

LABOR LAW AND ANTITRUST: "SO DECEPTIVE AND OPAQUE ARE THE ELEMENTS OF THESE PROBLEMS"*

A review of the scope of the labor exemption to the antitrust laws and an explication of how its limits remain undefined by the divergent opinions of the Justices of the Supreme Court in Jewel Tea and Pennington. Emphasis is placed on the evidentiary problems that result from the divergence.

SINCE the passage of the Sherman Act in 1890,¹ a perennial debate has raged over the proper application of the antitrust laws to the labor movement. Although the unions had long opted for an *absolute* right of employees to organize and pursue their mutual benefit,² at an early date such activity was held subject to antitrust strictures on the theory that the act did not contemplate discrimination between sources of restraint on trade.³ In time, however, Congress determined that labor was to be at least partially protected from the effects of the Sherman Act,⁴ and today sections six and twenty

* Local 309, Int'l Bhd. of Teamsters v. Hanke, 339 U.S. 470, 478 (1950).

¹ "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . declared to be illegal." Sherman Act § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

² Cf. CHAMBERLAIN, *COLLECTIVE BARGAINING* 23-47 (1951). The unions also asserted that the Sherman Act was intended primarily to apply to business combinations and thus that it should not be extended to the dissimilar labor field without a specific congressional mandate. See BERMAN, *LABOR AND THE SHERMAN ACT* 1-30 (1930) [hereinafter cited as BERMAN]; see also 21 CONG. REC. 2461-67 (1890). However, the government generally resisted this argument in antitrust prosecutions. See Miller, *Antitrust Labor Problems: Law and Policy*, 7 LAW & CONTEMP. PROB. 82-84 (1940). See also Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 30-32 (1963). See generally Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 802 & n.3 (1945), for a comprehensive list of the relevant congressional material.

³ E.g., *Loewe v. Lawlor*, 208 U.S. 274 (1908); *United States v. Debs*, 64 Fed. 724 (C.C.N.D. Ill. 1894); *United States v. Amalgamated Council*, 54 Fed. 994 (C.C.E.D. La. 1893). See also BERMAN 284-325, for a collation of the earlier cases. While it could be argued that ordinary union activity necessarily tends to restrain trade, it was never argued that unions themselves, as distinguished from their activities, were per se illegal. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 438-39 (1911). See also *Hitchman Coal & Coke Co. v. Mitchell*, 202 Fed. 512 (N.D.W. Va. 1912), *rev'd*, 214 Fed. 685 (4th Cir. 1914), *rev'd*, 245 U.S. 229 (1917).

⁴ The Clayton Act §§ 6, 20, 38 Stat. 731, 738 (1914), 15 U.S.C. § 17 (1964), 29 U.S.C. § 52 (1964), provided the first exemption of labor from the antitrust laws. The legislative history of this new law was unclear. See FRANKFURTER & GREENE, *THE LABOR INJUNCTION* 141-45 (1930) [hereinafter cited as FRANKFURTER & GREENE]. However, the courts soon determined that the stated exemption was applicable only to transactions involving unions and employees directly parties to a given labor dispute. See, e.g., *Duplex Print-*

of the Clayton Act⁵ coupled with sections four and thirteen of the Norris-LaGuardia Act⁶ are interpreted as providing that specified types of union activity undertaken in the course of a labor dispute are to be exempt from prosecution under the federal antitrust laws. When confronted with questions arising under these sections the courts have found the labor exemption and the Sherman Act difficult to reconcile.⁷ Efforts to harmonize these clashing policies have precipitated holdings that union activity which arguably falls within the exemption may lose its protected character where the union has combined with non-labor groups.⁸ However, since

ing Press Co. v. Dearing, 254 U.S. 443 (1921), discussed in FRANKFURTER & GREENE 166-70. For a parallel account see Winter, *supra* note 2, at 33-34. Thus, in the *Duplex* case the Clayton exemption was extended only to defendants directly in the employ of a plaintiff corporation. Duplex Printing Press Co. v. Dearing, *supra* at 472-74. This distinction between primary and secondary activity seems to have originated in *Loewe v. Lawlor*, *supra* note 3. Since § 16 of the act also authorized injunctive relief on private motion, incorporation of the primary-secondary distinction into the Clayton Act served to further harass union organization attempts. 38 Stat. 737 (1914), 15 U.S.C. § 27 (1964). See Winter, *supra* note 2, at 34. Injunctive relief was not available to employers under the Sherman Act. WITTE, *THE GOVERNMENT IN LABOR DISPUTES* 131 (1932). Sections 4 and 13 of the Norris-LaGuardia Act abolished the primary-secondary dichotomy insofar as private remedies available under the Clayton Act were concerned, and in *United States v. Hutcheson*, 312 U.S. 219 (1940), this exemption was extended to criminal penalties under the Sherman Act on the grounds that to do otherwise would be inconsistent with congressional purpose. See also Goldberg, *Unions and the Antitrust Laws*, 7 *LAB. L.J.* 178, 184-86 (1956).

⁵ "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, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organization, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws." Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

"No restraining order or injunction shall be granted by any court of the United States . . . in any case between employer and employees . . . growing out of a dispute concerning terms and conditions of employment . . ." Clayton Act § 20, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1964).

⁶ 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 104, 113 (1964). This legislation has been held to represent an expansion and clarification of the aims of the Clayton Act. *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 806 (1945); *United States v. Hutcheson*, 312 U.S. 219, 231 (1940).

⁷ "The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining." *Allen Bradley Co. v. Local 3, IBEW*, *supra* note 6, at 806.

⁸ *E.g.*, *UMW v. Pennington*, 381 U.S. 657 (1965); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Allen Bradley Co. v. Local 3, IBEW*, *supra* note 6. In the latter case, it was found that the exemption had been vitiated by the union's combination with several employer associations. The court noted that "the union's contribution to the trade boycott was accomplished through threats that unless their employers bought their goods from local manufacturers the union

the theoretical basis for this limitation is uncertain the exact scope of the exemption remains vague.

The limits of the labor exemption were recently at issue before the Supreme Court in *UMW v. Pennington*⁹ and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,¹⁰ and the divergence of opinion in these cases again illustrated the unsettled status of labor unions vis-a-vis the antitrust laws. Moreover, in the course of the opinions a substantial disagreement among the Justices was manifested as to the proper use of circumstantial evidence of the existence of a prohibited combination.¹¹ The following review of *Jewel Tea* and *Pennington* is designed to focus on both of these interrelated questions, and will undertake to divine the ramifications of the divergent views enunciated by the various Justices.

PRIOR TREATMENT OF THE LABOR EXEMPTION

The labor exemption was framed in its present statutory form by the Norris-LaGuardia Act in 1932.¹² Although it was arguable that the passage of this act and the complementary Wagner Act¹³ indicated a congressional intent to deprive the federal courts of the power to affect national labor policy,¹⁴ the Supreme Court in *Apex*

laborers would terminate the 'relationship of employment' and cease to perform 'work or labor' for them; and through their 'recommending, advising or persuading others by peaceful and lawful means' not to 'patronize' sellers of the boycott or electrical equipment." *Id.* at 807.

⁹ 381 U.S. 657 (1965).

¹⁰ 381 U.S. 676 (1965).

¹¹ There was no opinion of the Court in *Jewel Tea*. Mr. Justice White, joined by the Chief Justice and Mr. Justice Brennan wrote one opinion supporting reversal, *id.* at 679-97, while Mr. Justice Goldberg joined Justices Harlan and Stewart in urging reversal. *Id.* at 726-35. Mr. Justice Douglas' dissenting opinion was concurred in by Justices Black and Clark. *Id.* at 735-38.

Mr. Justice White's opinion is labelled the opinion of the Court in *Pennington*. 381 U.S. at 659-72. However, Mr. Justice Douglas wrote a concurring opinion for Justices Black and Clark. *Id.* at 672-75. Mr. Justice Goldberg, representing Justices Harlan and Stewart, concurred in the reversal in *Pennington*, but dissented from the opinion of the Court. *Id.* at 697-725.

¹² Norris-LaGuardia Act, 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1964), contained substantially the same provisions as the Clayton Act, and seems to have been designed to erase the court-created primary-secondary dichotomy. See note 4 *supra*.

¹³ National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-67 (1964).

¹⁴ The two statutes, when read together, 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 with-

*Hosiery Co. v. Leader*¹⁵ indicated that a violation of the antitrust laws would be found where 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.¹⁶ Subsequently, in *United States v. Hutcheson*,¹⁷ the Court seemingly shifted its focus from the effect of union activity on the market to the nature of the activity itself, and noted that under the exemption provided by section 20 of the Clayton Act:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit . . . 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.¹⁸

This statement, while perhaps indicative of a policy shift, left several questions unanswered. For instance, in the following term the Court indicated that no exemption would be accorded where the matter before it could not be characterized as a "labor dispute."¹⁹ Thus, an obvious question arose as to whether the "licit and illicit" nature of union activity could be examined and utilized as a criterion for the purpose of determining whether the matters at issue actually involved a labor dispute.²⁰ Moreover, granting the existence of a

holding the conduct of labor regulation from the jurisdiction of the courts. For general background in this area see FRANKFURTER & GREENE 231-78. See also WITTE, *op. cit. supra* note 4, at 131.

¹⁵ 310 U.S. 469 (1940).

¹⁶ Mr. Justice Stone concerned himself primarily with the question of whether an actual violation of the Sherman Act had occurred, and thus did not specifically consider the nature and extent of the exemption itself. It may be argued that in light of subsequent opinions the *Apex* court actually considered only the question of whether it had jurisdiction of the suit under the antitrust laws, and thus that no authoritative pronouncement was made concerning actual union liability.

¹⁷ 312 U.S. 219 (1941).

¹⁸ *Id.* at 232. Even though an argument could be made for complete immunity, the Court apparently thought that it would be too dramatic a policy reversal to offer labor a blanket exemption. *Nye v. United States*, 313 U.S. 33, 56-57 (1941) (Stone, J., dissenting). See also Miller, *Antitrust Labor Problems: Law and Policy*, 7 LAW & CONTEMP. PROB. 82 (1940), for a pre-*Hutcheson* discussion of the same problem.

¹⁹ *United States v. Hinton*, 315 U.S. 143 (1942).

²⁰ This question was discussed in the opposing briefs in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945). The defendant union contended that a labor organization must both combine with non-labor groups and cease to act in its own self-interest to fall without the exemption. Brief for Respondent pp. 34-35. The plaintiff, on the other hand, argued that the existence of a combination is irrelevant and unnecessary so long as the union pursued a "non-labor" objective, Brief for Petitioner, p. 27, since the presence of such an objective would be inconsistent with the existence of a labor dispute. *Id.* at 18-25. Ironically, although this argument was rejected, the plaintiff won its case.

labor dispute in a particular case, unanswered questions were raised by the requirement that a union must pursue its "self-interest" in order to fall within the exemption. For instance, although a union presumably always acts to further its own interest, it was suggested that the exemption might be vitiated where union activity benefits non-labor groups as well as the union membership.²¹

The Supreme Court remained notably unhelpful in resolving these issues²² until they were squarely presented in *Allen Bradley Co. v. Local 3, IBEW*.²³ In *Allen Bradley*, the union instituted a drive to organize the employees of most of the electrical equipment manufacturers and contractors in the New York area. In the course of this drive a series of agreements was negotiated whereby the contractors agreed to deal only with those manufacturers organized by the union, and the manufacturers in turn agreed to follow a similar procedure with regard to contractors. The resultant insulation from competition allowed the manufacturers to raise prices and the contractors to fix bids, ultimately resulting in higher wages and shorter hours for Local 3's membership.²⁴ The Supreme Court

²¹ See 29 CALIF. L. REV. 399, 408 (1941).

²² Following *Hutcheson*, the Court confined itself to rendering memorandum opinions on these matters. See *United States v. International Hod Carrier's Council*, 313 U.S. 539 (1941) (per curiam) (antitrust prosecution dismissed where union attempted to force employers to refrain from using labor saving devices); *United States v. American Fed'n of Musicians*, 318 U.S. 741 (1941) (per curiam) (antitrust prosecution dismissed where union, with cooperation of employers, attempted to eliminate recordings and music of non-union artists from the air waves).

²³ 325 U.S. 797 (1945).

²⁴ The defendant union was a member of the New York Building Trades Council, an affiliation that included some 120 local unions engaged in the building and construction industries. This Council had, prior to the events at issue, established procedures whereby any of its constituents could serve notice of injury caused by the unfair labor practice of any of the local building contractors and could in extreme cases call all of the members of the affiliated unions out on strike. In 1934 the defendant union sought to replenish its declining membership by organizing the employees of a group of local electrical equipment manufacturers. These manufacturers were in precarious financial positions and consequently paid wages substantially below the scale which the union habitually requested. However, the organization attempt was completely successful and the newly organized manufacturers substantially increased their wage scales. This increase was made possible by further actions of the union. Pursuant to the Building Council's procedures, the union had declared all producers of electrical equipment other than those local manufacturers organized by itself to be "unfair." This action placed any local building contractors dealing with other equipment manufacturers under the threat of immediate and serious strike. As a result the local manufacturers found themselves virtually without competition and able to raise prices to levels which would more than finance wage increases.

This arrangement was in turn made more palatable to the local building contractors by the establishment of an association of contractors and union representatives

held that although the union was acting in its own economic self-interest, this activity nonetheless fell without the purview of the labor exemption to the antitrust laws.²⁵

Although the exact basis of this holding is unclear, the decision did purport to resolve some of the ambiguities presented by *Hutcheson*. The Allen Bradley Company had argued that Local 3 was not entitled to an exemption under the Norris-LaGuardia Act because that union's unlawful intent had carried its conduct out of the context of a labor dispute.²⁶ The Court, however, specifically

which enforced a "Voluntary Code" governing bid procedures. The code, originally incorporated in various union-contractor collective bargaining agreements, provided that all bids for work within New York City had to be submitted in advance to a code committee for approval. Any bid ten per cent or more below the average of other bids for a particular job was to be investigated to determine whether an intent to engage in price cutting was involved. Substantial fines could be levied if such an intent were found. The contractors, of course, benefited from this arrangement in that it served as a vehicle to insulate them from any substantial competition among themselves. They also benefited from any increase in manufacturer prices, since the conventions adopted by the code committee required that members were to compute "commissions" on individual jobs by taking a percentage of the cost of materials.

The above statement of facts is derived substantially from the opinion of the lower court. *Allen Bradley Co. v. Local 3, IBEW*, 41 F. Supp. 727, 731-33 (S.D.N.Y. 1941), *rev'd*, 145 F.2d 215 (1944), *rev'd*, 325 U.S. 797 (1945). For the final disposition of the case at that level see 51 F. Supp. 36 (S.D.N.Y. 1943).

²⁵ 325 U.S. at 809.

²⁶ See discussion note 20 *supra*. This point is crucial when it is noted that by its terms the Norris-LaGuardia exemption obtains only when a given altercation can be characterized as a "labor dispute." Norris-LaGuardia Act § 1, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1964). Further, the Supreme Court by interpretation has indicated that such characterization may be made only when the dispute at issue arises somewhere within the matrix of a general employer-employee controversy. Thus, in *Columbia River Packers v. Hinton*, 315 U.S. 143 (1942), a dispute between a processor of fish and an organization of fishermen was held to be not a labor dispute and not within the labor exemption, since the fishermen could be more readily termed independent contractors than employees. On the other hand, in *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959), a union-management contract clause specifying minimum truck rentals to be paid third-party independent contractors was held to be sufficiently related to a labor dispute to be exempted from prosecution under state antitrust laws.

While *Hinton* may be rationalized by the statement that no labor dispute existed because no party to the controversy could be termed an employee, other cases indicate that not all actions of bona fide employees automatically fall within the exemption. For instance, in *Los Angeles Meat & Provision Drivers v. United States*, 371 U.S. 94 (1962), the union persuaded four self-employed grease peddlers to join in order that between them they might control the flow of waste grease from California restaurants to overseas purchasers. The Court held that such activity was without the labor exemption since there was found "no job or wage competition or economic interrelationship of any kind between the grease peddlers and other members of the . . . union." *Id.* at 103. Since strictly speaking the peddlers and the union were related economically through their common interest in the product market, the Court was obviously speaking to the fact that such relationship could in no way be termed "employment-related." Further, it would appear that the labor exemption has been

found a labor dispute present²⁷ and considered only the extent of protection afforded the activity at issue. Moreover, by terming irrelevant the lower court's finding that the union acted in its own economic self-interest, the Court apparently indicated that in the presence of a combination it was willing to make distinctions between the types of objectives which might be characterized as "protected" under the *Hutcheson* rubric of "self-interest."²⁸ On the other hand the Court also reaffirmed the *Hutcheson* view that a combination with non-labor groups was a necessary prerequisite to loss of the exemption, expressly noting that the union might have escaped antitrust liability had it negotiated its agreements with each individual employer rather than with employer groups.²⁹

withdrawn in these situations even where the union refrains from combining with non-union groups, but rather acts through an agency of its own to accomplish objectives unrelated to an employment-based controversy. See *Streiffer v. Seafarers Sea Chest Corp.*, 162 F. Supp. 602 (E.D. La. 1958). Further, some cases indicate that union attempts to control an employer's exercise of management prerogatives also will not be considered to arise out of a labor dispute. *Opera on Tour, Inc. v. Weber*, 285 N.Y. 348, 34 N.E.2d 349 (1941). See *Amalgamated Meat Cutters v. Jewel Tea Co.*, (opinion of White, J.), indicating that the scope of permissible union demands is to be determined by a process of weighing the adverse effect on competition against the directness of the union's interest. See also *Order of R.R. Telegraphers v. Chicago & N'wn Ry.*, 362 U.S. 330 (1960).

²⁷ 325 U.S. at 807 n.12. "It has been argued that no labor disputes existed. The argument is untenable. We do not have here, as we did in *Columbia River Packers Ass'n v. Hinton*, . . . a dispute between groups of businessmen revolving solely around the price at which one group would sell commodities to another group. On the contrary, Local 3 is a labor union and its spur to action related to wages and working conditions." *Ibid.*

²⁸ However, it is of course also possible to argue that the *Allen Bradley* holding was not intended to be read into the general structure established by *Hutcheson*, and thus that the case is a kind of sport that should be strictly limited to its facts. As an historical matter such an approach appears especially relevant in view of language in the opinion which seemed to indicate that the Court employed no general theory as a basis for its holding, but rather looked only at the particular anomaly which would be created if it held otherwise. See note 30 *infra*.

²⁹ 325 U.S. at 807, 810. The Court noted that "*aside from the fact that the labor union here acted in combination with the contractors and manufacturers, the means that it adopted to contribute to the combination's purpose fall squarely within the 'specified acts' declared by § 20 [of the Clayton Act] not to be violations of federal law* Consequently, under our holdings in the *Hutcheson* case and other cases which followed it, had there been no union-contractor-manufacturer combination the union's actions here, coming as they did within the exemptions of the Clayton and Norris-LaGuardia Acts, would not have been violations of the Sherman Act." *Id.* at 807. (Emphasis added.) Subsequently the Court reiterated its stand and expressly stated that "our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with non-labor groups." *Id.* at 810.

The approbation of parallel as opposed to multi-employer bargaining seems also to

The chief interpretive problems posed by *Allen Bradley* have centered around the effort to establish an adequate theoretical basis for distinguishing between legitimate and illegitimate combinations. This effort has in turn been hampered by the variety of factors adumbrated by the Court in the course of its opinion. The Court repeatedly observed that Congress could not have intended that a combination of employers in violation of the Sherman Act could be insulated from antitrust prosecution merely by the participation of a labor union.³⁰ This emphasis would seem to be rather

be supported by *Hunt v. Crumboch*, 325 U.S. 821 (1945), a companion case to *Allen Bradley*. In *Crumboch*, the union, because of labor difficulties with an interstate carrier, refused to allow that carrier's employees to join the union and simultaneously negotiated an agreement with A & P, the carrier's primary customer, which restricted A & P exclusively to truckers with union shop arrangements. The Court held that these union activities were within the labor exemption on the grounds that, *inter alia*, there was no combination of the union with non-labor groups. Thus the case was viewed as falling squarely within the *Hutcheson* rule. In view of the union's agreement with A & P, it is probably incorrect to state that no combination with non-labor groups existed; rather, the union had engaged in no *relevant* combinations. Although the precise standards of relevance are unclear, it is obvious in *Crumboch* that the contracting non-labor group received no competitive advantage from the extinction of its trucker, and it might be argued that this is the distinguishing feature of the case.

The importance of the "self-interest" rubric has been revived by *Republic Prod., Inc. v. American Fed'n of Musicians*, 245 F. Supp. 475 (S.D.N.Y. 1965), which construed the *Pennington* and *Jewel Tea* decisions as pointing "to the union's self-interest as the supreme test of antitrust immunity." *Id.* at 481. The plaintiff-employer argued that the union's conduct was not exempt under *Pennington* since that case held that the exemption of § 20 of the Clayton Act and § 4 of the Norris-LaGuardia Act did not control cases in which there was a union-employer agreement. The agreement by which plaintiff attempted to negate the immunity of the labor exemption was the collective bargaining agreement itself. *Id.* at 480. The court rejected this argument pointing out that this agreement, standing alone, is insufficient to vitiate the exemption. Evidence that the union conspired with one group of producers to injure another was essential to the exemption violation in *Pennington*. *Ibid.* See also 34 *FORDHAM L. REV.* 286, 295-97 (1965), which maintains that the "conspiracy" must be shown by reference to an agreement independent of the collective bargaining contract. But what evidence would be admissible to establish such an "independent agreement"? See text accompanying notes 88-110 *infra*.

³⁰ "There is . . . one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." 325 U.S. at 811.

The Court also noted that although it had previously held that combinations of labor unions, and businessmen were in violation of the act, see *Local 167, Int'l Bhd. of Teamsters v. United States*, 291 U.S. 293 (1934), and *United States v. Brims*, 272 U.S. 549 (1926), those cases were not persuasive since at the time of their decision the Court's attention was not sharply focused on the "crucial questions" presented in *Allen Bradley*. 325 U.S. at 807-08. This cryptic statement indicates an intent to retreat somewhat from the Court's previous position, which had tended to lay special emphasis on the impact of union activity on the product and geographic markets. See *United States v. Brims*, *supra* at 552. This retreat was especially apparent

unusual in view of the fact that only the union was being prosecuted in the particular action before the Court, and the courts have shown little inclination to limit *Allen Bradley* to this narrow interpretation.³¹

The interpretive problem is further complicated by the fact that the *Allen Bradley* Court was somewhat misleading in its statement of the facts. The Court speaks of the union as "aiding and abetting" the conspiracy³² when in fact the union would be more accurately characterized as a prime mover than a mere assistant.³³ Thus, one who felt constrained to read the case narrowly might argue that given the Court's enunciation of the union's role, the exemption was to be lost only where the union was being employed as a "tool" of management.³⁴ In light of the actual facts, however, it is arguable that a broader reading of the opinion was justified.

in *Allen Bradley* when the Court noted that regardless of the effect on the product and geographic markets the actions of Local 3 would fall within the exemption so long as the union did not combine with non-labor groups. 325 U.S. at 809. Presumably this statement may be interpreted to mean that the union might have lawfully achieved the same ends by using conventional economic pressures and negotiating parallel agreements with each contractor individually. See Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 671 (1965).

³¹In *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954), and its companion case, *United States v. Employing Lathers Ass'n*, 347 U.S. 198 (1954), trade unions were allegedly involved in a combination with business groups. The Court held it was error to have dismissed the civil Sherman Act action on grounds that the government had failed to state a claim upon which relief could be granted. No special allegation of an employer combination already in violation of the antitrust laws was required. See also *United Bhd. of Carpenters v. United States*, 330 U.S. 395 (1947).

³²325 U.S. at 801. See *id.* at 820-21 (dissenting opinion).

³³The findings of the district court, undisputed by either the court of appeals or the Supreme Court, stated: "It appears clearly . . . that . . . the local manufacturers were forced by the 'economic powers' of the local union to consent to the signing up of all their employees by the defendant local, obviously in consideration of their obtaining the exclusive market for their products in the metropolitan area, and the barring from the metropolitan area of all similar products made by others." *Allen Bradley v. Local 3, IBEW*, 41 F. Supp. 727, 732 (S.D.N.Y. 1941), *rev'd*, 145 F.2d 215 (1944), *rev'd*, 325 U.S. 797 (1945).

³⁴"And if it [the union] did [participate], benefits to organized labor cannot be utilized as a cat's paw to pull employer's chestnuts out of the antitrust fires." *United States v. Woman's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949) (citing *Allen Bradley*). For an example of a case in which the FTC apparently was influenced by whether the union was acting as an instrumentality of management or its own membership, see *California Sportswear & Dress Ass'n*, 54 F.T.C. 835, 893 (1957). The employment of this kind of a test, of course, is predicated as much on *Hutcheson* as on *Allen Bradley*, and thus involves the problem of the essential ambiguity of the "self-interest" test. However, the Commission also indicated that it would look to whether competition had *in fact* been stifled by the union-employer arrangements. *Ibid.* This additional criterion would seem to imply that the Commission itself was not satisfied with the *Hutcheson* rule. Further, the new requirement of competitive effect may

Some courts have interpreted *Allen Bradley* as broadly encompassing the rule that a union falls outside of the labor exemption whenever it combines with management to fix prices and allocate markets.³⁵ This interpretation also may be justified by reference to the language of the opinion, since the Court frequently adverted to this aspect of the union's activities.³⁶ Finally, it has been maintained that *Allen Bradley* may properly be read to stand for the proposition that any union-employer group combination is without the exemption where such combination is designed to allocate to the employer some benefits characteristic of a monopoly.³⁷ However, this interpretation would achieve an identical result regardless of the organization of a union's undertaking, and this in turn would seem to run directly counter to the *Allen Bradley* Court's implication that identical union activities with the same basic objectives may be protected when pursued alone but unprotected when pursued in conjunction with multi-employer bargaining units.³⁸

RECENT DECISIONS OF THE SUPREME COURT—PENNINGTON:

*"There is a Limit as to What Can Be Offered or Extracted
in the Name of Wages"*

The vagaries of the *Allen Bradley* doctrine formed the context of the recent decisions in *UMW v. Pennington* and *Amalgamated Meat Cutters v. Jewel Tea Co.* The antitrust issue in *Pennington*

also be grounds for reading *California Sportswear* as interpreting *Allen Bradley* as outlawing union-employer agreements where the employer realizes monopoly benefits. See discussion note 38 *infra* and accompanying text.

³⁵ This interpretation is favored at least in part by Mr. Justice Goldberg. See *Jewel Tea Co.*, 381 U.S. at 728-29. Further, practically every labor antitrust prosecution involves either price-fixing or market allocation. *E.g.*, *United Bhd. of Carpenters v. United States*, 330 U.S. 395 (1947) (cause of action stated when it was alleged that union had contracted to help management association establish a local monopoly in return for higher wages); *Local 175, Int'l Bhd. of Elec. Workers v. United States*, 219 F.2d 431 (6th Cir.), *cert. denied*, 349 U.S. 917 (1955) (union aided electrical contractors in establishing enforcement procedures for rigged bids); *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954) (union aided plumbing contractors in establishing enforcement procedures for rigged bids).

³⁶ 325 U.S. at 808-09.

³⁷ In the ordinary case this test would have substantially the same effect as the "price fixing and market allocation" approach. See cases cited note 35 *supra*.

³⁸ As proposed by Meltzer, this test would look only to the economic effects of a union's activity, and thus a union which negotiated identical parallel agreements with individual employers would be treated in exactly the same way for labor exemption purposes as one which negotiated a single contract with a single multi-employer bargaining unit. See Meltzer, *supra* note 30, at 734. Thus Professor Meltzer is compelled by the interior logic of his position to view the distinction between

arose as a cross-claim to the union's suit against a marginal coal operator for overdue royalty payments owed to an employee welfare and retirement fund.³⁹ The essential allegation of the cross-claim was that the union and the major coal operators had conspired to drive marginal operators out of business, thereby restraining trade in the bituminous coal industry. The plaintiff contended that the conspiracy was primarily effectuated by the use of the 1950 Bituminous Coal Wage Agreement (BCWA),⁴⁰ which he had signed in 1952. It contained provisions for wage and welfare fund royalty payments which were beyond the marginal operator's ability to meet. The BCWA also barred signator companies from leasing coal land to firms who failed to comply with the terms of the national agreement, and a subsequent amendment prohibited the parties from buying or selling the coal of such companies.⁴¹ The union embarked on an intensive campaign to impose the terms of the BCWA on the marginal producers. In addition, the union agreed

parallel individual and multi-employer agreements as a basic defect in the *Allen Bradley* opinion.

³⁹ 381 U.S. at 659-61. Phillips Brothers Coal Company, under the terms of the agreement it had signed with the union, was required to pay a forty cent royalty on each ton of coal mined to the Welfare and Retirement Fund of the UMW. It was alleged by the trustees of the fund that the company was \$55,000 in arrears. *Lewis v. Pennington*, 1961 Trade Cas. 78125-33 (E.D. Tenn.), *aff'd sub nom. Pennington v. UMW*, 325 F.2d 804 (6th Cir. 1963), *rev'd*, 381 U.S. 657 (1965).

⁴⁰ Since 1950, the bargaining pattern of the industry has been one which the coal operators of northern Appalachia have dominated. After a contract is negotiated with their association, the terms thereof are submitted to corresponding southern and midwestern associations as well as individual operators. From 74% to 79% of the industry operates under uniform terms as a result of this procedure. *Raymond O. Lewis*, 144 N.L.R.B. 228, 230-31 (1963).

⁴¹ This amendment was promulgated in 1958 and was known as the "Protective Wage Clause." *Id.* at 240. The Court stated that it barred the purchase and sale of coal from "nonunion companies." 381 U.S. at 660. Although the BCWA may have such an effect in practice, the finding is not literally accurate, since the clause merely provided "that all bituminous coal . . . procured or acquired by . . . [signator companies] under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract." *Raymond O. Lewis*, *supra* note 40, at 240. Hence nonunion companies adhering to *all* the terms of the BCWA could transact business with signatories.

These provisions were the subject of an unfair labor practice proceeding in which the union was held to have violated § 8(e) of the National Labor Relations Act. *Id.* at 238-39. The NLRB said this section prohibits entering into a contract in which the employer agrees to cease or refrain from doing business with any other person unless the contract is "intended to reserve, for the employees within the bargaining unit, work which they have traditionally performed." *Id.* at 234. The violation therefore was posited on the finding that the design and intent of these provisions was to "regulate the employment terms and conditions of employees of other employers with whom the signator employers may do business," rather than preserve "work for employees covered by the contract." *Id.* at 237. The union and operators

to and actively participated in mechanizing the industry, allegedly to enable the major coal operators to absorb the costs of the increased wage and welfare fund payments.⁴²

The BCWA made it impractical for marginal coal operators to retain major private coal companies as a market for their coal. The Tennessee Valley Authority markets,⁴³ however, provided an alternative outlet for the marginal operators. It was alleged that steps were also taken to foreclose these markets. The major companies and the union purportedly succeeded in convincing the Secretary of Labor to exercise his authority under the Walsh-Healy Act⁴⁴ to impose a high minimum wage on companies competing to supply T.V.A. under contracts exceeding 10,000 dollars.⁴⁵ The T.V.A. spot market for contracts of less than 10,000 dollars was not subject to the terms of the Walsh-Healy Act,⁴⁶ but it was allegedly rendered unprofitable by the sharp decrease in prices that occurred after two companies in which the union owned a controlling interest "dumped"⁴⁷ substantial tonnage into this market without regard to profits.⁴⁸

were ordered to cease and desist from maintaining, enforcing or giving effect to these provisions or entering into like provisions. *Id.* at 239.

⁴² 381 U.S. at 660.

⁴³ There were two "T.V.A. markets." Contracts for over \$10,000 constituted the "term market," whereas those under \$10,000 are "spot" orders and are exempt from the Walsh-Healy Act. *Lewis v. Pennington*, 1961 Trade Cas. 78125, 78128 (E.D. Tenn.), *aff'd sub nom.* *Pennington v. UMW*, 325 F.2d 804 (6th Cir. 1963), *rev'd*, 381 U.S. 657 (1965).

⁴⁴ "That in any contract made and entered into by any executive department, independent establishment, or other agency . . . of the United States . . . or by any corporation all the stock of which is beneficially owned by the United States . . . for the . . . furnishing of materials, [or] supplies . . . in any amount exceeding \$10,000, there shall be included the following representations and stipulations:

. . . .

"(b) That all persons employed by the contractor . . . will be paid . . . not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work . . . or similar industries . . . currently operating in the locality in which the materials [and] supplies . . . are to be . . . furnished under said contract . . ." 49 Stat. 2036 (1936), 41 U.S.C. § 35 (1964).

⁴⁵ It was alleged that the wage rate imposed was twice as high as the wage rate determined by the Secretary of Labor in any other industry. *Lewis v. Pennington*, 1961 Trade Cas. 78125, 78127 (E.D. Tenn.), *aff'd sub nom.* *Pennington v. UMW*, 325 F.2d 804 (6th Cir. 1963), *rev'd*, 381 U.S. 657 (1965).

⁴⁶ See notes 43-44 *supra*.

⁴⁷ The alleged "dumping" was done by West Kentucky Coal and its subsidiary, Nashville Coal Company, which were repositories for \$25,000,000 of union capital investments. *Lewis v. Pennington*, 1961 Trade Cas. 78125, 78128 (E.D. Tenn.), *aff'd sub nom.* *Pennington v. UMW*, 325 F.2d 804 (6th Cir. 1963), *rev'd*, 381 U.S. 657 (1965).

⁴⁸ *Lewis v. Pennington*, *supra* note 47, at 78137.

The Union denied the allegations of conspiracy and maintained that the negotiation and execution of the BCWA and its subsequent amendments were exempt from the antitrust laws since these activities furthered legitimate labor objectives.⁴⁹ The Union rationalized the leasing and "boycotting" provisions of the national agreement as protective devices designed to prevent signatories from evading the terms of the agreement,⁵⁰ and explained its acquiescence to mechanization as an acceptance of "an outgrowth, result and development of American economy in the industry over the years."⁵¹

The district court instructed the jury that it must consider the BCWA and its amendments as lawful and nonviolative of the Sherman Act if they were included at the behest of the union to protect its wage scale and other benefits and to prevent evasion by the signatories rather than as a result of a conspiracy between the union and the major operators.⁵² The resulting jury verdict for the defendant on his cross-claim was affirmed by the court of appeals, which found a sufficient factual basis for the decision in the circumstantial evidence of a conspiracy in restraint of trade.⁵³ A

⁴⁹ *Id.* at 78129. Moreover, the union maintained that even if there was interference with the coal production of Phillips Brothers, such a restraint of trade was insufficient for proscription under the Sherman Act. *Id.* at 78130. Presumably the union was relying on *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). See Winter, *supra* note 2, at 55; text accompanying note 15 *supra*.

⁵⁰ *Lewis v. Pennington*, *supra* note 47, at 78134-36. Since the major operators may not have enough coal of special quality on hand to meet the demands of their larger customers they are often forced to buy "supplementary" coal from substandard producers. The price of this coal is often below the production cost of the major coal companies, since labor is the main cost factor. Hence these operators may be tempted to buy substantial amounts of coal as a substitute for production in the majors' mines. Layoffs in the unionized mines may result from this practice. See Raymond O. Lewis, 144 N.L.R.B. 228, 236-37 (1963).

⁵¹ *Lewis v. Pennington*, *supra* note 47, at 78129. Prior to 1950 the union opposed mechanization and consistently bargained for a three-day week. 381 U.S. at 660. The advocacy of the three-day week was one method of combating unemployment occasioned by overproduction in the industry. Although a three-day week is a method primarily aimed at maintaining as many jobs as possible, there is evidence that this was not the overriding concern of the union even prior to 1950. Coexistent with the aim of retaining jobs was an attempt to upgrade pay, security and benefits of existing jobs. Hence, there was a union policy which, if successful, might lead to acceptance of a reduction in the total number of jobs through institution of automation as a quid pro quo for upgrading. See *id.* at 698 and authorities cited therein (Goldberg, J., concurring in part).

⁵² *Lewis v. Pennington*, *supra* note 47, at 78135.

The district court change seemingly emanates from *Allen Bradley*. The analogy is posed by the fact that the exemption would be vitiated upon a finding of union-employer conspiracy, with the existence of a labor dispute being assumed by the charge. *Id.* at 78131.

⁵³ *Pennington v. UMW*, 325 F.2d 804 (6th Cir. 1963), *rev'd*, 381 U.S. 657 (1965).

divided Supreme Court, however, reversed and remanded on the basis of a harmful error in the trial court's charge. The opinion of the Court, written by Mr. Justice White, found the charge defective insofar as it authorized a finding of conspiracy from the showing of a union-management effort to persuade the Secretary of Labor to apply a high minimum wage to suppliers of the T.V.A. term market.⁵⁴ Since concerted action to influence public officials even as a part of a larger conspiratorial scheme cannot be the basis of an antitrust violation, the Court held that the jury was misled as to the sources of evidence which might be considered in finding the needed conspiracy.⁵⁵

The Court did hold, however, that there were allegations of agreement which, if proven, would cause the union to lose its exemption.⁵⁶ If it could be clearly shown that the union "agreed with one set of employers, to impose a certain wage scale on other bargaining units," the union would lose any claim to exemption in spite of the fact that wages are a mandatory subject of bargaining.⁵⁷ The White opinion did not clearly indicate whether the factual showing sufficient to vitiate the labor exemption would be

⁵⁴ 381 U.S. at 669-70.

⁵⁵ *Ibid.* The Court relied on *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In this case an association of railroads and a public relations firm were charged with conspiring to restrain trade in and monopolize the long-distance freight business. The firm conducted a publicity campaign against truckers, part of which was aimed at maintaining and adopting legislation deleterious to the trucking business. The Court noted that concerted attempts to influence legislation are not within the prohibitions of the Sherman Act since any resulting restraint would arise from government action. *Id.* at 135-36. It was further held that even if such concerted influencing was done with a predatory purpose as part of a greater endeavor to bring economic hardship upon competitors, it would still be exempt. The Court reasoned that persons may by right seek self-interested legislation and, moreover, the government is in need of the information received through the admittedly biased lobbying conduit. *Id.* at 138-40. The court of appeals in *Pennington* was held to have misread the *Noerr* opinion when it limited its application to lobbying not a part of a larger conspiratorial scheme. 381 U.S. at 669-70.

⁵⁶ Mentioned but not principally relied upon was the alleged agreement that the union would utilize the coal companies in which it held a controlling interest to drive prices down in the T.V.A. spot market so as to force marginal operators out of that market. *Id.* at 663. These allegations are also alluded to in the concurring opinion written by Mr. Justice Douglas as evidence of a union-management conspiracy. *Id.* at 674.

⁵⁷ *Id.* at 665-66.

The National Labor Relations Act § 8(d), 61 Stat. 142 (1947), as amended, 29 U.S.C. § 158(d) (1964), purports to delineate mandatory subjects of bargaining: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . ."

enough to establish a violation of the antitrust laws.⁵⁸ Such a showing for Mr. Justice Douglas, however, would be sufficient to constitute prima facie evidence of an antitrust violation. The concurrence of the three Justices who joined in the Douglas opinion was necessary to elevate the White opinion to that of the Court.⁵⁹ These Justices subscribed to the White opinion by reading it as instructing the trial court to charge the jury to find a violation of the antitrust laws if the wage scale of the collective bargaining agreement "exceeded the financial ability of some operators to pay" and was designed to drive these companies out of business.⁶⁰

The concurring Justices' concern with an actual violation of the antitrust laws stands in contradistinction to the White opinion's involvement with the status of the labor exemption from these laws. Mr. Justice Douglas takes the position that proof of an industry-wide collective bargaining agreement containing terms that could not be met by some members of the industry is "prima facie evidence of a violation" of the antitrust laws.⁶¹ Given a collective bargaining

⁵⁸ After pointing out that the exemption would be forfeited upon a clear showing that the union "agreed with one set of employers to impose a wage scale on other bargaining units," the opinion of the Court states that "one group of employers may not conspire to eliminate competitors from industry and the union is *liable* with the employers if it becomes a party to the conspiracy." 381 U.S. at 665-66. (Emphasis added.) The opinion subsequently asserts that such extra-unit bargaining unlawfully limits the union's freedom and that this defect is present "without regard to predatory intention . . ." *Id.* at 668. Since predatory purpose is the crux of a conspiracy it would seem that a distinction is being made between conspiring and extra-unit bargaining.

⁵⁹ Justices Brennan and Warren joined in the majority opinion written by White. Justices Black and Clark concurred in the Douglas opinion. Justices Goldberg, Stewart, and Harlan concurred in the reversal in *Pennington* but dissented from the opinion. See text accompanying notes 79-87 *infra*.

⁶⁰ 381 U.S. at 673. See *id.* at 670-73. This holding was viewed by Douglas as a reaffirmation of the principles of *Allen Bradley*. *Id.* at 672. It is difficult to determine, however, exactly what "principles" in *Allen Bradley* are being reaffirmed. Mr. Justice Douglas cites language in *Allen Bradley* to the effect that "[the Sherman Act] intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the . . . Act." *Id.* at 674. This would seem to imply that the action of the employer-defendants in *Pennington*, without the union's participation, would have been in violation of the Sherman Act.

⁶¹ 381 U.S. at 673. (Emphasis added.)

Douglas reads the opinion of the Court as directing the trial judge that:
"First. On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.

"Second. An industry-wide agreement containing those features is prima facie evidence of a violation." 381 U.S. at 672-73.

agreement of this nature, the question of exemption from the anti-trust laws appears immaterial under the Douglas interpretation. Rather, to avoid the strictures of the antitrust laws, the union must refute the prima facie case established by proof of the collective bargaining agreement and its effects.

JEWEL TEA: "*There is no litmus paper test to determine whether a particular bargaining provision is within the labor exemption.*"

In *Jewel Tea*, a companion case to *Pennington*, 9,000 Chicago retailers and seven unions were engaged in contract negotiations covering virtually all butchers in the area. Jewel Tea was one of several concerns that sought to relax restrictions contained in the existing contract that prohibited the sale of meat after six o'clock in the evening.⁶² The union rejected these proposals and threatened to strike those concerns who failed to sign the agreement containing the restrictions. Since Jewel Tea was the single holdout, it was eventually forced to succumb to this pressure and sign the agreement.⁶³ Subsequently, Jewel Tea brought an action against the

The meaning of an "industry-wide agreement" is nowhere specified with precision. It could mean a collective bargaining agreement signed by all members of the industry or one signed by the major members thereof. Further, it might connote an agreement, *other than* a collective bargaining contract, between the union and the major members of the industry to impose the terms of a collective bargaining agreement on all members of the industry. A second question concerns the "features" of an agreement which taint it with the onus of prima facie illegality. Presumably, the allusion to "features" is referring back to the first section of the proffered charge to the jury. If so, the "features" subsume only a high wage scale aimed at driving competitors out of business. Arguably this is only one feature—an excessive wage scale—having a "feature" of its own—an aim to drive competition out of business. There are other features of the contract that might be relevant, such as the leasing and "boycott" provisions. Yet no reference is made to them in the proffered charge. See note 97 *infra*.

⁶² There was a long history of union concern with the hours at which meat was to be sold. As early as 1920 there was a collective bargaining agreement containing the provision that "no customers will be served who come into the market after 6 P.M. and 9 P.M. on Saturdays and on days preceding holidays . . ." 381 U.S. at 695. Jewel Tea instituted a self-service meat operation in 1948, and during the 1957 bargaining negotiations Jewel Tea broached the suggestion that the marketing restrictions be relaxed so as not to apply to self-service vending of meat. *Id.* at 694-96.

The union maintained that where self-service night operations were in effect, ostensibly without the use of butchers, customer service was still needed and these butchering tasks were performed by non-butchers. Moreover, preparation for night self-service operations increased the workload of the butchers during the day. *Id.* at 696.

⁶³ Jewel Tea's plea that the marketing restrictions were illegal fell on deaf ears. The union rejected its plea and a counteroffer, and authorized a strike. Under this pres-

union and the signatory retailers to invalidate the provisions of the contract prohibiting the night sale of meat as violative of sections 1 and 2 of the Sherman Act.⁶⁴

The district court dismissed the complaint after a full trial of the case, holding that the "record was devoid of any evidence to support a finding of a conspiracy" to impose the prohibitions on Jewel Tea.⁶⁵ The court further held that the union's action was within the labor exemption since it concerned terms and conditions of employment.⁶⁶ Moreover, the district court ruled that there could be no violation of the antitrust laws even if the union's action was not exempt since it did not result in an unreasonable restraint of trade.⁶⁷ The court of appeals reversed,⁶⁸ ruling that the contract provisions restricting operating hours interfered with the exercise of a proprietary function and thereby constituted an unreasonable restraint of trade.⁶⁹ The Supreme Court reversed and reinstated the judgment of the district court, but the majority was unable to agree on a common opinion.⁷⁰

Mr. Justice White, writing for Mr. Chief Justice Warren and Mr. Justice Brennan, noted that the issue on which certiorari was granted was whether the limitations on the sale of meat constituted a labor

sure Jewel Tea ended its stand as the only remaining member of the industry not being a signator of the contract. National Tea, a former dissenter, acceded to union demands earlier. *Id.* at 680-81.

⁶⁴ The action was brought in 1958 against seven local unions, the Associated Food Retailers of Greater Chicago, Inc. (Associated), and Associated's Secretary-Treasurer. *Id.* at 681. Renegotiations of the contract occurred in 1959 and 1961, with Jewel Tea's signing preconditioned on reservation of the rights under this action. *Id.* at 694 n.7.

⁶⁵ Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters, 215 F. Supp. 839, 845 (E.D. Ill. 1963), *rev'd sub nom.* Jewel Tea Co. v. Associated Food Retailers, 331 F.2d 547 (7th Cir. 1964), *rev'd sub nom.* Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965).

⁶⁶ 215 F. Supp. at 846-48.

⁶⁷ *Id.* at 848-49.

⁶⁸ Jewel Tea Co. v. Associated Food Retailers, 331 F.2d 547 (7th Cir. 1964), *rev'd sub nom.* Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965).

⁶⁹ 331 F.2d at 549. The court proceeded to assert that from the evidence it was clear that the union and the association of retailers, Associated, entered into a combination which constituted a conspiracy. The court cited *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939), indicating that the proscription of conscious parallelism contained in that case was applicable in *Jewel Tea* in that each retailer knew or was aware that all other members of the industry were being presented with the same contract, and that the necessary effect of wholesale acceptance would be an unreasonable restraint on trade. Hence, the court of appeals ordered that operations under the contract be enjoined and remanded with instructions that damages be ascertained and awarded. *Jewel Tea Co. v. Associated Food Retailers*, *supra* note 68, at 551.

⁷⁰ 381 U.S. at 697.

dispute and therefore fell within the labor exemption and *not* whether there had been a violation of the antitrust laws.⁷¹ The opinion asserted that the limitations were within the labor exemption since the union's interest was so *immediate* and *direct* as to outweigh the effect upon competition.⁷² The immediacy and directness of the union's interest emanated from the fact that night self-service operations would encroach on the butchers' workload and jurisdiction over their designated tasks.⁷³ This encroachment was deemed a question of fact for the trial court and its findings were held not to be so clearly erroneous as to warrant reversal.⁷⁴

In dissent, Justices Douglas, Black and Clark argued that the multi-employer collective bargaining agreement was not exempt from the antitrust laws and that evidence of a *prima facie* violation had been established.⁷⁵ They viewed the principles of *Allen Bradley* as dictating that the union's conduct was not immune since the contract and the context in which it was negotiated showed that the union was attempting to aid a non-labor group, retailers,⁷⁶ by

⁷¹ The Supreme Court had limited certiorari to the question of whether the contract was exempt absent a finding of conspiracy. 381 U.S. at 684 n.3. The White opinion interpreted the opinion of the court of appeals as having found a violation of the Sherman Act on the broad ground of concerted interference with a proprietary function, *id.* at 690-91, thus making it unnecessary to disturb the district court's finding that there was no conspiracy. *Id.* at 689.

⁷² "And, although the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement, the concern of union members is immediate and direct. Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work." *Id.* at 691.

⁷³ "If it were true that self-service markets could actually operate without butchers, at least for a few hours after 6 P.M., that no encroachment on butchers' work would result and that the workload of butchers during normal working hours would not be substantially increased, Jewel's position would have considerable merit. For then the obvious restraint on the product market—the exclusion of self-service stores from the evening market for meat—would stand alone, unmitigated and unjustified by the vital interests of the union butchers which are relied upon in this case. In such event the limitation imposed by the union might well be reduced to nothing but an effort by the union to protect one group of employers from competition by another, which is conduct that is not exempt from the Sherman Act. Whether 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 692-93.

⁷⁴ *Id.* at 694-97. Mr. Justice White's opinion stated that the court of appeals had found it unnecessary to review the trial court's findings on the effect night marketing would have on the butchers' workload or jurisdiction. Hence, there was no basis for the Supreme Court to refute the court of appeals' interpretation of the factual determinations made at the trial level. *Id.* at 683-84.

⁷⁵ *Id.* at 736-37.

⁷⁶ *Id.* at 737. The member of the Associated Food Retailers were not self-service

forcing Jewel Tea to give up the competitive advantage it had over that group.⁷⁷ Moreover, Mr. Justice Douglas challenged the factual basis for the finding of immediacy and directness since there was "indisputable evidence" indicating that self-service operations could be carried on without encroaching on the workload or jurisdiction of the union.⁷⁸

THE GOLDBERG VIEW: *The Labor Exemption is
Coextensive with Mandatory Subjects of Bargaining*

Mr. Justice Goldberg, writing for Justices Harlan and Stewart, took a completely different approach to the problems raised by *Pennington* and *Jewel Tea*.⁷⁹ He urged that collective bargaining agreements concerning mandatory subjects of bargaining⁸⁰ be exempt from antitrust litigation⁸¹ in order to preserve the institution of collective bargaining in any meaningful form.⁸²

Goldberg termed *Pennington's* requirement of unilateral action unrealistic in light of the nature of the collective bargaining process. An employer who desires to bargain in good faith should inform the union that competitive conditions prevent it from meeting the union's demands unless the competition is required to meet similar demands. However, under the *Pennington* holding, if such a statement by the employer were followed by union activity aimed at "bringing the competition along," subsequent anti-trust liability could result.⁸³ Moreover, to determine whether the union has "acted unilaterally," the courts under the *Pennington* rationale must investigate the terms of collective bargaining agreements. If the inquiring court determines that the terms are economically or

markets. Therefore they employed more butchers than did Jewel Tea. By failing to compete with the self-service markets their business might well decline and employment opportunities for butchers would consequently suffer. Thus, both the retailers and the union had a joint interest in maintaining the share of the market served by the former.

Another danger to the retail group was the possibility that marketers who took advantage of Jewel Tea's night meat opportunities might become accustomed to doing all their shopping at Jewel Tea. This market shift could likewise be detrimental to both the unions and their alleged co-conspirators.

⁷⁷ *Ibid.*

⁷⁸ *Id.* at 737-38.

⁷⁹ *Id.* at 697 (dissenting from the opinion in *Pennington* but concurring in the reversal; concurring in the judgment in *Jewel Tea*).

⁸⁰ See note 57 *supra*.

⁸¹ 381 U.S. at 731-32.

⁸² *Id.* at 713-26.

⁸³ *Id.* at 715-16.

socially undesirable, it might well infer some sort of submerged conspiracy behind the provisions.⁸⁴ This to Goldberg was tantamount to resurrecting the type of judicial control over national labor policy that Congress abolished when it destroyed "government by injunction."⁸⁵

These Justices also found the White opinion in *Jewel Tea* faulty for its encroachment upon mandatory subjects of bargaining by vitiating the exemption accorded these areas through a determination of their importance to the worker.⁸⁶ Like *Pennington's* judicial intrusions into the collective bargaining process, this too runs contrary to the national labor policy as expressed by Congress.⁸⁷

The Evidentiary Approaches

In light of the divergence of opinion in *Pennington* and *Jewel Tea*, it is hazardous to state what variables they add to the body of antitrust law. The practitioner, however, must advise his clients in light of the existence of these opinions. In a field posing the spectre of treble damages, it is essential to divine a minimal area of agreement among a majority of the Court on how unions may retain exemption from the antitrust laws. In this regard, it is crucial to ascertain whether a majority of the Court ascribes to a single evidentiary scheme. Vitiating of the exemption is greatly dependent upon the type of evidence the Court will consider and the probative effect it will accord this evidence.

The White view looks beyond the collective bargaining agreement for evidence which will vitiate the labor exemption. Extra-unit bargaining, the basic defect for which the exemption may be

⁸⁴ *Id.* at 716-19.

⁸⁵ FRANKFURTER & GREENE 1, 20, 142. Under the unilateral action requirement of *Pennington*, when the trier of fact infers a conspiracy from the terms of the collective bargaining agreement it undoubtedly has some standard in mind, the fulfillment of which leads it to conclude that a conspiracy is extant. In the wage context of *Pennington*, the trier of fact has, in essence, established a wage ceiling. An agreement that exceeds this ceiling is susceptible of conspiratorial inferences. 381 U.S. at 718-19.

⁸⁶ *Id.* at 727-28. See text accompanying notes 72-73 *supra*.

⁸⁷ *Id.* at 726-29. The White opinion in *Jewel Tea* was also refuted as taking an unduly narrow view of the legitimate interests of labor unions in its holding that if self-service operations could be run without impinging on the workload or jurisdiction of the union or its members, no exemption from the antitrust laws would be applicable. *Id.* at 692. If, to protect the job security of union members, it were necessary to aid the small retailers by imposing limitations on business hours, Mr. Justice Goldberg would retain exemption for the union since their concern would be job security, a mandatory subject of bargaining. *Id.* at 728.

lost under the White rationale in *Pennington*, is not a fact that will ordinarily appear on the face of the agreement.⁸⁸ Nor can the immediacy and directness of the union's interest be gleaned from mere terms of the contract.⁸⁹ Combined with this receptivity for extrinsic evidence is a respect for the trial court's more proximate assessment of this evidence, as indicated by White's acceptance of the lower court decisions in both *Pennington* and *Jewel Tea*.⁹⁰

On the other hand, Mr. Justice Douglas in *Pennington* could be read as asserting that prima facie evidence of a violation can be established from a collective bargaining agreement pernicious on its face.⁹¹ Consideration must be paid, however, to language in the Douglas opinion in *Jewel Tea* which indicates that he may not be relying solely on the collective bargaining agreement for his evi-

⁸⁸ "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and work vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. *There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency.*" 381 U.S. at 665 n.2. (Emphasis added.)

⁸⁹ To ascertain whether the union's interest in the provisions was immediate and direct, the White group looked to the long history of union interest in *Jewel Tea*'s night service provision, note 62 *supra*, as well as to the manner in which the marketing of meat was carried on. 381 U.S. at 694-97.

⁹⁰ In *Pennington*, the issue on appeal was whether there was evidence sufficient to take the case to the jury and sustain its finding of an antitrust violation. The trial judge had overruled the union's motion to dismiss and allowed the jury to rule on the evidence. *Lewis v. Pennington*, 1961 Trade Cas. 78126 (E.D. Tenn.), *aff'd sub nom. Pennington v. UMW*, 325 F.2d 804 (6th Cir. 1963), *rev'd*, 381 U.S. 657 (1965). Although the Supreme Court reversed and remanded, the White opinion found that the allegations and supporting evidence were sufficient to vitiate the labor exemption if the jury believed the evidence. White found that the fatal admission of evidence regarding administrative lobbying without a proper cautionary charge so beclouded the issue that one could not tell if the jury disbelieved the permissible evidence and granted relief solely on the evidence that was presented under improper instructions. 381 U.S. at 669-70.

In *Jewel Tea*, the trial court failed to find either an *Allen Bradley*-type of conspiracy vitiating the union's exemption or a bargaining demand lacking in vital self-interest. *Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters*, 215 F. Supp. 839, 845-49 (1963), *rev'd sub nom. Jewel Tea Co. v. Associated Food Retailers*, 331 F.2d 547 (7th Cir. 1964), *rev'd sub nom. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). Such a ruling turned on the narrow factual question of whether self-service marketing could be done without encroaching upon the union's workload or jurisdiction. The White opinion held that a finding that encroachment was unavoidable was not clearly erroneous. 381 U.S. at 694.

⁹¹ See Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 721 n.214 (1965). Meltzer indicates that the Douglas view contemplated that a prima facie violation and not merely evidence thereof was established from the face of the agreement.

dence of a prima facie violation. He stated that "*in the circumstances of this case the collective bargaining agreement itself . . . was evidence of a conspiracy,*"⁹² and that "the district court failed to give any weight to the collective bargaining agreement itself as evidence of a conspiracy and to the *context* in which it was written."⁹³ Hence, perhaps the agreement was not sufficient in and of itself to dictate a finding of prima facie violation under the Douglas rationale. If this interpretation is correct, there is a greater proximity to the approaches of the White and Douglas opinions.

The evidentiary approach of the White and Douglas opinions would be more easily reconcilable if their apparent differences in *Pennington* could be dismissed as mere appearance. Douglas would charge the jury to find a violation if there were an *industry-wide* collective bargaining agreement containing a wage scale exceeding the ability of some members of the industry to meet, and for the purpose of driving these financially inferior members of the industry out of business.⁹⁴ Yet the jury is also told that "an industry-wide agreement containing these features is prima facie evidence of a violation."⁹⁵ The ambiguity of this statement lends itself to two interpretations. The opinion may require an instruction to the jury that a prima facie violation exists if there is *extrinsic* evidence that the agreement was industry-wide and the wage scale of the agreement exceeded the ability of some members of the industry to pay. At the least, the statement may imply that a determination of whether the agreement is industry-wide must be derived from the contract itself. Under this latter view, the jury may presume a violation and need only find that, viewing all relevant evidence, the nature of the wage scale is excessive.⁹⁶ The facts in *Pennington* seem to warrant the first view, since the collective bargaining agreement was not industry-wide on its face.⁹⁷ Rather, it was between

⁹² 381 U.S. at 736.

⁹³ *Id.* at 737. (Emphasis added.)

⁹⁴ *Id.* at 672-73.

⁹⁵ *Id.* at 673. (Emphasis added.)

⁹⁶ See note 61 *supra*.

⁹⁷ There were provisions of the BCWA and its amendments that affected the marginal operators, such as the conditions prohibiting the signatories from leasing land to or buying coal from substandard, nonsigning operators. These terms in and of themselves do not impose the wage scale of the collective bargaining agreement upon the marginal operators. They may be elements that would induce the operators to sign the agreement, since they are often dependent on using major company land for strip mining and the major coal companies themselves as the market for their coal. However, the Douglas opinion does not seem to rely on these "features" of

the major coal operators and the union,⁹⁸ and extrinsic evidence seems to be a requisite for proof of both industry-wideness and the excessiveness of the wage scale.

Another factor which militates toward the conclusion that Douglas' opinion in *Pennington* looked toward extrinsic evidence as proof of a violation is the more obvious nature of the product market restraint in *Jewel Tea*, combined with the less apparent nature of labor's interest in the restraint. The inference that a non-labor interest is being fostered by a union is seemingly derived more readily from a collective bargaining provision limiting the hours that a proprietor can sell his products than from a provision requiring higher wages.⁹⁹ Yet the *Jewel Tea* opinion looks overtly to surrounding circumstances and context to discern the motive behind the hourly restrictions.¹⁰⁰

Under the Goldberg view, all latitude for the trier of fact is narrowly circumscribed by making the scope of the labor exemption coextensive with the duty of labor and management to bargain concerning mandatory subjects.¹⁰¹ The problems posed by this position focus upon the determination of what is a mandatory subject and who is to make this determination.

the contract as the basis for its reasoning that the agreement was industry-wide. They are not included in the recommended charge to the jury. Douglas merely alludes to them later in the opinion and seemingly accords them little significance in the evidentiary context. See 381 U.S. at 674; note 91 *supra*.

Another explanation of what the Douglas opinion means by its assertion that "an industry-wide collective bargaining agreement containing those features is prima facie evidence of a violation," *id.* at 673, lies in the footnote to that statement, which cites the conscious parallelism of *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939). 381 U.S. at 673 n.*. This may indicate that Douglas would find a violation if, when the major companies accepted the agreement, they knew or were aware (as opposed to having explicitly agreed) of a union attempt to get the marginal coal operators to sign the same contract. Such scienter would include a cognizance of the fact that if the marginal operators accepted the agreement they would necessarily be forced out of business. Since the necessary consequence of their participation would restrain interstate commerce, a finding of a preexisting illicit conspiracy is unnecessary under *Interstate Circuit*. See *ibid*.

⁹⁸ According to the Court's description of the pattern of bargaining, see note 40 *supra*, it would appear that the BCWA is not a master contract signed by the union and a national association of coal operators which purports to cover the whole industry or even all of its members. Rather, regional bargaining seems to be the pattern, with the association of northern Appalachia being the leader.

⁹⁹ See Meltzer, *supra* note 91, at 715. Meltzer had proposed that only obvious restraints upon the market should be subject to antitrust litigation. This thesis was rejected in *Jewel Tea*, a fact which the author notes in an appendage to his original article. *Ibid*.

¹⁰⁰ 381 U.S. at 736-37.

¹⁰¹ See text accompanying notes 81-85 *supra*.

The Goldberg opinion does not dissent from that portion of the White opinion in *Pennington* which rejects the union's argument that the NLRB has original jurisdiction of the dispute.¹⁰² Hence the district court shall be the forum which will decide if a mandatory subject of bargaining exists. However, it would appear to Goldberg that in determining this issue the district court will be forced to draw upon NLRB precedents,¹⁰³ which have been established without regard to antitrust considerations.¹⁰⁴

Thus, on the preliminary question of the union's exemption, a court must determine that a mandatory subject of bargaining is absent.¹⁰⁵ It would defeat the purpose of the Goldberg opinion if

¹⁰² 381 U.S. at 710 n.18. The White opinion in *Jewel Tea* listed several reasons for rejecting the union's claim that the NLRB rather than the district courts had primary jurisdiction. (1) The district courts are competent to ascertain mandatory subjects of bargaining. (2) Referral to the Board would be fruitless in light of the conspiratorial allegations in the complaint, since a Board determination that mandatory subjects were involved would not foreclose antitrust consideration. (3) To invoke the Board's jurisdiction, an unfair labor practice complaint must issue. In the typical antitrust situation the plaintiff is a stranger to the bargaining and therefore has no standing to complain to the NLRB regarding the unfair practice committed during the bargaining. (4) Even if the situation were such that the plaintiff could complain to the NLRB, it lies within the discretion of the Counsel General to determine whether an unfair labor practice complaint will ultimately issue. Moreover, the six-month statute of limitations for such complaints is too restrictive for antitrust purposes. *Id.* at 686-87.

¹⁰³ "[D]ecisions of the Labor Board as to what constitutes a subject of mandatory bargaining are, of course, very significant in determination of the applicability of the labor exemption." *Id.* at 710 n.18.

That Mr. Justice White would also look to NLRB precedents to determine the force of the union interest in the agreement is demonstrated by his language in *Pennington*. "Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity . . ." 381 U.S. at 665.

¹⁰⁴ The "direct and overriding interests of unions in such subjects as wages, hours, and other working conditions, which Congress has recognized in making them subjects of mandatory bargaining," *id.* at 732-33, renders product market considerations immaterial to Goldberg. Therefore, although the NLRB precedents interpreting the will of Congress were established without taking into account product market considerations, they are an important source for ascertaining exemption from the antitrust laws since they define the "central core" of the collective bargaining process. The area subsumed by this definition is indispensable to a meaningful exercise of the bargaining process and one that Congress has decided shall not be affected by the application of the antitrust laws. *Id.* at 710. In essence, the Goldberg opinion interweaves the "labor acts" and the antitrust laws in a manner which subordinates the latter statutes to the former when mandatory subjects of bargaining are involved.

¹⁰⁵ Indeed, the Goldberg opinion may be maintaining that it was mandatory for the coal operators and the union to bargain over the wages *others* would pay. One commentator interprets the Goldberg opinion as insulating from antitrust strictures the negotiations which are logically "intertwined" with the discussion of wages. See Handler, *Recent Antitrust Developments—1965*, 40 N.Y.U.L. Rev. 823, 833 (1965).

the issue is treated as a factual rather than a legal question to be decided by the court. Meaningful collective bargaining is subverted if the trier of fact may disregard what is a mandatory subject on its face and find conspiracy in restraint of trade.

However, a situation could arise in which a collective bargaining agreement is concluded on mandatory subjects but where there is also direct evidence of an unlawful conspiracy. Whether the Goldberg opinion insulates such an agreement merely because it pertains to mandatory subjects is questionable in light of his approval of the holding in *Allen Bradley*.¹⁰⁶ The opinion reads *Allen Bradley* as condemning union participation in price fixing and market allocation accomplished by joining a conspiracy of employers,¹⁰⁷ although the collective bargaining agreements in that case furthered job security,¹⁰⁸ higher pay and expanded union jurisdiction.¹⁰⁹ Arguably, there were terms in the agreements which indicated that the union was joining in an attempt to fix prices and allocate markets. Nonetheless, Mr. Justice Goldberg merely characterized the agreements as concerned with subjects in which the union had only an indirect interest, without stating the reasons for such a categorization. Was it based upon a finding of nonmandatory subjects in the agreement which partook of price fixing and market allocation? Or, was the indirectness found in the presence of extrinsic evidence of a conspiracy which so tainted the overt thrust of the collective bargaining agreement that it appeared to be chiefly concerned with price fixing and market allocation?¹¹⁰ The most persuasive interpretation of Goldberg's approval of *Allen Bradley* is that he viewed the decision as discerning the presence of price fixing and market allocation provisions on the face of the agreement and that this vitiated the labor exemption. Such an interpre-

¹⁰⁶ 381 U.S. at 706-07.

¹⁰⁷ *Ibid.*

¹⁰⁸ It is interesting to note that the Goldberg opinion in *Jewel Tea* stated that even if the unions were attempting to aid the small retailers in competing with the chain stores, this in itself would not cause them to lose their exemption since it could be said that the union was seeking job security. *Id.* at 727-29.

¹⁰⁹ See text accompanying note 24 *supra*.

¹¹⁰ To Goldberg, the existence of an illicit combination with non-labor groups cannot be analytically separated from the question of whether the union was acting in direct self-interest. This is demonstrated by his reading of *Hutcheson*: "a union acting as a union, in the interests of its members, and not acting to fix prices or allocate markets in aid of an employer conspiracy to accomplish these objects, with only indirect union benefits, is not subject to challenge under the antitrust laws." 381 U.S. at 710.

tation is consistent with the major theme of the Goldberg opinion—once the door is open to extrinsic evidence, judicial manipulations can occur which may result in liability and thereby lead to stilted collective bargaining.

CONCLUSION

Any attempt to collate the divergent opinions into a coherent pattern is fraught with difficulty. Seemingly, the labor and anti-trust laws have been interwoven in such a manner that it can be stated, albeit with some trepidation, that a majority of the Court subscribes to the position enunciated in *Allen Bradley*¹¹¹ that a union-management conspiracy will vitiate the exemption.¹¹²

Despite the Court's approbation of *Allen Bradley*, however, there is a division as to the evidence which will fulfill the requisites of that case when applied. This is most clearly shown by the Douglas opinion in *Jewel Tea*, which focused the main thrust of its dissent upon a finding of an *Allen Bradley*-type conspiracy, even in face of the fact that certiorari had been limited to exclude this issue. Although the facts of *Pennington* do not indicate as crude a conspiracy as that involved in *Allen Bradley*,¹¹³ the three Justices who joined the Douglas opinion gave nothing more than passing attention to the labor exemption. Rather, they would instruct the jury that evidence of a prima facie violation of the antitrust laws may permissibly be gleaned from either the face of the collective bargaining agreement¹¹⁴ or from this source plus an undefined but limited modicum of evidence as to the context of the negotiations.¹¹⁵

¹¹¹ See text accompanying notes 26-31 *supra*.

¹¹² The White group's adherence to this proposition appears to coexist with their proscription of extra-unit bargaining. See note 58 *supra*. The Douglas opinion subscribes to the conspiracy thesis. See text accompanying notes 59-61 *supra*. That the Goldberg Justices purport to follow the holding of *Allen Bradley* in principle, see text accompanying notes 106-10 *supra*.

Absent a conspiracy, the White Justices would vitiate the exemption if extra-unit bargaining occurred. See text accompanying notes 56-58 *supra*. Where neither an *Allen Bradley* conspiracy nor extra-unit bargaining is an issue, these Justices would still not immunize a collective bargaining agreement containing provisions having an adverse effect on competition in the product market if that effect outweighs the union's legitimate interest in the provisions. This is the test used by the White Justices in *Jewel Tea*. See text accompanying notes 71-72 *supra*. Although the Goldberg Justices disagree with the application of this test when mandatory subjects of bargaining are involved, see text accompanying notes 86-87 *supra*, they do not necessarily reject it when such subjects are not in issue. See 381 U.S. at 732-33.

¹¹³ See text accompanying note 24 *supra*.

¹¹⁴ See text accompanying notes 61, 75-76 *supra*.

¹¹⁵ See text accompanying notes 91-93 *supra*. In *Jewel Tea*, the trial court noted

Moreover, the three White Justices, by looking to the collective bargaining agreement and the context of its effectuation, seemed to consider the issue of exemption as arguable under the facts of *Pennington*. By blending their extra-unit bargaining argument with their conspiracy contentions, they were unclear as to whether something more than proof of the concerted action element of a section 1 violation is needed to foreclose the issue of exemption.¹¹⁶ Nonetheless, it is clear that both the White and Douglas Justices approve of the use of the collective bargaining agreements and the negotiations from which it was created to vitiate the exemption.¹¹⁷

The Goldberg Justices seem to automatically exempt conduct culminating in a collective bargaining agreement solely dealing with mandatory subjects of bargaining.¹¹⁸ This per se rule is diametrically opposed by the rule of submitting multi-employer collective bargaining agreements to jury consideration¹¹⁹ advocated by the Douglas Justices.¹²⁰ As evidenced by *Jewel Tea*, this makes the more ambivalent White Justices the swing group. This fact is the prime

in support of its holding that "the record was devoid of any evidence to support a finding of conspiracy:

"The record showed only that Bromann, on behalf of Associated . . . dealt with the union at arm's length. At no time did he receive a direction to demand a 6 P.M. closing; nor did he make any such demand. On the contrary, Associated through Bromann, joined in the all-employer offer of November 15, 1957, demanding the elimination of the restriction on night marketing, and specifically requested that change from the union representative at a subcommittee meeting. . . . This fluctuating opposition by some employers to night operations because of their high cost is hardly tantamount to a conspiracy with the unions." 215 F. Supp. at 845.

¹¹⁶ See text accompanying notes 56-58 *supra*.

¹¹⁷ See text accompanying notes 88-100 *supra*.

¹¹⁸ See text accompanying notes 105-10 *supra*.

¹¹⁹ By holding that evidence of a prima facie violation may be made out from the collective bargaining agreement itself, Mr. Justice Douglas is not necessarily requiring jury consideration since in theory the defendant may come forward with evidence so persuasive that he not only rebuts the presumption against him but also earns a right to a directed verdict. In practice, however, jury consideration would appear to be guaranteed by giving this evidence a prima facie procedural effect. Moreover, this opinion has been interpreted to mean that a prima facie violation is made out by the proof required by it rather than mere evidence thereof. See Meltzer, *supra* note 91.

¹²⁰ Mr. Justice Douglas does not assert that all multi-employer collective bargaining agreements will be so susceptible of antitrust inferences that evidence of a prima facie violation could be established from them. However, his imposition of antitrust liability under the circumstances in *Jewel Tea* leads to the inference that no multi-employer bargaining agreement is immune. This was the interpretation of the Douglas opinion divined by Mr. Justice Goldberg. 381 U.S. at 726. They seem to have interpreted the opposition to night operations by some employers as equivalent to a conspiracy with the union. Such disagreement is bound to take place within any large employer association when it bargains with the union. There cannot always be homogeneity on every issue. Therefore most of these collective bargaining situations will present significant antitrust evidence under the Douglas position.

source of the precariousness of the labor exemption, since this latter group subscribes to all three methods of vitiating, as well as to the use of circumstantial evidence to fulfill the criteria of these methods. Moreover, their apparent reverence for the factual determinations of the trial court¹²¹ instructs the practitioner that the trial level may be the decisive battleground.

The White opinion in *Pennington* transcends the mere placement of the labor exemption in a precarious posture. In the process, it intimates that a new theory of antitrust *liability* has been created. In advocating that extra-unit bargaining may vitiate the labor exemption, Mr. Justice White reasoned that such conduct suffered from the basic defect of restraining the freedom of the union "to act according to . . . [its] own choice and discretion."¹²² If participation in extra-unit bargaining is liability-creating *per se*¹²³ rather than mere exemption-vitiating, the rule of reason has been discarded, for the core of that rule is the tenet that not all arrangements which in some manner impinge upon unencumbered discretion are unlawful.¹²⁴

c.d.a.

r.a.s.

¹²¹ See note 90 *supra*.

¹²² 381 U.S. at 668.

¹²³ See note 58 *supra*.

¹²⁴ See Handler, *supra* note 105, at 836.