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Antitrust--Sherman Act--Sections 1 & 2 Held Applicable to Labor Union-Employer National Wage Agreement (United Mine Workers v. Pennington, 381 U.S. 657 (1965))

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RECENT DECISIONS

ANTITRUST — SHERMAN ACT — SECTIONS 1 & 2 HELD APPLICABLE TO LABOR UNION-EMPLOYER NATIONAL WAGE AGREEMENT. — Appellant-union entered into a collective bargaining contract with several large coal companies and agreed to impose the terms of the national wage agreement upon all coal operators regardless of their ability to pay. The United States Supreme Court *held* that an agreement between a union and one group of employers to secure uniform labor standards throughout an industry is not exempt from antitrust legislation.[1] However, the court of appeals' affirmance of the district court's judgment for the defendant-coal company was reversed on the ground of an improper jury instruction. *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

From 1890 until 1930, organized labor suffered serious disadvantages in its drive to obtain effective bargaining power.[2] In 1890, Congress passed the Sherman Anti-Trust Act which made certain combinations and conspiracies in restraint of trade illegal.[3] The legislative history indicates that the Act was not intended to be applied to labor unions.[4] However, in *Lawlor v. Loewe,*[5] the United States Supreme Court affirmed the conviction of a union for violating the Sherman Act. Disturbed at the hostility of the courts, the American Federation of Labor made a determined effort to influence federal legislation during the early 1900's.[6] This effort culminated in the passage of the Clayton Anti-Trust Act [7] in 1914

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[1] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958). In general, § 1 prohibits combinations in restraint of trade, and § 2 provides for criminal prosecution.

[2] See GREGORY, LABOR AND THE LAW 158-223 (2d ed. 1961).

[3] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-4 (1958).

[4] Senator Sherman, speaking on the floor of the U.S. Senate, declared that his bill had nothing to do with labor unions. COHEN, LABOR LAW 117 (1964). See also Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies,* 110 U. PA. L. REV. 1094 (1962).

[5] 235 U.S. 522 (1915). The Court concluded that a secondary boycott which unlawfully interfered with interstate commerce fell within the strictures of the Sherman Act.

[6] The union presented a "Bill of Grievances" to the President and Congress asking for immunity from the Sherman Act. COHEN, *op. cit. supra* note 4, at 119.

[7] Section 6 states: "The labor of a human being is not a commodity or article of commerce. . . ." 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958). Section 20 bars injunctions "in any case between an employer and employees, or between employers and employees" involving a dispute over terms and conditions of employment. 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958).

which attempted, *inter alia,* to discourage the application of the Sherman Act to labor unions by protecting certain labor conduct from injunction. The ambiguous wording of the new Act, however, fostered the holding in *Duplex v. Deering*[8] that the Clayton Act was not a bar to antitrust prosecution where union activities *restrained* interstate commerce. *Duplex's* true significance is found in the prophetic dissent of Justice Brandeis who asserted that the Clayton Act was meant to legalize certain labor behavior regardless of its effect on commerce.[9]

With the economic depression of the 1930's came the substantiation of the Brandeis dissent. The demise of a conservative Congress resulted in the passage of the Norris-LaGuardia Act in 1932[10] which, without the ambiguities contained in the Sherman Act, eliminated the use of injunctions against unions involved in "labor disputes."[11] In 1935, the National Labor Relations Act[12] (popularly known as the Wagner Act) limited an employer's right to interfere with union activities and determined that wages, hours, and other terms and conditions of employment were *mandatory subjects* over which labor and management must bargain. With the attainment of such favorable legislation, labor then looked to the courts for support.[13] In *Apex Hosiery Co. v. Leader,*[14] the Supreme Court declared that a union strike, utilized to effectuate a wage agreement with an employer, was not subject to the antitrust laws regardless of its effect on interstate commerce. In *United States v. Hutcheson,*[15] the Court read the Norris-LaGuardia Act[16] in conjunction with the Clayton Act[17] and concluded that action

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[8] 254 U.S. 443 (1921). The Court noted that the individuals engaged in the strikes and boycotts were not employees of the Duplex Company. From this it concluded that the Clayton Act was not applicable since it only exempted cases between employers and employees. *Accord,* Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927).

[9] Duplex v. Deering, 254 U.S. 443 (1921) (dissenting opinion).

[10] 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1958).

[11] A "labor dispute" was defined as including any controversy over terms and conditions of employment. 47 Stat. 73 (1932), 29 U.S.C. § 113 (1958).

[12] 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1958). The Act set up a three-man National Labor Relations Board which has been said to have reflected the desire of Congress to narrow the judiciary's role in the formulation of labor policy by entrusting principal enforcement responsibilities to an administrative agency. Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities,* 73 YALE L.J. 14, 38 (1963).

[13] President Roosevelt's attempt to "pack" the Supreme Court in 1937 was an important factor in the Court's change of attitude. SCHLESINGER, THE POLITICS OF UPHEAVAL chs. 24, 25, 26 (1960).

[14] 310 U.S. 469 (1940). *Cf.* Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940).

[15] 312 U.S. 219 (1941).

[16] 47 Stat. 73 (1932), 29 U.S.C. § 113 (1958).

[17] 38 Stat. 731 (1914), 29 U.S.C. § 52 (1958).

taken pursuant to a "labor dispute," which could not be enjoined under the Clayton Act, was ipso facto exempt from the Sherman Act. The Court clarified *Hutcheson* in *Allen Bradley Co. v. Local 3, IBEW*,[18] by stating that a union violated the Sherman Act if it combined with *non-labor groups* to create business monopolies and to control the marketing of goods and services.

Thus, labor unions were exempt from antitrust legislation except in cases where direct evidence of a conspiracy was revealed.[19] The courts uniformly declared that the formulation of labor policy fell within the province of the legislature rather than the judiciary.[20] As a result, the courts would not make a determination as to whether a union had a legitimate interest in a subject of collective bargaining, but rather, would not interfere with labor-management relations except in instances of clearly apparent conspiracies in restraint of trade.[21]

Such broad immunity from the antitrust laws led to many abuses by organized labor.[22] This, combined with the improved public image of business after World War II, resulted in the 1947 Taft-Hartley amendments to the Wagner Act.[23] The amendments enumerated unfair union practices and set up a system for policing collective bargaining. Disenchantment with labor activities continued into the early 1950's when corrupt union practices[24] gave birth to the Landrum-Griffin amendment,[25] which set up rules by which the internal structures of unions were to be regulated.

In the instant case, the trustee of a union welfare fund filed suit in a federal district court against a coal company for failure to

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[18] 325 U.S. 797, 808 (1945). The union was convicted in this case of aiding non-labor groups to create business monopolies. *Accord,* United States v. Employing Plasterers Ass'n, 347 U.S. 186, 190 (1954); United Bhd. of Carpenters v. United States, 330 U.S. 395 (1947); Local 175, IBEW v. United States, 219 F.2d 431 (6th Cir. 1955).

[19] See Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 805-11 (1945).

[20] See Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 102-03 (1940); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 562 (1938).

[21] See, *e.g.,* Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Union, 346 U.S. 485 (1953).

[22] See GREGORY, LABOR AND THE LAW 279-88 (2d ed. 1961); Hunt v. Crumboch, 325 U.S. 821 (1945).

[23] 61 Stat. 136 (1947), 29 U.S.C. §§ 141-68 (1958). Some other important provisions of the Act were: (1) a ninety day "cooling off" period after a strike deadline if the work-stoppage threatened the national security, (2) unions had a right to choose their own bargaining agents or to reject unions altogether, (3) it was an unfair labor practice for a union or its agents to use force or direct threats to impose organization on unwilling employees.

[24] Television coverage of the Senate investigation of the Teamsters Union did considerable damage to labor prestige. See KENNEDY, THE ENEMY WITHIN (1960).

[25] 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964).

make royalty payments under a collective bargaining contract containing a national wage agreement.[26] The coal company filed a cross-claim against the union alleging a violation of the antitrust laws because of a union agreement with the larger employers to impose the terms of the wage agreement upon all operators regardless of their ability to pay. The trustee made a motion to dismiss alleging that the agreement concerned a mandatory subject of collective bargaining and thus was immune from antitrust prosecution.[27] The motion was denied and the jury returned a verdict against the union[28] which was affirmed by the court of appeals.[29] The United States Supreme Court reversed, but did not disturb the lower court's finding that the union was not exempt from the antitrust laws.

The majority opinion, by Mr. Justice White, reasoned that Section 20 of the Clayton Act and Section 4 of the Norris-La-Guardia Act permit unions to act *alone* with immunity from antitrust prosecution, but that neither act deals with agreements between unions and employers.[30] It further determined that although wages are a mandatory subject of collective bargaining, agreements concerning them are not per se exempt from antitrust legislation, since the policy of the antitrust laws is enunciated clearly against employer-union agreements seeking to prescribe labor standards outside the bargaining unit.[31] The Court concluded that the union did not have a legitimate interest in the subject matter of the agreement because the union benefits to be derived therefrom would be indirect.

Mr. Justice Goldberg concurred in the reversal but dissented from the opinion, reasoning that labor-management agreements involving *mandatory subjects* of collective bargaining are per se exempt from the antitrust laws unless there is direct evidence of a conspiracy in restraint of trade. In his view, a determination by the courts as to what are *legitimate interests* of unions would usurp the power of Congress in the field of labor legislation.[32]

Mr. Justice Douglas, concurring in the reversal, reasoned that an industry-wide wage agreement containing provisions, the pur-

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[26] United Mine Workers v. Pennington, 381 U.S. 657 (1965).

[27] Lewis v. Pennington, TRADE REG. REP. (1961 Trade Cas.), ¶70,036 (FTC Dkt. 3431, May 17, 1961).

[28] *Id.* at 78,129.

[29] Pennington v. United Mine Workers, 325 F.2d 804 (6th Cir. 1963).

[30] *Supra* note 26, at 661-62. The opinion of the Court, expressing the views of six members, was written by Mr. Justice White. Mr. Justice Douglas concurred joined by Mr. Justice Black and Mr. Justice Clark. Mr. Justice Goldberg, joined by Mr. Justice Harlan and Mr. Justice Stewart, concurred in the reversal but dissented from the opinion.

[31] *Id.* at 664-65.

[32] The concurring opinion of Mr. Justice Goldberg is contained in Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 709 (1965).

pose of which is to force some employers out of business, is prima facie evidence of a violation of the antitrust laws.[33]

The Court decided *Pennington* and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[34] on the same day. In *Jewel Tea,* the appellant, a butchers' union, was convicted by the court of appeals [35] of violating the Sherman Anti-Trust Act on the ground that it entered into an agreement with a group of employers to limit the operational hours of meat markets. The Supreme Court reversed on the narrow factual ground that the union did have a legitimate interest in the marketing hours of its employer since the additional hours of operation would increase the workload of the butchers.[36] Mr. Justice White, writing the opinion of the Court,[37] made it clear, however, that if an intimate connection between hours of work (which is a mandatory subject of collective bargaining) and hours of sale had not been evident, the union would have lost its immunity from the Sherman Act.

A combination of the majority view in *Pennington* and the opinion of the Court in *Jewel Tea* restricts the broad exemption from antitrust liability previously enjoyed by labor. A collective bargaining agreement between a union and an employer which is intended to secure a uniform standard may now subject the union to antitrust liability. The courts will now be carefully examining collective bargaining agreements when antitrust suits are brought. If the agreement concerns a mandatory subject of collective bargaining, there will be no automatic exemption from antitrust liability, although it will be considered strong evidence in favor of immunity.[38] The courts may evaluate the directness of the benefit to the union before applying the possible exemption. If the agreement concerns a non-mandatory subject of bargaining, this of itself, will be substantial evidence of antitrust liability because of the lack of a strong union interest.

The above conclusions do not necessarily mean that there will be an increase in antitrust convictions, but in determining whether or not a labor exemption exists, the type and quantum of evidence admissible in ordinary antitrust actions, including indirect evidence and inferences, will be applicable in labor situations. A judge and

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[33] *Supra* note 26, at 673.

[34] Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965).

[35] Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters, 331 F.2d 547 (7th Cir. 1960).

[36] *Supra* note 34, at 682.

[37] The opinion of the Court was written by Mr. Justice White and joined in by Chief Justice Warren and Mr. Justice Brennan. Mr. Justice Goldberg concurred joined by Mr. Justice Harlan and Mr. Justice Stewart. Mr. Justice Douglas dissented joined by Mr. Justice Black and Mr. Justice Clark.

[38] *Supra* note 34, at 689.

jury may now exercise discretion which was not previously available in applying antitrust standards to labor-management agreements. This may give rise to evidentiary difficulties in ascertaining whether a union was acting alone or in concert with other employers. Especially significant is the fact that there was no direct evidence of a conspiracy in *Pennington,* but that this fact was inferred from the wage agreement and the circumstances arising therefrom. There may also be a judicial tendency toward a liberal construction of the "conspiracy" concept, which may lead to antitrust convictions on the basis of a collective bargaining agreement alone.[39]

The instant case represents a setback for organized labor. Unions will be more restrained at the bargaining table; they will try to avoid non-mandatory subjects in fear of setting adverse precedent. In addition, there is the possibility of court-and-jury-made labor legislation,[40] which may reflect the growing dissatisfaction with union policies which has asserted itself in the past two decades.

CONSTITUTIONAL LAW — STATE'S POWER TO REGULATE NON-RETAIL PRICING OF LIQUOR HELD CONSTITUTIONAL. — Plaintiff sought an injunction to restrain the enforcement of that section of the New York Alcoholic Beverage Control Law which regulated the price at which brand-name liquor was sold in New York.[1] Plaintiff contended that since the law was not designed to promote temperance, it was an unconstitutional exercise of police power and an unjustified interference with interstate commerce. In sustaining the statute, the Court of Appeals, in a four to three decision, *held* that the regulation was within the broad police power traditionally exercised by the states under the twenty-first amendment. *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 16 N.Y.2d 47, 209 N.E.2d 701, 262 N.Y.S.2d 75 (1965).

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[39] It is possible that the "most favored nation" clause, found in many labor-management agreements, is now invalid according to the instant case. This clause allows renegotiation by the employer if competitors secure more favorable terms from the union. 59 LAB. REL. REP. (27 L.R.R.M.) 238, 242-43 (Aug. 2, 1965).

[40] This is the reasoning of Justice Goldberg. *Supra* note 34, at 697 (concurring opinion).

[1] The section provided that vendors must sell brand-name liquor in New York at prices certified by them to be no higher than the lowest price at which the brand was sold to any wholesaler or state agency elsewhere in the country, during the previous month. N.Y. ALCO. BEV. CONTROL LAW § 101-b(3)(d)-(k) (Supp. 1965).