" test,[220] which invariably gives wider discretion to courts in determining which activity is subject to the antitrust laws. The test's application in this case left NMU liable since the restraint-on-transfer clause went to the union's survival and had little, if any, tangible effect on wages or working conditions, because a sister union would have represented any new crew a purchaser would have obtained.[221]

The *Mackey* and *Commerce* opinions indicate that *Connell* will not be applied in isolation but as merely one more piece in a far larger mosaic formed by *Allen Bradley, Pennington*, and *Jewel Tea. Connell*, however threatens to obscure those decisions if lower courts focus on its "natural

216. 553 F.2d at 802.

217. *Id.* at 802 & n.8 (quoting Handler, *Labor and Antitrust: A Bit of History*, 40 ANTITRUST L.J. 233, 239-40 (1971)). With that the court brushed aside Commerce's argument that a determination that the clause violated § 8(e) also determined the antitrust issue.

218. 553 F.2d at 801-02. The Court apparently felt that the federal policy regarding collective bargaining did not protect the agreement since it remanded to determine whether there was a direct restraint on the product market. *Id.* at 802.

219. *Id.* at 801 (quoting *Connell*, 421 U.S. at 625).

220. *See* text accompanying notes 103-04 *supra*.

221. *See* 553 F.2d at 796-97.

effects" test and overlook the narrow context of its underlying facts. While commentators have suggested that *Connell's* unusual circumstances will invariably limit its future applicability,[222] it is possible that lower courts may interpret *Connell* as signaling a stiffer standard for determining wages and working conditions within the nonstatutory antitrust exemption of *Jewel Tea*. This view is evident in *Commerce* and suggests a broad reading of *Connell*. Certainly, it suggests a close examination of agreements the Board has declared violative of section 8(e).[223]

IX. *CONNELL*: CHANGING THE COURSE OF BOARD LAW

The Supreme Court's collateral disposition of the section 8(e) proviso issue in *Connell* represented a significant departure from the Board's development of the proviso. In several pre-*Connell* cases, which did not directly raise a *Connell*-type issue, the Board had found similar subcontracting agreements to be within the proviso.[224] The General Counsel had previously issued a memorandum on the point[225] and had administratively dismissed charges which were based, at least in part, on legal arguments advanced in *Connell*.[226] Additionally, the General Counsel submitted an amicus curiae brief seeking affirmance of the lower court decision without reaching the question of whether the clause violated section 8(e), since he argued that the clause qualified for the exemption and thus jurisdiction rested with the Board.[227]

As recognized by the *Connell* Court, the primary purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same

222. *See* St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 628 (1976); Comment, *Labor's Antitrust Immunity After Connell*, 25 AM. U.L. REV. 971, 1001-02 & n.154 (1976).

223. *See* 553 F.2d at 801-02.

224. *See* Los Angeles Bldg. & Constr. Trades Council (B & J Investment Co.), 214 N.L.R.B. 562, 87 L.R.R.M. 1424 (1974); Los Angeles Bldg. & Constr. Trades Council (Church's Fried Chicken, Inc.), 183 N.L.R.B. 1032, 74 L.R.R.M. 1669 (1970).

In *B & J Investment Co.*, a general contractor, who was not signatory to any collective bargaining agreement, was pressured to sign an agreement to cease doing business with nonunion contractors. The Board upheld the agreement. The *Connell* Court noted that it was not ascertainable whether the Board had considered the absence of a collective bargaining relationship, 421 U.S. at 631-32 n.10; *see* note 115 *supra*.

225. NLRB General Counsel Memorandum Release No. R-1343 (July 2, 1974) *reprinted in* LAB. YEARBOOK, *supra* note 116, at 298; *see* notes 116-17 & accompanying text *supra*.

226. Plumber's Local 100 (Hagler Construction Co.) N.L.R.B. Case No. 16-CC-447 (1975).

227. Memorandum for the National Labor Relations Board as Amicus Curiae, Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975).

construction site.[228] Since Local 100 did not represent or seek to represent Connell's employees, Local 100 could hardly claim that the clause protected the interests of any of Connell's employees. In the Court's view, the clause merely served Local 100's interest in the "top-down" organizing of subcontractors.[229] The Court concluded that the lack of a collective bargaining relationship and the failure of the clause to be limited to particular jobsites struck a fatal blow to Local 100's agreement with Connell. The Court however, left unanswered questions concerning the scope of the proviso and the prerequisites for antitrust exemption.

In a significant development, the NLRB's General Counsel has issued a detailed memorandum delineating his interpretation of the *Connell* requirements for compliance with the construction industry proviso.[230] These requirements provide that when an employer and a union are parties to a lawful collective bargaining relationship, whether developed under section 9(a)[231] or section 8(f)[232] of the Act, they may agree to a section 8(e) clause,[233] if:

> 1) The clause is operational only at times when the employer has employees represented by the union.
>
> 2) The clause applies only to sites at which the employer has employees represented by the union.
>
> 3) In the case of a section 8(f) relationship, such relationship is not the consequence of section 8(b)(7) picketing.[234]

The General Counsel also determined that a collective bargaining relationship was not required in circumstances in which the representative of a unionized subcontractor on a jobsite had agreed with the general contractor that he should not hire nonunion subcontractors. This conclu-

228. 421 U.S. at 630; *see* Essex County & Vicinity Dist. Council of Carpenters v. NLRB, 332 F.2d 636, 640 (3d Cir. 1964).

229. 421 U.S. at 632.

230. NLRB General Counsel Memorandum Release No. 76-57 (December 15, 1976) [hereinafter G.C. Memo, 76-57]. Under § 3(d) of the Act, 29 U.S.C. § 153(d) (1970), the General Counsel is given the power to issue complaints on behalf of the Board.

231. 29 U.S.C. § 159(a) (1970).

232. 29 U.S.C. § 158(f) (1970). Section 8(f) refers to the ability of a labor organization and an employer to enter into pre-hire agreements when the labor organization has not been selected by a majority of the represented employees. Under a § 8(f) contract, after the employees are hired they are considered by the Board to be represented by that labor organization, which therefore, has an interest in them. *See* Zidell Explorations, Inc., 175 N.L.R.B. 887 (1969).

233. G.C. Memo, 76-57, *supra* note 230, at 20.

234. *Id.* The Board has held that picketing for a § 8(f) contract is violative of § 8(b)(7) which restricts "top-down" organizing. *See* Local 542, Int'l Union of Operating Eng'rs, 142 N.L.R.B. 1132, *enforced*, 331 F.2d 99 (3d Cir. 1964), *cert. denied*, 379 U.S. 889 (1964).

sion is clearly warranted by the Court's suggestion that the proviso might extend not only to agreements "in the context of [a] collective-bargaining relationship" but also "possibly to common-situs relationships on particular job sites as well."[235]

Under section 8(f), an employer and union in the construction industry are permitted to enter into "pre-hire" agreements in which a collective bargaining relationship is deemed established before any employees are hired.[236] Since the union is the representative of the employees under a lawful collective bargaining agreement, the union has a "legitimate interest in assuring that these represented employees are not required to work alongside nonunion employees."[237] Therefore the union and employer can include a section 8(e) clause within the "pre-hire" contract requiring the general contractor to use only unionized subcontractors.[238] The clause, however, cannot be effective before an employer actually hires employees or when no employees represented by the union are present at a particular jobsite.[239]

Perhaps the "most far reaching position taken by the General Counsel" and likely "to be the bitterest bone of contention" is his determination that the proviso does not protect subcontracting agreements benefiting "named" unions.[240] This particular point has prompted more inquiries than any other.[241] Parties before the General Counsel have attempted to circumvent this provision by having the restrictive subcontracting agreement describe the type of union with which the subcontractor must have a relationship, in terms of the benefits received by members.[242] Such a clause would undoubtedly reflect the benefits offered by the union seeking the agreement. This type of hybrid union

235. 421 U.S. at 633; *see* note 147 *supra*. *See also* G. C. Memo, 76-57, *supra* note 230, at 10 & n.20.

236. The unusual economics of the construction industry (short term projects, the need to calculate labor costs in advance, and the need for a readily available supply of skilled labor) convinced Congress of the necessity of permitting "pre-hire" contracts. *See* G.C. Memo, 76-57, *supra* note 230, at 7 & n.14. *See also* S. REP. NO. 187, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2344-45.

237. G.C. Memo, 76-57, *supra* note 230, at III.

238. In order to satisfy the "purpose" of the construction industry proviso, the employees covered by the "pre-hire" contract presumably are considered unionized. In that regard, the contract cannot limit the subcontracting to unit work such that nonunit work can be performed by nonunion subcontractors. *See* G.C. Memo, 76-57, *supra* note 230, at 20.

239. *See Id.* at 8.

240. Interview with Peter Mirsky, NLRB Attorney, General Counsel's Advice Section in Washington, D.C. (Oct. 19, 1977); *see* notes 153-55 & accompanying text *supra*.

241. Interview, *supra* note 240.

242. *Id.*

signatory-union standards clause should be viewed as no less a "top-down" organizing tool than the "particular" union clause, since the union seeking the clause would invariably be the beneficiary. Moreover, such a clause would appear to negate the section 7 right of employees to choose their own bargaining representatives.

In a supplemental memorandum, the General Counsel also addressed the problem of the parties' intention in drafting and applying a particular subcontracting clause.[243] The memorandum stated that if the parties entered into an impermissibly broad agreement, the parties may offer evidence that it was their mutual intention, at the time of the agreement, that the clause operate only when represented employees were present, and that the clause had been applied consistently with that interpretation.[244] This determination comports with the general rule that a violation of section 8(e) turns on contractual intent and application.[245]

The General Counsel has done an exacting job of interpreting *Connell's* proviso guidelines. The Memorandum's effectiveness in discouraging restrictive subcontracting clauses unrelated to the problem of jobsite friction will, to some degree, depend upon the ingenuity of construction industry unions in devising circumventing clauses.[246] To a greater degree, its effectiveness depends upon the extent to which the Board affirms those guidelines.

X. CONCLUSION

The General Counsel's handling of the construction industry proviso issue has interjected needed clarity into this troublesome area of the law. Hopefully, the Board will move quickly to implement the General Counsel's guidelines in decisional law, especially the "particular" union provision. That provision offers profound implications for the traditional craft unions' hold over construction industry employees and presents a viable route for the introduction of new labor organizations in the area. One can expect intense litigation over that provision. A possible alternative approach for construction unions in the wake of the *Connell* guidelines would be to conclude union standards agreements by which contractors agree to subcontract only to firms having wage and working

243. NLRB General Counsel Memorandum, No. 77-2 (Jan. 10, 1977).

244. *Id.* at 1.

245. *See* Teamsters Local 386 (Construction Material Trucking Inc.), 198 N.L.R.B. 1038 (1972).

246. For instance, a union representing the general contractor's employees could easily avoid the particular jobsite limitation by having a requirement incorporated into its collective bargaining agreement with the general contractor that at least one of the general contractor's employees be present at each of his construction sites.

condition standards equal to or exceeding those of area union workers. Under *Apex*, there should be no problem with antitrust liability in removing these standards from competition.

Lower courts have tended to minimize the impact of the restrictive implications of the *Connell* decision.[247] This may be due, in part, to the ambiguity of the decision and to the narrow context of its underlying facts. This suggests that the *Allen Bradley-Pennington-Jewel Tea* line of cases will continue to exert substantial influence in lower court opinions.

The courts have continually demonstrated that they are ill-suited to the task of reconciling the broad proscriptions of the antitrust laws with the regulatory scheme of the labor statutes. The Supreme Court's view of the proper balance between these policies has often been at odds with that of Congress. More recently, Congress indicated that it considers the *Connell* decision contrary to congressional purposes in the accommodation of the antitrust and labor policies.[248] Congress, however, has been unable to muster the votes necessary to reverse the effects of *Connell* or to inject needed clarity in this troublesome area of the law. Until it does so, one should not be surprised at the courts' imposition of their own view of the proper balance to be achieved between labor and antitrust.

*Robert G. Conway**

247. In Carpenters v. General Contractors, 404 F. Supp. 1067 (N.D. Calif. 1975), the court stated that disputes between unions and employers do not normally give rise to violations of the antitrust laws. Only an agreement between a union and employer to conspire in some respect gives rise to an antitrust violation. In Ackerman-Chillingworth v. Pacific Elec. Contractors Assoc., 405 F. Supp. 99 (D. Hawaii 1975), the court discussed the labor exemption in terms of *Allen Bradley* without discussing *Connell*.

248. The criticism of *Connell* came in the somewhat unrelated context of hearings on the Common Site Picketing Bill, H.R. 5900 & S. 1479, 94th Cong., 1st Sess. (1975). *See* Kilberg, *Interpretation of the Supreme Court's Decision in Connell Construction Company and its Impact on the Situs Picketing Bill*, 127 B.N.A. Daily Lab. Rep. (July 1, 1975).

* At the time of the publication of this comment, the author was Counsel to Boardmember John C. Truesdale of the National Labor Relations Board. The opinions expressed are the author's own and not those of the National Labor Relations Board.