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Labor Law -- Application of Antitrust Law to Union Activities -- Extra-Unit Agreements

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Hickenlooper Amendment should be their effect on the growth of international law. The Supreme Court in Sabbatino felt that a review of the Cuban expropriation would retard the growth of international law. However, the reverse would seem to be true.

Since international courts have jurisdiction only when the parties are consenting nations, many disputes between foreign states and citizens of the United States would, through application of the act of state doctrine, not be litigable at all. Farr, if followed should help to fill this gap in the settlement of transnational disputes. As Mr. Justice White pointed out in his Sabbatino dissent, our courts, under the majority ruling, would have to validate automatically, discriminatory and unlawful expropriations. Such acts, if they are also permitted by the law of another nation, would then tend to become a part of accepted international law. Needless to say, if peace and order are to be attained through world law, there can be no place for lawless acts that detract from the stature of international law.

International law has long been declared part of the law of the United States. It would seem, therefore, that our American courts should follow the precedents of the courts of other nations and decide these disputes, even though they may involve acts of foreign states, in the context of international law.

Farr and the Hickenlooper Amendment should achieve this result.

Tommy W. Jarrett

Labor Law—Application of Antitrust Law to Union Activities—Extra-Unit Agreements

In an effort to avoid the concentration of economic power, two national policies have been promulgated that, ironically, result in apparent conflict. The antitrust policy, intended to distribute power

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85 376 U.S. at 433.
86 Polsom, supra note 32, at 727.
87 376 U.S. at 439.
88 The Paquete Habana, 175 U.S. 677 (1900); Hilton v. Guyot, 159 U.S. 113 (1895).
89 The courts of several countries have not hesitated to declare foreign expropriations unlawful. See e.g., Anglo-Italian Oil Co. v. S.U.P.O.R. Co., [1955] Int'l L. Rep. 23 (Civ. Ct. Rome); Anglo-Iranian Oil Co. v. Jaffrate, [1953] Int'l L. Rep. 316 (Aden Sup. Ct.). It is also especially important to note that the Permanent Arbitration Court in Norway v. United States, 1 U.N. Rep. Int'l Arb. Awards 325 (1933), has declared discriminatory takings to be in violation of international law.
among entrepreneurs, establishes prohibitions on the restraint of competition, while the national labor policy, on the other hand, exempts most union activity from those prohibitions in an attempt to balance the powers of entrepreneurs and workers. The necessity of resolving this conflict of attitudes toward competition is perhaps most pressing when the courts are asked to apply the antitrust laws to labor unions.\(^3\) Recently the United States Supreme Court was faced with that necessity in two cases. In *UMW v. Pennington*\(^2\) Mr. Justice White, writing the opinion of the Court but speaking for only three members, said that while it is clear that unions can bargain with multiemployer groups,\(^3\) the union "forfeits its exemption from the antitrust laws when it has agreed with one set of employers to impose a certain wage scale on other bargaining units."\(^4\) But in the companion case, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,\(^6\) the union acted alone and not at the request of an employer group, and Mr. Justice White found that an attempt to gain a marketing-hours restriction is "within the protection of the national labor policy and . . . therefore exempt from the Sherman Act,"\(^8\) since such a restriction, he decided, is intimately related to wages, hours, and working conditions.

In *Pennington* a long controversy concerning a solution to the problem of overproduction in the coal industry had culminated in the National Bituminous Coal Wage Agreement of 1950 in which

\(^{3}\) For an analysis of this conflict see Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963). Professor Winter takes the position that collective bargaining creates anticompetitive incentives and that there are no general principles that will reconcile the conflict. For the position that no conflict exists between the two policies see Frank, *The Myth of the Conflict between Antitrust Law and Labor Law in the Application of Antitrust Law to Union Activity*, 69 DICK. L. REV. 1 (1964).

\(^{2}\) 381 U.S. 657 (1965).

\(^{3}\) Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations. At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed of enactment. They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.

\(^{4}\) 381 U.S. at 665 (1965).

\(^{6}\) 381 U.S. 676 (1965).

\(^{8}\) Id. at 689-90.
the United Mine Workers gave up its opposition to automation and in return for the resulting higher wages agreed to enforce those wages against the smaller companies without regard for their ability to pay.\textsuperscript{7} The trustees of the UMW retirement fund brought suit against Phillips Brothers Coal Company, a small operator who had entered the agreement only under union pressure,\textsuperscript{8} to recover royalties due under the agreement. Phillips cross-claimed, alleging that the union and trustees had conspired with the large operators to force the smaller companies out of business in violation of sections 1 and 2 of the Sherman Act.\textsuperscript{9} The union answered affirmatively that under section 6 of the Clayton Act\textsuperscript{10} it is exempt from the Sherman Act provisions.\textsuperscript{11} On appeal from a verdict against the union,\textsuperscript{12} the Court of Appeals for the Sixth Circuit held that an exemption from the antitrust laws "does not exist . . . where a labor union combines with a nonlabor organization to restrain competition in, or to monopolize the marketing of, goods in interstate commerce."\textsuperscript{13}

Also under union pressure, Jewel Tea Company entered an agree-

\textsuperscript{7} Adam, \textit{Technology and Productivity in Bituminous Coal, 1949-1959}, 84 \textit{MONTHLY LABOR REV.} 1081 (1961). The author reviews the general background of the industry and the changes after the agreement.

\textsuperscript{8} Pennington v. UMW, 325 F.2d 804, 806 (6th Cir. 1963).

\textsuperscript{9} Section 1 provides:

\begin{quote}
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . . Every person who shall make any [such] contract or engage in any [such] combination or conspiracy . . . shall be deemed guilty of a misdemeanor . . . .
\end{quote}

Section 2 provides:

\begin{quote}
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine . . . or by imprisonment . . . or by both . . .
\end{quote}


\textsuperscript{10} The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.


\textsuperscript{11} Pennington v. UMW, 325 F.2d 804, 808 (6th Cir. 1963).

\textsuperscript{12} The charge against the trustees was dismissed by the trial court.

\textsuperscript{13} Pennington v. UMW, 325 F.2d 804, 809 (6th Cir. 1963).
ment whereby it was to sell meat in Chicago only between nine a.m. and six p.m. The same agreement had at first been resisted and then accepted by a multi-employer group of 9,000 other Chicago meat retailers. Jewel alleged a conspiracy between the union and the trade association in violation of the Sherman Act but the trial court, finding no evidence of such a conspiracy, held that the union had acted in its own interests and was thus entitled to the labor exemption. The Court of Appeals for the Seventh Circuit, however, relying on traditional antitrust law, reversed. The court held that the agreement between the union and the trade association was in itself a conspiracy, that the determination of marketing hours is a proprietary function, and that therefore a conspiracy designed to restrict that function "is a violation of the Sherman Act, and not entitled to the exemption therefrom. . . ."15

The history of the Court's efforts to reconcile this conflict of policies is marked by confusion and uncertainty resulting first from a lack of legislative guidelines and then from a refusal to recognize the guidelines once they were established. Thus, in the pre-Clayton Act era the Court, relying on the broad language of the antitrust laws and the failure of Congress to include a proposed labor exemption, decided in Loewe v. Lawlor16 that a secondary boycott was susceptible to a suit for treble damages because the Sherman Act "provided that 'every' contract, combination or conspiracy in restraint of trade was illegal."17 Two years later the Court relied on this construction to uphold an injunction against a "we don't patronize" list published in a union paper.18

But in 1914 the congressional response was that human labor is not a commodity19 and that certain enumerated activities are not to be considered a violation of the federal laws.20 Such language should

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14 Jewel Tea Co. v. Associated Food Retailers, Inc., 331 F.2d 547, 551 (7th Cir. 1964).
15 Id. at 549.
16 208 U.S. 274 (1908).
17 Id. at 301.
20 No restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury. . . .

And no such restraining order or injunction shall prohibit any
have been a more than adequate guideline, but seven years later in *Duplex Printing Press Co. v. Deering* the Court circumvented the mandate. There the Court construed away the meaning of the statute and enjoined a secondary boycott by restricting section 6 to disputes between employers and their immediate employees and by emphasizing the words "lawfully" and "peacefully" in section 20 to infer that the statute dealt only with lawful conduct. Then in *Coronado Coal Co. v. UMW* the Court found a way to outlaw primary activity, saying

[W]hen the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering . . . interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.

Such restrictive constructions of the Clayton Act were frequent until Congress reacted again in 1932 by passing the Norris-La-Guardia Act. The committee reports preceding enactment show a person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.


51 254 U.S. 443 (1920).
52 268 U.S. 295 (1925).
53 Id. at 310.

The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or
clear intent to proscribe such judicial toying with the national labor policy. The Court seemed to recognize this and began to give the act full effect. For example, the restrictive definition of a labor dispute in *Duplex* appeared to have been effectively repudiated in *New Negro Alliance v. Sanitary Grocery Co.* A year later, in a case involving a violent sit-down strike, the Court declared that the elimination of wage competition is the object of labor unions but that this is not the kind of restraint on competition that the Sherman Act was intended to curtail.

Finally in 1941, thirty-three years after *Lawlor* and twenty-seven years after the Clayton Act, the Court managed in *United States v. Hutcheson* to give full effect to the labor policy by adopting a "harmonizing text" concept and saying

If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States."

But the decision in *Hutcheson* was not quite as far reaching as it might otherwise have been, for the Court also said

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unself—

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26 "That there have been abuses of judicial power in granting injunctions in labor disputes is hardly open to discussion. The use of the injunction in such disputes has been growing by leaps and bounds." S. Rep. No. 163, 72d Cong., 1st Sess. 8 (1932). "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, . . . which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932).
27 303 U.S. 552 (1938).
28 Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-04 (1940).
29 312 U.S. 219 (1941).
30 "Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." Id. at 231.
31 Id. at 232.
ishness of the end of which the particular union activities are the means.\textsuperscript{32}

It was this unnecessarily broad dictum that pointed directly to the problem of combinations between labor and management in \textit{Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers.}\textsuperscript{33}

Although, when the Court reached \textit{Allen Bradley}, it had refused the exemption to a group of fishermen because they were considered entrepreneurs\textsuperscript{34} and had struck down a state court injunction against picketing bakeries to organize independent peddlers,\textsuperscript{35} it had not, since the enactment of Norris-LaGuardia, directly faced the problem of unions and employers conspiring against other employers.\textsuperscript{36} In \textit{Allen Bradley} the union combined with manufacturers of electrical equipment and the contractors who installed it to close the New York City market to all outside manufacturers. The result of this arrangement was that prices and wages soared to the benefit of all of the conspirators and to the detriment of everyone else. Presented with this hard case, the Court made bad law, perhaps, by saying, in language that was again too broad,

\begin{quote}
When the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.\textsuperscript{37}
\end{quote}

The Court continued, "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 business groups."\textsuperscript{38}

Since the enactment of Norris-LaGuardia, then, the history of the decisions may be viewed as an effort to give full effect to the labor exemption prescribed by Congress. This effort reached its peak in \textit{Hutcheson} and receded in \textit{Allen Bradley} in which the Court created a sweeping exception that has bothered it ever since.\textsuperscript{39}

\textsuperscript{32} \textit{Ibid.}
\textsuperscript{33} 325 U.S. 797 (1945).
\textsuperscript{34} Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942).
\textsuperscript{35} Bakery Drivers Union v. Wohl, 315 U.S. 769 (1942).
\textsuperscript{36} \textit{Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers}, 325 U.S. 797, 807-08 (1945).
\textsuperscript{37} Id. at 809.
\textsuperscript{38} Id. at 810.
\textsuperscript{39} Since \textit{Allen Bradley} it has been held that union-employer combinations
When the Court was faced in *Pennington* with another flagrant abuse of union power, two precedents were possibly open to it—the *Allen Bradley* approach offered by Mr. Justice Douglas and the *Hutcheson* approach offered by Mr. Justice Goldberg. Significantly, Mr. Justice White rejected both, though he failed to say so expressly, and chose instead to attempt to balance the conflict between the two relevant policies. He reasoned that there is nothing in the national labor policy that permits a union to combine with an employer unit to enforce agreed wage standards against other employers. Quite the contrary, he decided, the labor policy requires the union to keep itself free to bargain on a unit-by-unit basis. On the other hand, the antitrust policy precludes such an agreement since the interests of the union would be inextricably bound to those of a favored employer.

If in *Pennington* Mr. Justice White pointed out what unions may not do, in *Jewel* he showed what unions may do. Here he said that if the subject matter of an agreement is within the realm of mandatory bargaining, the union is exempt if it unilaterally seeks such an agreement from one employer, though the same agreement has been made with other employers. But the rule was offered with this caveat: the mere fact that only one employer is involved does not mean that the antitrust exemption necessarily follows. Again, he pointed out that the problem is one of balancing the relevant policies and that though a mandatory subject of bargaining weighs heavily on the side of exemption, it is not conclusive.

to fix prices, Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n, 155 F.2d 799 (3d Cir. 1946), or to bar competition, United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954), are not within the exemption. Also, it has been held that the union's participation will not provide entrepreneurs with the exemption. United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949). *Accord*, Los Angeles Meat Drivers Union v. United States, 371 U.S. 94 (1962). But it has also been held that, absent other evidence of conspiracy, a wage contract is exempt even though it was made to force an employer out of business. Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (8th Cir. 1958).

*The Hutcheson* approach would seem to be feasible if the language quoted above is treated as dictum and the price control factor in *Allen Bradley* is emphasized.

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*381* U.S. at 665.
*Id.* at 666.
*Id.* at 668.
*381* U.S. at 689-90.
*Id.* at 689.
Thus, he decided that this marketing-hours restriction was so intimately related to wages, hours and other conditions of employment as to fall within the protection of the labor policy.

The two cases when read together, then, seem to stand for the proposition that the union may not make extra-unit\(^4\) bargaining agreements even on mandatory subjects, but even when the subject is not clearly mandatory, the mere existence of a parallel agreement will not deprive the union of its exemption. From this one limitation on \textit{Allen Bradley} is readily apparent: the traditional doctrine of antitrust law, which infers conspiracy without express agreement, will not be applied in the area of collective bargaining.\(^5\) Moreover, it seems clear that the broad language of \textit{Hutcheson} will not be used to exempt agreements on nonmandatory subjects.\(^6\)

However, some problems are not so clearly resolved. For instance, in view of the fact that predatory purpose lurked heavily in the background of \textit{Pennington} and did not appear on the surface in \textit{Jewel}, did the talk of balancing policies actually reflect at least a partial return to the wrongful intent doctrine of the \textit{Coronado} era?\(^7\) Indeed, since the union intent in \textit{Pennington} was in fact anticompetitive, was Mr. Justice White's emphasis on extra-unit agreements only dictum, or will the Court actually hold all such agreements antitrust violations in spite of their purpose?\(^8\) Further, may unions continue to rely on industry leaders to set bargaining patterns for the smaller companies? Is it true, as Mr. Justice Goldberg suggested, that mention of competitive disadvantage will be treated as evidence of conspiracy?\(^9\)

In seeking answers to these problems and others, it must be kept in mind that the Court was split three-three-three in both cases.\(^\ast\)

\(^4\)Extra-unit bargaining occurs when the union agrees “with one set of employers to impose a certain wage scale [or other terms] on other bargaining units.” UMW v. Pennington, 381 U.S. 657, 665 (1965).

\(^5\)\textit{Id.} at 665 n.2. \textit{Contra, id.} at 673 (concurring opinion).


\(^7\)\textit{Id.} at 720 (separate opinion).


\(\ast\)In both cases the opinion labeled as that of the Court involved only three members. Justices Douglas, Black and Clark chose to rely on \textit{Allen}
It is this fact that precludes any definite answers without further litigation or new legislation. In the meantime, the most that can be said is that complete reliance on either Hutcheson or Allen Bradley has been renounced by the majority of the Court.

MARTIN N. ERWIN

Labor Law—Pre-Election v. Post-Election Relief Under the LMRDA

When Raymond Harvey sought to nominate himself for office in the National Marine Engineers Beneficial Association, he discovered that he was unable to do so since he was ineligible to be a candidate. The union bylaws provided that a member could nominate only himself for office, and the union's constitution provided that no one was eligible for nomination to a full-time union office unless he had been a union member for five years and had served at least 180 days in each of two of the three preceding years on ships with union contracts. Harvey had not met the service requirement. He sued the union president, Jesse Calhoon, to enjoin the election, alleging violations of Title I of the Labor Management Reporting and Disclosure Act of 1959. This Title guarantees equal rights to all union members to nominate candidates and allows any member whose rights are violated to bring a pre-election suit in a federal district court for a remedy.

The question presented to the United States Supreme Court in Calhoon v. Harvey was whether plaintiff Harvey's rights under Bradley, concurring in Pennington and dissenting in Jewel. In a separate opinion, Mr. Justice Goldberg, joined by Justices Harlan and Stewart, concurred in both cases but dissented from the extra-unit bargaining rule. This separate opinion raised many of the important problems inherent in the opinion of the Court. Its basic position is that Mr. Justice White has ignored the fundamental realities of collective bargaining and established barriers to negotiation which will frustrate the congressional intent to promote labor peace and stability.

1 Harvey v. Calhoon, 324 F.2d 486, 487 (2d Cir. 1963).
   Equal Rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organizations, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.