UNION-EMPLOYER AGREEMENTS AND THE ANTITRUST LAWS: THE PENNINGTON AND JEWEL TEA CASES

Section 1 of the Sherman Act provides that "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" is illegal.\(^1\) Section 2 of the same act proscribes monopolization, attempts to monopolize and agreements to monopolize interstate or foreign commerce.\(^2\) Other statutes accord labor organizations special status under the antitrust laws. Section 6 of the Clayton Act provides:

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.\(^3\)

Section 20 of the Clayton Act and sections 1 and 13 of the Norris-LaGuardia Act in effect exempt union-employer agreements relating to "terms or conditions of employment."\(^4\) The scope of the exemption in the context of union-employer agreements depends on what are the "legitimate objects" of unions and what are "terms or conditions of employment."\(^5\)

The phrase "terms or conditions of employment" appears in another context. Under sections 8(d), 8(a)(5) and 8(b)(3) of the Taft-Hartley Act,\(^6\) union and employer have a duty to bargain in good faith with each other about "wages, hours, and other terms and conditions of employment." In many cases, then, the Taft-Hartley Act compels union-employer bargaining.\(^7\) The question raised is whether the similarity of language in the

---


\(^7\) The scope of the so-called "mandatory" bargaining subjects is wide. In Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), for example, the Supreme Court held that the employer was under a duty to bargain with a maintenance em-
statutes means that Congress intended to exempt from the antitrust laws only those union-employer agreements which deal with subjects about which employer and union have a duty to bargain in good faith, or whether the exemption is broader or narrower than that duty.

I. ALLEN BRADLEY AND PROGENY

In a 1945 case, *Allen Bradley Co. v. Local 3, International Bhd. of Elec. Workers,* a New York local of the International Brotherhood of Electrical Workers had entered into closed shop agreements with electrical equipment manufacturers and electrical contractors, all in the New York City area. The contractors agreed to buy only from local manufacturers which had closed shop agreements with the union; the manufacturers agreed to confine their New York City sales to contractors employing members of the union. "In the course of time, this type of individual employer-employee agreement expanded into industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control." The results were more jobs, higher wages and shorter hours for members of the local. Prices of electrical equipment in New...
York City were disproportionately high, as were the profits of local contractors and manufacturers. The Supreme Court affirmed a judgment against the union under section 1 of the Sherman Act. The theory of the Court, in an opinion by Mr. Justice Black, was that the union had aided and abetted an employer conspiracy aimed at eliminating competitors.

[W]hen 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.10

In dictum, Mr. Justice Black affirmed an earlier statement by Mr. Justice Frankfurter in United States v. Hutcheson11 that

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 [of the Clayton Act] 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.12

Mr. Justice Black conceded in Allen Bradley 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 business groups."13 Mr. Justice Roberts, concurring in Allen Bradley, pointed out that the union had been the active party, the instigator rather than merely an "aider and abettor."14 He argued that agreements between one union and one employer should be subject to antitrust liability where appropriate.15 Mr. Justice Murphy dissented because the union had acted in its "self-interest." Why, he asked, should activity lawful if done alone become unlawful if done with the same purpose, but with the assistance of others?16

Allen Bradley's vague standard of "combining" with non-labor groups raised many questions. When else would a multi-employer collective bargaining agreement be held to violate the antitrust laws? Why should agreements between a union and single employer be exempt? Since the electrical union was itself the leading force in the conspiracy, the "aider and abettor" epithet apparently was of little importance.

10 325 U.S. at 809.
11 312 U.S. 219 (1941).
12 Id. at 232; see 325 U.S. at 810-11.
13 Id. at 810.
14 Id. at 814.
15 Id. at 818.
16 Id. at 820-21.
Is union purpose relevant or even determinative in deciding whether there has been a violation? If union purpose to restrain trade is a consideration, must the sole purpose be to restrain trade? The primary purpose? Or just a substantial purpose?

Do only agreements framed in terms of direct market restraints—price fixing, product limitation or market allocation—constitute violations? Was price fixing or exclusion of out of state products, or both, or each, the vice in Allen Bradley? Or do all multi-employer agreements constitute violations when the detrimental effect on competition is substantial? Did the Allen Bradley holding constitute a retreat from the Court’s position in Apex Hosiery Co. v. Leader? In that case the Supreme Court held that an organizational sit-down strike of a nonunion factory to force the employer to sign a closed shop agreement did not violate section 1 of the Sherman Act. Only eight of the employer’s 2,500 employees were members of the union. Much of the plant’s equipment was damaged. Mr. Justice Stone, writing for the majority, said:

Since, in order to render a labor combination effective it must eliminate the competition from nonunion made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.18

The Court entered this area again in 1954, when on the same day it decided United States v. Employing Plasterers Ass’n19 and United States v. Employing Lathers Ass’n.20 In Employing Plasterers the Court reversed the dismissal of a complaint which alleged that a Chicago trade association of plastering contractors, a local plasterers’ union and the union’s president acted in concert to suppress competition among local plastering contractors, to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors without approval by a private examining board set up by the union. The effect of all this has been an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plastering industry.21

---

17 310 U.S. 469 (1940).
18 Id. at 503-04. An alternate ground for decision was that there had not been an actual or intended restraint on market competition, hence there could be no substantive Sherman Act violation even absent the labor exemption. Indeed, the bulk of the opinion was devoted to this ground. See id. at 486-502, 505-13.
21 347 U.S. at 188.
The complaint was founded on section 1 of the Sherman Act. The Court also reversed dismissal of the complaint in Employing Lathers, where a similar kind of combination was alleged to have achieved almost complete mastery over the lathing business in the Chicago area. It limits the number of lathing contractors, prescribes their qualifications, decides who meets the standards prescribed, excludes persons from the business on varied grounds, including arbitrary racial standards, and assigns plastering contractors to each lathing contractor.23

Although at several points Mr. Justice Minton, dissenting, said that there had been no purpose to restrain interstate commerce,24 his emphasis was on the word ‘interstate.’ It is not clear what importance he gave to union purpose. From the majority’s statement of the allegations in each case it arguably could have ignored union purpose. In Employing Plasterers Mr. Justice Black for the majority summarily dismissed the union’s claim of immunity from prosecution because of section 20 of the Clayton Act by saying that “the allegations . . . show, if true, that the union and its president have combined with business contractors to suppress competition among them. Allen Bradley . . . .”25 Arguably, the allegation of combination “to suppress competition” calls for proof of union purpose to suppress competition.

Thus, many questions raised by Allen Bradley have remained in limbo until the Supreme Court’s recent decisions in two civil cases brought against unions by employers who were themselves party to collective bargaining contracts with the defendants. Although the Court struggled to formulate guidelines, it is again doubtful whether, on the whole, clarity or uncertainty has been the product.26

II. Jewel Tea

In Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.,27 the local unions had obtained covenants in collective bargaining agreements with virtually all the supermarkets and independent meat dealers in the Chicago area that no meat store or meat department would remain open past six p.m.

22 Id. at 187 n.*.
23 347 U.S. at 199-200.
24 347 U.S. at 190, 195.
25 Id. at 190.
26 This Comment will analyze the scope of a rule announced in one of the cases, pp. 911-14 infra, some problems in its philosophy and application, pp. 914-25 infra, and the dissenting view of Mr. Justice Goldberg, pp. 925-30 infra, and will suggest an approach which may harmonize the concerns of a majority of the Court, pp. 931-37 infra. Finally, it will suggest that the unique facts of the case may justify new legislation, pp. 937-38 infra.
27 381 U.S. 676 (1965).
Bargaining had been with a multi-employer bargaining unit composed of about 9,000 food retailers. The employers came to terms with the union after Jewel Tea and another employer, National Tea Company, had dropped out of the bargaining unit. Jewel Tea thereafter agreed to the union demand in the face of a union strike vote. It later brought suit in a federal district court against the unions and an association of about 1,000 individual and independent (as contrasted with chain) food stores, "Associated Food Retailers," which had been part of the multi-employer bargaining unit. The company sought an injunction and damages, alleging a conspiracy to restrain trade among retail meat markets in the Chicago area by limiting the marketing hours for meat.

In a trial without a jury the district judge ruled that there was no violation of the Sherman Act because (1) there was no evidence tying in Associated and its officers as conspirators—indeed, there was evidence of arm's length bargaining; (2) the marketing hours restriction was a proper labor goal, within the labor exemption from the Sherman Act, because (a) there was a long collective bargaining history of union interest in marketing hours, (b) the union introduced evidence that self-service meat markets cannot operate at night without employees on duty to rearrange and replenish the stock in the counter and to give personal attention to customers and (c) the union properly was concerned about increased work during the day because of night operations; (3) there was no evidence of a destructive effect on competition within the Chicago area; and (4) "the fact that some consumers would prefer longer than 54 hours during the week within which to buy fresh meat can hardly constitute the basis for holding a restriction on night hours to be an unreasonable restraint of trade." The court of appeals reversed, holding that "the evidence . . . supports the allegations of the complaint charging that the unions and . . . [Associated] effectuated through a contract, an unreasonable restraint of trade." The court found that the provision as to marketing hours was not within the labor exemption because such a consideration was "one of the proprietary functions." 28

The court of appeals reversed, 30 holding that "the evidence . . . supports the allegations of the complaint charging that the unions and . . . [Associated] effectuated through a contract, an unreasonable restraint of trade." 31 The court found that the provision as to marketing hours was not within the labor exemption because such a consideration was "one of the proprietary functions." 32


30 Jewel Tea Co. v. Associated Food Retailers, 331 F.2d 547 (7th Cir. 1964).

31 Id. at 550.

32 Id. at 549.

The hours of the day when his business is to be open to accommodate the demands of customers, in the judgment of the owner of the business, is not a condition of employment, contrary to the district court's finding. As long as all rights of employees are recognized and duly observed by the employer, including the number of hours per day that any one shall be required to work, any agreement by a labor union, acting in concert with business competitors of the employer, designed to interfere with his operation of a retail business, engaged in handling products in the course of interstate commerce,
The Supreme Court reversed the court of appeals in a six to three decision. The majority held that the marketing hour restriction was "within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain." Mr. Justice White, writing for Mr. Chief Justice Warren and Mr. Justice Brennan, characterized the dispute as "a narrow factual question: Are night operations without butchers, and without infringement of butchers' interests, feasible? The District Court resolved this factual dispute in favor of the unions." Mr. Justice White saw the Court's function as "limited to reviewing the record to satisfy ourselves that the trial judge's findings are not clearly erroneous. Fed. Rules Civ. Proc. 52(a)." In deciding that the lower court's findings were not clearly erroneous, he pointed to the evidence of the long history of union opposition to night work by seeking marketing hour restrictions, the unions' evidence as to the impracticality of night operations without butchers and the fact that during the 1957 negotiations proposals by employers for relaxation of the operating hours restriction were accompanied by provisions for flexible work days that would permit night work. Mr. Justice White focused solely on whether the unions acted within their exemption; he did not consider whether the unions' activity would have constituted a violation of the Sherman Act had there been no exemption.

Concurring in the judgment, Mr. Justice Goldberg, writing an opinion joined by Justices Harlan and Stewart, characterized the case as involving "conventional collective bargaining on wages, hours, and working conditions—mandatory subjects of bargaining" under the labor laws. He carried the notion of legitimate interest further than did Mr. Justice White, saying that even if the unions intended to protect the independent food markets they were pursuing a legitimate purpose.

Mr. Justice Douglas, joined by Justices Black and Clark, dissented on the ground that proof of a conspiracy had been made out:

[I]n the circumstances of this case the collective agreement itself, of which the District Court said there was clear proof, was evi-
dence of a conspiracy among the employers with the unions to impose the marketing hours restriction on Jewel via a strike threat by the unions.  

... ...

Unless Allen Bradley is either overruled or greatly impaired, the unions can no more aid a group of businessmen to force their competitors to follow uniform store marketing hours than to force them to sell at fixed prices. Both practices take away the freedom of traders to carry on their business in their own competitive fashion.

III. UMW v. Pennington

In UMW v. Pennington, trustees of the United Mine Workers welfare fund brought suit against Phillips Brothers Coal Company, a small mining partnership, for $55,000 dollars in royalty payments due under the terms of the collective bargaining agreement which Phillips had signed. Phillips filed a cross claim against the UMW and a counterclaim against the trustees of the welfare fund, alleging that the UMW and the trustees had conspired with several large mine operators in violation of sections 1 and 2 of the Sherman Act. A jury verdict against the trustees was set aside by the trial judge, who entered judgment notwithstanding the verdict. The court of appeals affirmed the trial judge's finding of insufficient evidence to support the verdict. A jury verdict against the UMW for $90,000 dollars was trebled by the trial judge, whose finding of substantial evidence to support the verdict was affirmed by the court of appeals. The aspect of the case dealing with the trustees of the welfare fund did not come before the Supreme Court, but the judgment against the UMW was unanimously reversed by the Court, and the case was remanded for a new trial.

The allegations against the UMW were that it had agreed with the large mine operators to control overproduction in the industry by helping to eliminate the small mines. The union's part was to help finance the mechanization of the larger mines and to impose a uniform wage agreement on all operators without regard for their ability to pay. The union members were to receive higher wages as the large mines gained control of the market and produced more coal through mechanization.

Mr. Justice White, writing for the Chief Justice and Mr. Justice Brennan in an opinion designated as the Court's, based reversal on the trial court's improper admission of evidence of union attempts to influence public officials. The trial court's theory had been that such evidence would show illegal activity if part of a general scheme to eliminate small mine operators.

38 Id. at 736.
39 Id. at 737.
40 381 U.S. 657 (1965).
41 Pennington v. UMW, 325 F.2d 804 (6th Cir. 1963).
42 Ibid.
Mr. Justice White held that the rule of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.* immunized attempts to influence public officials irrespective of any anticompetitive purpose which might be present. Before reaching this conclusion, however, he held that the trial court had not erred in denying the UMW's motion for a directed verdict and for judgment notwithstanding the verdict. The union's theory had been that in the circumstances presented it was clearly exempt from the antitrust laws. Mr. Justice White held that the motions were properly denied because "if as is alleged in this case, the union became a party to a collusive bidding arrangement designed to drive Phillips and others from the TVA spot market, we think any claim to exemption from antitrust liability would be frivolous at best." He went on to say in dictum that although a union may bargain with a multi-employer group and may try to get the same terms from other employers,

>a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

From the labor law standpoint, Mr. Justice White reasoned, the national labor policy of permitting unions to obtain uniform labor standards does not mean that "the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry." Furthermore, the antitrust law policy is "clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit." The primary justification for this conclusion was that the union thereby "surrenders its freedom of action with respect to its bargaining policy," and "it is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy."  

---

44 It had also contended in support of its motion for judgment notwithstanding the verdict that there was insufficient evidence to support the jury verdict. The trial judge rejected this contention. Record, vol. I, p. 90a, UMW v. Pennington, 381 U.S. 657 (1965). The court of appeals affirmed. Pennington v. UMW, 325 F.2d 804, 810-16 (6th Cir. 1963).
46 Id. at 665-66.
47 Id. at 666.
48 Id. at 668.
49 Ibid.
A concurring opinion was written by Mr. Justice Douglas, in which Justices Black and Clark joined. He interpreted the opinion "of the Court" as calling for jury instructions that (1) an industry-wide collective bargaining agreement in which union and employers agree on a wage scale too high for some employers, made for the purpose of forcing some employers out of business, violates the antitrust laws and (2) "an industry-wide agreement containing those features is prima facie evidence of a violation." 50

Mr. Justice Goldberg, with Justices Harlan and Stewart joining, concurred in the result but dissented from the opinion. He first stressed that, contrary to the theory of Phillips that the UMW had participated in an employer conspiracy to drive the small mine owners out of business, the union had adopted "a philosophy of achieving uniform high wages, fringe benefits, and good working conditions" in return for accepting the "burdens and consequences of automation." 51 He further stated that Pennington, as Jewel Tea, involved "conventional collective bargaining on wages, hours, and working conditions—mandatory subjects of bargaining under the National Labor Relations Act . . . ." 52 He maintained:

To hold that mandatory collective bargaining is completely protected would effectuate the congressional policies of encouraging free collective bargaining, subject only to specific restrictions contained in the labor laws, and of limiting judicial intervention in labor matters via the antitrust route—an intervention which necessarily under the Sherman Act places on judges and juries the determination of "what public policy in regard to the industrial struggle demands." 53

The rule propounded by the Court, he said, makes a meaningless, formalistic distinction, in that "it states that uniform wage agreements may be made with multi-employer units but an agreement cannot be made to affect employers outside the formal bargaining unit." 54 Finally, Mr. Justice Goldberg asserted that the Court must have ignored section 6 of the Clayton Act, which provides that "the labor of a human being is not a commodity or article of commerce," 55 and the rule of Apex that "the antitrust laws do not prohibit the 'elimination of price competition based on differences in labor standards.'" 56 An agreement to seek uniform wages in an industry restraints only competition in employee wage standards.57

50 Id. at 672-73.
52 Id. at 700.
53 Id. at 710, quoting in part from Duplex Printing Press Co. v. Deering, 254 U.S. 443, 485 (1921) (dissenting opinion of Mr. Justice Brandeis).
54 381 U.S. at 722.
55 Id. at 723.
56 Ibid.
57 Ibid.
IV. AGREEMENTS TO IMPOSE TERMS ON OTHER EMPLOYERS

While only two other Justices joined Mr. Justice White's opinion in Pennington, a majority of the Court may subscribe to his dictum that a union acts outside its immunity to the antitrust laws when it agrees to impose a certain wage scale on other employers. The outer limits of this rule, a new development in antitrust law, were not made explicit by Mr. Justice White. It therefore becomes important to discuss what scope the rule may assume in future cases.

A. Per Se Violation?

Possibly Mr. Justice White did not intend to imply that agreements to impose terms on other employers are per se violations of the antitrust laws, but meant instead that the rule of reason governs, and that such agreements may be justified in the appropriate case. Support for this view might be found in his framing the rule in terms of forfeiting the labor exemption rather than in terms of violating the antitrust laws. His approach in Pennington, however, contrasts with that taken in Jewel Tea. In the latter case he also spoke in terms of the labor exemption, and held that the justified use of a marketing hour restriction to control the hours of work brought the Meat Cutters within the labor exemption. But he then went on to say in a footnote that were the restriction not so justified the reasonableness of the restraint would be at issue. Any such suggestion of a possible reasonable justification in terms of “wages, hours, and other terms and conditions of employment” is lacking in Pennington. Furthermore, it is difficult to reconcile the view that he did not intend such agreements to be per se violations with his statement that the undesirability of such agreements from the standpoint of antitrust policy is not dependent upon their purpose or effect:

From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy.

58 Mr. Justice Douglas began his concurring opinion in Pennington by saying, “As we read the opinion of the Court,” 381 U.S. at 672, implying that he and the two justices he spoke for had no essential disagreement with the majority opinion. Furthermore, Mr. Justice Douglas would more readily find an antitrust violation than would Mr. Justice White, see pp. 922-25 infra, so it is fair to infer that he and the justices who joined his opinion would go at least as far as supporting the Pennington dictum.

59 Id. at 693 n.6.


The sense that these agreements are violative per se also comes through in the sentences immediately following Mr. Justice White's statement of the forfeiture rule:

One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.\(^6\)

These factors make it more probable than not that Mr. Justice White's treatment of the issues in Pennington solely in terms of the union exemption actually indicates that a union's agreement to impose terms of employment on other employers is a per se violation of the antitrust laws.

**B. "Most Favored Nation" Clauses**

Mr. Justice White spoke in terms of agreements "to impose," but presumably he would include in his rule agreements whereby the union agrees to use its "best efforts" to impose conditions on other employers, because the effect would be the same. Instead of a covenant to impose, or attempt to impose, similar standards on other employers, the union might agree to a "most favored nation" clause, whereby the union promises not to extend more favorable terms to another employer unless the contracting employer gets the benefits of those terms. Mr. Justice White's opinion casts some doubt upon the legality of such a clause.\(^3\)

Although an agreement to impose terms and a most favored nation clause are essentially the same thing, that is, an assurance to the contracting employer that other employers will not be placed in a more advantageous competitive position by virtue of having to give up less to the union, there is a difference. Mr. Justice White's concern about the union's relinquishing control over its collective bargaining policy is not operative in the case of the most favored nation clause to the same degree as in the case of agreements to impose terms, since in the former case the union has no obligation to the employer to seek similar terms from other employers. For this reason, it might be argued that a union which is operating under a most favored nation clause will not be as inflexible in its demands on other employers as one which is party to an agreement to impose terms. However, the union's decision on whether to back off from its original demand will be affected by the necessity of giving similarly favorable terms to the original employer or employers because of the most favored nation clause.

\(^6\) Id. at 665-66.

\(^3\) The prohibition of most favored nation clauses, and related clauses such as agreements to impose terms on other employers, was advocated in Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L.J. 14, 71 (1963).
Thus a powerful union would probably be as inflexible in its subsequent bargaining policy under a most favored nation clause as under the other proscribed types of employer guarantees or assurances. Hence, it seems reasonable to conclude that Mr. Justice White would hold that most favored nation clauses come within his rule.

C. Allen Bradley Dictum Overruled?

Although Mr. Justice White spoke of agreements between a group of employers and a union to impose terms on other employers, there appears to be no rational distinction, in terms of the considerations which he thought important, between multi-employer agreements and agreements with single employers. In each case labor standards are imposed on employers outside the bargaining unit. In each case "the union surrenders its freedom of action with respect to its bargaining policy." Mr. Justice White's treatment of the contested clause in Jewel Tea is consistent with the view that the antitrust laws apply to single employer agreements. In that case he said there was no issue as to the existence of a union-employer conspiracy against Jewel Tea, and that the only question was whether the Jewel Tea agreement itself was immune from the antitrust laws. He did say that "it might be argued that absent any union-employer conspiracy against Jewel and absent any agreement between Jewel and any other employer, the Union-Jewel contract cannot be a violation of the Sherman Act." But unless he thought there was a real possibility that such an agreement might violate the Sherman Act, his treatment at length of whether the agreement was immune from antitrust law was a gesture of extraordinary futility.

It thus appears that a majority of the Court would find no rational ground for making the same distinction that was made in the Allen Bradley dictum 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." Mr. Justice Black, who concurred with Mr. Justice Douglas in Pennington, wrote the majority opinion in Allen Bradley. Mr. Justice Douglas was a part of that majority. Their concurrence in Mr. Justice White's opinion in Pennington may be an indication that the Allen Bradley dictum was not a well considered one. On the other hand, it is entirely possible that these Justices did not think Mr. Justice White's approach necessarily conflicted with it.

---

64 UMW v. Pennington, 381 U.S. 657, 668 (1965).
66 Ibid.
67 See id. at 688-97.
It is possible that the *Allen Bradley* opinion seemed to the Justices to require an employer conspiracy before there could be an antitrust violation by a union, on the assumption that a single employer's agreement could not by itself "unreasonably" restrain trade. Mr. Justice White in *Jewel Tea* apparently did not share that assumption, however, because he carefully pointed out that an agreement between the union and Jewel Tea on meat prices would not be exempt, "whatever substantive questions of violation there might be." If the contract is not exempt from the antitrust laws, why might there not be an unlawful restraint of trade? If the price fixing agreement were not held per se violative, what justification could the union offer for its "reasonableness" in fixing the employer's price? What justification could a union offer for agreeing to use whatever means it could to drive an employer's competitors out of business?

V. "AGREEMENT": SUFFICIENCY OF THE EVIDENCE

Mr. Justice White said, in *Pennington*:

Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek 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.

The question which Mr. Justice White did not answer is how a judge or a jury is to distinguish unilateral union action to impose a uniform wage scale on all employers from action pursuant to an agreement with some employers. A review of the evidence in the *Pennington* case illustrates the difficulty of distinguishing these two factual situations, a difficulty which was heightened by the lack of clarity in the judge's charge to the jury.

A. The Evidence

Phillips' evidence against the union was directed toward showing that there was a change in the pattern of collective bargaining in 1950, whereby

---

69 381 U.S. at 689.
70 The hypothetical situation of a price fixing agreement with a single employer is probably unrealistic for, even assuming that the employer had a monopoly or was an oligopolistic price leader and could unilaterally raise its prices at the expense of consumers, the union could get all that its members would want merely by demanding a higher wage. The effect on consumers, of course, would probably be the same.
71 This situation would be realistic where the union had organized only one employer or could provide job replacements for those members who lost jobs because of its activities.
the union gave up its attempt to control the working time of its members, and in return the large mine operators agreed to a union shop clause and a welfare fund clause. Wage increases and increases in payments required to be made to the welfare fund were allegedly “carefully designed and tailored to meet the abilities of these major coal companies to pay the increases by reason of their intervening mechanization since the last increase.”

The “only purpose” of the union in imposing the uniform national collective bargaining agreement on the small mine operators, Phillips contended, was to force the small mines out of business. Several clauses in the uniform agreement were allegedly directed against the small employers. A “land-lease” clause, instituted in 1943, provided that the collective bargaining agreement applied to coal land leased out by signatory companies, cutting off from nonunion operators a source of mining locations. A 1958 clause, the “protective wage” clause, prevented signatory mine operators from buying coal (usually for fulfilling requirements under long-term contracts) from mines which maintained conditions of employment below union scale.

Phillips cited instances of joint action by the union and large coal operators, the effect of which was to harm small operators. Several large companies joined the union in its successful campaign to get the Secretary of Labor to determine a high minimum prevailing wage rate for the bituminous coal industry, under the Walsh-Healey Act. A union representative attended a meeting held by representatives of the large mines with Tennessee Valley Authority officials, at which the mine owners argued that the TVA should curtail its purchases on the “spot market” and buy more of its coal requirements by term contract. The spot market consisted of coal purchases under contracts of less than six months’ duration, a substantial portion of which were exempt from the Walsh-Healey Act and its minimum wage requirement.

---

74 Id. at vols. 2, 3, pp. 998a-1002a.
75 Id. at vol. 1, p. 400a.
76 Ibid.
77 Id. at vol. 1, p. 114a.
78 Id. at vol. 2, p. 960a. There was no evidence of a written agreement between the union and the large mine operators to impose the uniform national bargaining agreement on the small operators. Phillips introduced evidence of union violence and harassment to force small mine operators, including Phillips, to sign the national agreement even though the union did not represent a majority of their employees. Id. at vol. 1, pp. 119a-95a, vol. 2, pp. 964a-84a.
79 Id. at vol. 3, p. 1108a.
80 Id. at 1109a.
81 Id. at vol. 1, pp. 456a-60a.
84 See id. at 807a-08a, 824a.
The evidence further showed that the union had acquired a substantial interest in a major coal company, West Kentucky Coal Company. The union owned outright about ten percent of the outstanding common stock and all of the preferred stock. A total of more than fifteen million dollars in loans by the union to various individuals and corporations was secured by stock in West Kentucky and its subsidiary Nashville Coal Company. Under the terms of the loans the debt could be extinguished by surrender of the stock to the union, even though the market value may have dropped. There was no provision for interest, although in some cases the union got one-half the dividends, and in another case the union got all the dividends. There was no demand for additional collateral when the stock did drop in value. One large loan secured by West Kentucky stock had been made to Cyrus S. Eaton, chairman of the boards of directors of West Kentucky and Nashville. Other evidence of union involvement was that a five million dollar bank loan to West Kentucky was secured by union-owned United States Treasury Bonds.

Phillips' theory was that the union had used its effective control over the two coal companies to guide their selling policies and use them as "fighting ships" to dump coal on the TVA spot market at depressing prices. West Kentucky had reneged on a large twenty-year contract with Tampa Electric Company, arguing that the contract was invalid as violative of the antitrust laws. The Supreme Court had rejected that argument in another case. Phillips contended that the objective behind reneging on the contract was to use the coal to flood the TVA spot market.

As part of the union's defense, John L. Lewis testified that it was union policy to seek uniform wages and not to resist mechanization. The higher wages were said to have been justified by the higher coal pro-

---

87 Value: $2,500,000. Id. at vol. 1, p. 500a, vol. 2, p. 591a.
88 Id. at 499a-500a. The union's outright ownership of 85,400 common shares of West Kentucky and security interest in 395,000 shares probably gave it control over a majority of the 857,264 outstanding common shares.
89 Id. at 488a-89a, vol. 2, p. 553a.
90 Id. at vol. 3, p. 1125a.
91 Id. at vol. 2, p. 644a.
92 Id. at 570a-71a.
93 Id. at vol. 1, p. 499a, vol. 2, p. 557a.
94 Id. at vol. 1, p. 501a. Evidence of other union investments showed union involvement in companies which bought coal. Id. at vol. 2, p. 579a. Aside from the loan to West Kentucky, a $1,500,000 union-secured loan to a coal land holding company was cited as an example of the union's use of its economic power to allow coal lands to be tied up by favored companies, to the detriment of small operators. Id. at 648a-49a.
95 Id. at 609a-11a.
96 Id. at 913a.
99 Id. at vol. 3, p. 1142a.
100 Id. at vol. 1, p. 475a, vol. 3, pp. 1130a-37a.
duction per worker. The protective wage clause was described as necessary to prevent operators from fulfilling contracts with coal mined under substandard conditions, thus diverting work from the employees of signatory companies. The land-lease clause was said to have been necessary in order to stop operators from signing a union agreement, then leasing or subcontracting a mine or a section of a mine to a nonunion operator who paid substandard wages. The union shop clause, it was argued, was ineffective because it explicitly provided that it was applicable only when lawful, and Tennessee law prohibited such clauses.

In measuring its damages Phillips had compared only the sale price of its "utility" coal (sold on the TVA spot market) with the national average sale price for all coal, and had excluded the average sale price of its "premium" (higher quality) coal. Comparisons between coal of the type mined by Phillips with coal mined throughout the country may fairly be characterized as inconclusive. The union introduced evidence which tended to show that the average price of all coal sold by Phillips from 1955 through 1958 was above the national average.

A vice president of West Kentucky testified that the company sold in the TVA spot market only when it could not sell elsewhere, and that it had lowered its prices in the spot market only after bidding unsuccessfully at higher amounts.

Negotiations for the National Bituminous Wage Agreement of 1950, during which the conspiracy allegedly was formed, were shown to have been made under pressure of federal court injunctions. One was granted on suit by the National Labor Relations Board pending its adjudication of an unfair labor practice complaint against the union. It enjoined the union from insisting that any agreement contain a closed shop clause not in compliance with statutory requirements, a provision for a welfare fund for the

---

101 See id. at vol. 3, pp. 1135a-37a, vol. 4, p. 1724a.
102 Id. at vol. 3, pp. 1109a-11a, 1205a-06a.
103 Id. at 1108a-09a, 1201a.
104 Id. at vol. 1, pp. 195a-96a.
105 Id. at vol. 2, p. 998a.
106 Id. at vol. 1, p. 195a.
107 Id. at 207a-08a.
108 Strip-mined coal (the type produced by Phillips) was shown to have brought a lower price on a national average than other types of coal, because of factors of quality and reliability of supply. Id. at vol. 3, pp. 1347a-48a, 1357a. On the other hand, Phillips introduced evidence which tended to show that its coal was superior in quality to the national average. Id. at 1284a, 1515a.
109 Phillips' coal price averaged forty-five cents a ton above the national average in 1955, eighty-five cents a ton above in 1956, twenty-six cents below in 1957 and eight cents below in 1958. Id. at vol. 4, p. 1733a.
110 Id. at vol. 3, p. 1402a.
111 Id. at 1395a-1406a. Out of twenty-eight bids on the spot market by West Kentucky, only six were successful. Id. at vol. 4, p. 1730a. John L. Lewis testified that the union was interested in West Kentucky primarily as an investment and as a means of providing employment for union members. Id. at vol. 3, pp. 1124a-20a. He said the union did not use its power as a shareholder to coerce management into signing a union contract and did not influence the company's pricing policies. Id. at 1127a-28a.
benefit of union members only, an "able and willing" clause or a "memorial period" clause.\textsuperscript{112} The other injunction, granted on suit by the United States Attorney General under the emergency provisions of the Taft-Hartley Act,\textsuperscript{113} ordered the union and mine operators to "engage in free collective bargaining in good faith for the purpose of resolving their disputes and . . . [to] make every effort to adjust and settle their differences . . . ."\textsuperscript{114}

Other union evidence pointed to the failure of Phillips to honor the wage scale of the collective bargaining agreement. One of the Phillips partners testified:

\begin{quote}
Q. And whatever you decided to pay an individual was what you and he decided? A. That's right.

Q. And so whatever money you made or lost was based upon this labor agreement that you had with the men and not by reason of the wage scale set forth in the union agreement, is that correct? A. How's that now?

Q. So whatever you made or lost during this four and a half year period took into account the wages that you and your men agreed upon and not the wage scale set forth in the union contract.

A. That's right.\textsuperscript{115}
\end{quote}

The Phillips partner also testified that he had filed reports with the union understating tonnage of coal produced at the mine,\textsuperscript{116} thus lowering the amount of welfare royalties.

The National Bituminous Coal Wage Agreement of 1950,\textsuperscript{117} which was in effect during the years of alleged union misconduct (1954-1958), did not include a clause whereby the union agreed to seek similar terms of employment from other employers. The Appalachian Coal Union Agree-

\textsuperscript{112} Id. at 1476a-78a; Penello v. UMW, 88 F. Supp. 935 (D.D.C. 1950). The "able and willing" clause provided:

\begin{quote}
It is the intent and purpose of the parties hereto that this agreement . . . shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement during such time as such persons are able and willing to work.
\end{quote}

\textit{Id.} at 939. (Italicized in original.) The "memorial period" clause provided: "The International Union, United Mine Workers of America may designate memorial periods provided it shall give proper notice to each district." \textit{Ibid.} The court said:

\begin{quote}
The reason for insistence upon the provisions in question (to all intents and purposes openly stated by respondent Lewis) is to control production, and ultimately, through such control, at least indirectly, to fix prices.
\end{quote}

\textit{Id.} at 940. The court concluded that insistence on inclusion of the "able and willing" and "memorial period" clauses was a refusal to bargain in good faith because such inclusion would contravene \textsuperscript{8(d)} of Taft-Hartley, which provides for continuation of the collective bargaining agreement for sixty days following notice of termination, and because agreement on such clauses might have violated the antitrust laws.


\textsuperscript{116} \textit{Ibid.} The trustees of the welfare fund recovered $43,424.22 in royalty payments from Phillips in this case. Pennington v. UMW, 325 F.2d 804, 809 (6th Cir. 1963).

\textsuperscript{117} CCH LAB. L. REP \textsection 59914, at 85583-96 (1964).
ment, signed in 1941, and the National Bituminous Coal Wage Agreement of 1945 did contain most favored nation clauses.\textsuperscript{118} These clauses were expressly rescinded by the National Bituminous Coal Wage Agreement of 1947.\textsuperscript{119}

\textbf{B. The Charge}

In his charge to the jury, the trial judge paraphrased the \textit{Hutcheson} test:

The Court charges you that if the wage and welfare payment provisions in these contracts were arrived at by the parties as a result of collective bargaining, the coal companies on their behalf and in their self-interest, and the United Mine Workers on behalf of its members and in their own self-interest, there is no violation of the Sherman Act in the establishment of the wage rates and welfare provisions through the contract, provided there was no agreement between the Union and coal operators to fix high wage rates and royalty payments in order to drive the small coal operators out of business.\textsuperscript{120}

It was not a violation for the union to insist on the “same wage and benefit provisions in all of its collective bargaining agreements with small, medium and large companies alike.”\textsuperscript{121} The union’s substantial investment in a coal producing company was not a violation, even if made for the purpose of having the company “recognize and bargain with the union and pay the union scale of wages and fringe benefits.”\textsuperscript{122} The protective wage and land-lease clauses were lawful, according to the trial judge, provided the union’s insistence on them was motivated by a desire to protect union scale wages and other benefits, and the clauses were not the product of the union’s enforcement of an agreement with large companies to drive the small companies out of business.\textsuperscript{123} The union might lawfully approach the Secretary of Labor to obtain a minimum wage determination under the Walsh-Healey Act, except in connection with such a conspiracy.\textsuperscript{124} The lowering of prices for coal by the larger companies in sales to the TVA was permissible if done defensively and not for the “specific purpose” of damaging small mines.\textsuperscript{125} Urging the TVA to cut down its purchases of

\textsuperscript{118} Id. at 85552, 85559 (1941); id. at 85566, 85569 (1945).

\textsuperscript{119} Id. at 85571, 85581 (1947). This rescinding clause was carried over in the 1950 contract. Id. at 85583, 85595 (1964).

Interestingly, the \textit{Jewel Tea} case did present a collective bargaining agreement which contained a most favored nation clause. Record, vol. 1, pp. 56-57, Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965). Mr. Justice White apparently was not aware of its existence. See \textit{id.} at 688.

\textsuperscript{120} Record, vol. 3, p. 1556a, UMW v. Pennington, 381 U.S. 657 (1965).

\textsuperscript{121} \textit{Ibid.}

\textsuperscript{122} Id. at 1557a.

\textsuperscript{123} Id. at 1557a-58a.

\textsuperscript{124} Id. at 1558a.

\textsuperscript{125} Id. at 1558a-59a.
spot market coal and increase its purchases by term contract was not a violation of the antitrust laws unless done for the purpose of driving out the small operators.\footnote{126}

Other instructions were more general. The court, in posing an either-or standard, seemed to put forth a "primary objective" test:

The jury must determine from all of the evidence in the case whether the Union, on the one hand, was acting alone to further the interest of its members in wages and working conditions. Or, on the other hand, was acting in combination with the large coal companies to restrain trade of small companies or to attempt to monopolize the industry for large companies.\footnote{127}

The judge stated that a "specific intent" to restrain trade or build a monopoly would support a violation where an insubstantial restraint resulted,\footnote{128} but also charged:

It is not necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade results as the consequence of the alleged conspirators' conduct or business arrangements.\footnote{129}

The court also formulated a "sole purpose" test in such a way as to imply that the union's purpose must have been free from any taint of a desire to restrain trade:

If you find that the actions of the Union in this case were prompted solely by the motive to improve the working conditions and wages of its members, independent of the kind of conspiracy alleged by Phillips Brothers Coal Company, then you must answer that there was no conspiracy upon the conspiracy question.\footnote{130}

The judge allowed the jury to inquire into the "reasonableness" of restraints other than price fixing or market allocation, if first it found "combination."\footnote{131} The instructions closed with a restatement of the \textit{Apex Hosiery} and \textit{Allen Bradley} tests.\footnote{132}

After this charge a juryman might reasonably have concluded that he could find against the union on any one of several theories: that the union's sole purpose was to shut down or injure the small mine owners;
that its primary purpose was to do so; that it had a purpose to do so; or that, irrespective of purpose ("specific intent"), the effect of the collective bargaining agreements was to close down or injure the small owners.

C. On Remand

It seems doubtful that the Supreme Court opinions made any clearer the kind or quantum of evidence needed for a finding that a union participated in a conspiracy to violate the antitrust laws.

In Jewel Tea, Mr. Justice White considered only whether the marketing hour clause was within the labor exemption. He said:

It is well at the outset to emphasize that this case comes to us stripped of any claim of a union-employer conspiracy against Jewel. The trial court found no evidence to sustain Jewel's conspiracy claim and this finding was not disturbed by the Court of Appeals.\textsuperscript{133}

The trial court's finding of no union-employer conspiracy was based partly on a finding that the members of the multi-employer bargaining group had bargained at arm's length with the union.\textsuperscript{134} The court of appeals had not "disturbed" the finding of arm's length bargaining, but it had, contrary to Mr. Justice White's statement, reversed the finding of no union-employer conspiracy:

In view of the facts in this case as shown by the evidence it is clear that plaintiff proved that the unions, Associated Food Retailers and Bromann, its secretary, entered into a combination or agreement, which constituted a conspiracy, as charged in the complaint. It was therefore illegal and void because violative of the Sherman Act. . . .

The agreement between the unions and Associated Food Retailers is still operative as shown by their common defense in this case. Whether it be called an agreement, a contract or a conspiracy, is immaterial.\textsuperscript{135}

Would uncontradicted credible evidence of arm's length bargaining negate a finding of antitrust violation based on an agreement to seek similar terms from other employers? Mr. Justice White gave no suggestion that such would be the case. Indeed, in Pennington he said, "there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached

\textsuperscript{133} 381 U.S. at 688.

\textsuperscript{134} The trial judge did not give the most favored nation clause any weight in reaching his decision.

\textsuperscript{135} Jewel Tea v. Associated Food Retailers, 331 F.2d 547, 551 (7th Cir. 1964).
may disregard other laws."\(^{136}\) Were evidence of arm's length bargaining sufficient to rebut the charge of conspiracy, the only effect of the *Pennington* rule might be to encourage unions and employers to build a record of a hard fight before signing an agreement with a clause whereby the union agrees to seek similar terms from other employers. It therefore seems unlikely that Mr. Justice White would consider evidence of arm's length bargaining relevant to defeating the charge of conspiracy.

The Douglas-Black-Clark opinions did speak to the question of sufficiency of evidence and, indirectly, to the scope of review. In *Pennington*, Mr. Justice Douglas said in his concurring opinion that he read Mr. Justice White's opinion as follows:

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.\(^{137}\)

The second sentence, setting up a prima facie evidence test, appears to do no more than restate the first. This reading, however, would make the second sentence absurd. A repetition of all the elements of the first sentence is a violation, not merely a prima facie case. What Mr. Justice Douglas appears to have meant is that "those features" which constitute prima facie evidence of violation are: (1) an industry-wide collective bargaining agreement (2) which contains a wage scale beyond the ability of some employers to pay. Given these facts, Mr. Justice Douglas would shift to the union the burden of persuading a fact-finder that the agreement was not made for the purpose of forcing some employers out of business. This reading is supported by Mr. Justice Douglas' footnote citation to a quotation from *Interstate Circuit, Inc. v. United States*:\(^{138}\)

Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. . . .\(^{139}\)

---


\(^{137}\) *Id.* at 672-73.

\(^{138}\) 306 U.S. 208 (1939).

Thus, Mr. Justice Douglas' view severely undercuts Mr. Justice White's statement that it is "beyond question" that a union may seek similar wages from all employers, even where the weak employers cannot afford the demanded wage. A remaining question is what proof an employer must present to obtain a finding that the wage scale exceeds his "financial ability . . . to pay." Mr. Justice Douglas would probably not force the employer to wait until he had been driven out of business, so presumably a showing that the employer is currently losing money would suffice.

The Douglas rule carries the rule of *Interstate Circuit* too far. As the Supreme Court said in a later case, "circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." 140 In *Interstate Circuit*, two motion picture theater chains and several distributing corporations were enjoined by a federal district court from enforcing or renewing contracts found to have been entered into in pursuance of a conspiracy in violation of the antitrust laws. The facts showed that an agent of Interstate, one of the theater chains, sent a letter to the distributors demanding as a condition to its continued exhibition of motion pictures in first run theaters at a night admission of forty cents or more, that the distributors not allow the same films to be exhibited in any theater at night for less than twenty-five cents, nor allow such films to be part of a double feature. Agents of the two exhibitors met with representatives of the distributors and subsequently the distributors individually entered into agreements granting the conditions to the exhibitors. The Supreme Court held that the circumstances justified an inference that the distributors had acted in concert. This inference was grounded on (1) the failure of the distributors to offer testimony denying the charges by officials who would have been in a position to know of the existence of an agreement; (2) the "substantial unanimity of action" taken by the distributors upon the proposals made to them; and (3) the fact that there were far-reaching changes in the distributors’ business methods. 141

The circumstantial evidence in *Interstate Circuit* made it more probable than not that the distributors shared a common purpose to offer benefits to the two powerful theater chains in the form of restraints on smaller "second run" exhibitors. In the case of a national labor union, however, the fact that several inefficient producers may be driven out of business by a high uniform wage scale—or probably more correctly the fact that a high uniform wage scale is one factor in driving some producers out of business—does not make it more probable than not that the union and the more efficient employers have made an agreement designed to put those producers out of business. It is quite possible that neither the union


nor the efficient producers would have knowledge that some producers could not afford to pay the demanded wage. Just as probable would be the conclusion that the union had unilaterally pressed demands for a uniform wage to a successful conclusion. Not only would such a course be permissible, but sections 8(d), 8(a)(5) and 8(b)(3) of the Taft-Hartley Act place a duty on employer and union to bargain in good faith on "wages, hours, and other terms and conditions of employment." Does the good faith requirement demand that the union guarantee employers that they will not go out of business if they pay the union wage? Such a rule would put too great a burden on labor unions.

It is evident then that Mr. Justice Douglas has a strong predilection toward finding an antitrust violation where a collective bargaining agreement injures a signatory employer competitively. His handling of the issues in *Jewel Tea* further illustrates this attitude. The collective bargaining agreement itself, he said,

was evidence of a conspiracy among the employers with the unions to impose the marketing-hours restriction on Jewel via a strike threat by the unions. This tended to take from the merchants who agreed among themselves their freedom to work their own hours and to subject all who, like Jewel, wanted to sell meat after 6 p.m. to the coercion of threatened strikes, all of which if done in concert only by businessmen would violate the antitrust laws.¹⁴²

Mr. Justice White, in affirming the trial court finding of a close nexus between marketing hours and terms of employment, held that the lower court's finding of underlying fact was not clearly erroneous:

It found that "in stores where meat is sold at night it is impractical to operate without either butchers or other employees. Someone must arrange, replenish and clean the counters and supply customer services." Operating without butchers would mean that "their work would be done by others unskilled in the trade," and "would involve an increase in workload in preparing for the night work and cleaning the next morning." ¹⁴³

Mr. Justice Douglas was more willing to reexamine the underlying facts as to the impracticality of operating self-service counters without employees on duty:

It is, however, undisputed that on some nights Jewel does so operate in some of its stores in Indiana, and even in Chicago it sometimes operates without butchers at night in the sale of fresh poultry and sausage, which are exempt from the union ban.¹⁴⁴

¹⁴³ Id. at 694.
¹⁴⁴ Id. at 738.
Mr. Justice Douglas apparently found the increase in workload to be a consideration not important enough to mention. Perhaps he was right in doing so, because it is difficult to conceive of the propriety of a union demanding fewer sales as a condition to agreement so that its members could work less hard. The point to be stressed, however, is that Mr. Justice Douglas was far more willing than Mr. Justice White to reweigh facts underlying the inferential question of what is a “term or condition of employment,” within the meaning of the section 13 Norris-LaGuardia exemption. Mr. Justice Douglas apparently held the trial court finding clearly erroneous because “on some nights” in “some of its stores” Jewel operated without butchers in Indiana, and “sometimes” so operated in Chicago “in the sale of poultry and sausage.” Contrasted with this willingness to redetermine underlying fact where an antitrust violation was not found by the trier of fact is his apparent willingness in Pennington to give the initial trier the power to impute anticompetitive purpose to the union on evidence of uniform wage agreements which hurt some employers competitively.\(^{146}\)

**VI. The Goldberg View**

Mr. Justice Goldberg’s primary disagreement with the other opinions in Pennington was a product of his fear that a judge or jury might base a finding of a Sherman Act violation solely on the feeling that a collective bargaining policy chosen by a union unduly injured some employers.\(^{146}\) According to Mr. Justice Goldberg:

> Congress intended to foreclose judges and juries from roaming at large in the area of collective bargaining, under cover of the antitrust laws, by inquiry into the purpose and motive of the employer and union bargaining on mandatory subjects.\(^{147}\)

At the very least, his position was that union purpose should not be “inquired into” where mandatory bargaining subjects clearly are involved.

\(^{145}\) Congress can design an oligopoly for our society, if it chooses. But business alone cannot do so as long as the antitrust laws are enforced. Nor should business and labor working hand-in-hand be allowed to make that basic change in the design of our so-called free enterprise system. If the allegations in this case are to be believed, organized labor joined hands with organized business to drive marginal operators out of existence. According to those allegations the union used its control over West Kentucky Coal Co. and Nashville Coal Co. to dump coal at such low prices that respondents, who were small operators, had to abandon their business. According to those allegations there was a boycott by the union and the major companies against the small companies who needed major companies’ coal land on which to operate. According to those allegations, high wage and welfare terms of employment were imposed on the small, marginal companies by the union and the major companies with the knowledge and intent that the small ones would be driven out of business. UMW v. Pennington, 381 U.S. 657, 674-75 (1965) (Douglas, J., concurring).


\(^{147}\) Ibid.
Yet, in order to decide whether a subject is mandatory or not, where the subject is not in terms of wages or hours, an analysis of union purpose must be made. Mr. Justice Goldberg suggested that were the union attempting to protect small independent meat dealers by its marketing hour restriction, rather than merely limiting the working day at Jewel Tea, the union still would be immune from antitrust liability. Whether or not he would hold such an objective a mandatory subject of bargaining, he clearly is looking at union purpose in order to make a decision about antitrust immunity. His citation of labor laws as examples of legislative displeasure at inquiries into union purpose seems misplaced, for Congress has imposed the duty to make such inquiries on the NLRB. The Board made such an inquiry in a case involving the same protective wage clause that had been accepted by Phillips in Pennington. In Raymond O. Lewis, the NLRB held that the protective wage clause violated section 8(e) of the Labor-Management Reporting and Disclosure Act of 1959, on the ground that the union intended by the clause not to preserve the work and standards of employment of union employees, but to regulate the terms and conditions of employment of nonunion companies and to extend the union contract to them.

Mr. Justice Goldberg's position may be that courts should not be permitted to infer an agreement with some employers to impose terms on others from the mere existence of uniform wage contracts within an industry and the fact that some employers have suffered competitively. However, doubt is cast on this reading by Mr. Justice Goldberg's insistence in Jewel Tea that

even if the self-service markets could operate after 6 p.m., without their butchers and without increasing the work of their butchers

148 Id. at 707-08.
149 Section 8(b)(4) of the National Labor Relations Act provides that the union commits an unfair labor practice when it threatens, coerces or restrains "any person engaged in commerce or in an industry affecting commerce, where in either case as object thereof is . . . [to accomplish certain results]." 61 Stat. 141 (1947), as amended, 29 U.S.C. §158(b)(4) (1964). (Emphasis added.) Section 8(b)(7) makes picketing an unfair labor practice where "an object" is recognition or organization. 73 Stat. 544 (1959), 29 U.S.C. §8(b)(7) (1964). The extent to which union purpose is relevant or determinative under §8(e), 73 Stat. 543 (1959), 29 U.S.C. §158(e) (1964), which proscribes certain union-employer agreements prohibiting subcontracting and contracting out of work, is unclear. See generally Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§8(b)(4) and 8(e), 113 U. Pa. L. Rev. 1000 (1965). Arguably the result should turn on whether the union attempts to affect labor standards at the contracting employer's company rather than at the company of an employer not signatory to the collective bargaining contract. "Consideration of the purpose of the statutory proscription suggests the view that, under §8(e) no less than 8(b)(4), the primary or secondary quality of the union's action should be tested by examination of its object rather than its effect." Id. at 1032 n.133.

150 144 N.L.R.B. 228 (1963).
152 The Board's reasoning was that the signatory employer was perfectly free to purchase coal from nonsignatory employers, so long as the nonsignatory employers maintained union standards. Raymond O. Lewis, 144 N.L.R.B. 228, 230-37 (1963).
at other times, the result of such operation can reasonably be ex-
pected to be either that the small, independent service markets
would have to remain open in order to compete, thus requiring
their union butchers to work at night, or that the small, inde-
pendent service markets would not be able to operate at night and
thus would be put at a competitive disadvantage. Since it is clear
that the large, automated self-service markets employ fewer butch-
ers per volume of sales than service markets do, the Union cer-
tainly has a legitimate interest in keeping service markets competi-
tive so as to preserve jobs. Job security of this kind has been
recognized to be a legitimate subject of union interest.\textsuperscript{183}

Must an employer bargain with the union over the job security not
merely of his own employees but of the employees of his competitors? If
so, does an employer also have a duty to bargain with a union about the
price at which he sells his product, on the theory that too low a price will
hurt competitors which have been organized by the same union? Can the
union demand that an employer limit his production to give other union-
ized employers an opportunity to maintain a given level of sales? Must an
employer bargain over a demand that he deal only with other employers
organized by the same union, in order to preserve jobs for union mem-
bers?\textsuperscript{154} Mr. Justice Goldberg was not willing to carry “job security”
to these limits:

The direct and overriding interest of unions in such subjects as
wages, hours, and other working conditions, which Congress has
recognized in making them subjects of mandatory bargaining, is
clearly lacking where the subject of the agreement is price-fixing
and market allocation.\textsuperscript{185}

Perhaps a more accurate formulation of Mr. Justice Goldberg’s ap-
proach is that the labor exemption includes all labor-management agree-
ments except those which are framed in terms of direct market restraints—
price fixing, limitation of production or market allocation.\textsuperscript{156} Another pos-
sible formulation would be that those subjects which are “arguably” man-
datory are exempt.\textsuperscript{157} This formulation may produce the same results,

\textsuperscript{183} 381 U.S. at 727-28.

\textsuperscript{154} Such an agreement might constitute an unfair labor practice by both union
and employer and would be void, under § 8(e) of the Labor-Management Reporting
was reached as to a clause held to have this purpose in Raymond O. Lewis, 148
N.L.R.B. 249 (1964), on the ground that all union employers taken collectively did
not constitute an appropriate bargaining unit.

\textsuperscript{155} 381 U.S. at 732-33.

\textsuperscript{156} This approach was advocated in Cox, Labor and the Antitrust Laws—A Pre-

conduct arguably subject to regulation under federal labor law is exempt from state
regulation).
because Mr. Justice Goldberg might well say that only direct market re-
straints are "clearly" nonmandatory.

Under either of the suggested alternative formulations, Mr. Justice 
Goldberg's approach gives broader scope to the phrase "terms or conditions 
of employment" in the section 13 Norris-LaGuardia labor exemption than 
in the duty to bargain imposed by sections 8(d), 8(a)(5) and 8(b)(3) of 
Taft-Hartley, because the scope of mandatory bargaining subjects would 
not be as wide as the labor exemption.\textsuperscript{168} It might be contended that 
Congress probably intended similarity of scope where it used similar 
phrases. This argument might be countered, however, by pointing out 
that Congress has adopted a policy encouraging collective bargaining agree-
ments between labor and management.\textsuperscript{189} By subjecting unions and 
employers to possible antitrust liability for entering agreements on subjects 
neither clearly mandatory nor clearly nonmandatory, areas of union-
employer agreement may become unduly circumscribed, contrary to the 
policy of Taft-Hartley.

Some support for this rebutting argument might be found in section 6 
of the Norris-LaGuardia Act, which provides:

No officer or member of any association or organization, and 
no association or organization participating or interested in a 
labor dispute, shall be held responsible or liable in any court of the 
United States for the unlawful acts of individual officers, mem-
bers, or agents, except upon clear proof of actual participation in, 
or actual authorization of, such acts, or of ratification of such acts 
after actual knowledge thereof.\textsuperscript{160}

In \textit{United Bhd. of Carpenters v. United States},\textsuperscript{161} the Supreme 
Court held that union and employer defendants in a criminal prosecution 
under section 1 of the Sherman Act were entitled to a charge under sec-

tion 6 of Norris-LaGuardia as to ratification of unlawful acts of agents 
by the organizations involved: "We hold, therefore, that 'authorization' as 
used in § 6 means something different from corporate criminal responsi-

Section 6 does not, in terms, provide that clear proof must be 
shown of the unlawfulness of the acts of "individual officers, members, or 
agents," and the Court in \textit{Carpenters} gave no indication that it does by 
implication. The allegations in that case were that the unions had con-
spired with manufacturers and dealers to monopolize trade in millwork 
and patterned lumber in the San Francisco Bay area. The alleged 
purpose was to prevent out of state manufacturers from selling there. The

\textsuperscript{168} See notes 4, 6 \textit{supra} and accompanying text.
\textsuperscript{169} Labor-Management Relations Act (Taft-Hartley Act) § 1, 61 Stat. 136 (1947), 
\textsuperscript{161} 330 U.S. 395 (1947).
\textsuperscript{162} \textit{Id.} at 406. (Footnote omitted.)
means to the supposed end was a restrictive collective agreement clause which provided:

no material will be purchased from, and no work will be done on any material or article that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this Agreement.163

The Court held that a demurrer was properly overruled by the trial court, and cited Allen Bradley.164

Counsel for the UMW in Pennington argued that section 6 demanded "clear proof" of union liability.165 It is arguable that Congress, while primarily concerned with the agency problem in section 6, evidenced an intention that the unlawfulness of union purpose not be too easily inferred where the employer-employee relationship is concerned. If there must be clear proof that the union authorized "unlawful acts," it is entirely possible that Congress would demand clear proof that a union intended primarily to restrain trade rather than to seek or protect a wage level.

Mr. Justice White may have adopted a form of the "clear evidence" rule without elaboration. His statement of the rule in Pennington was that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."166

The clear evidence rule would be a way to remedy Mr. Justice Goldberg's mistrust of juries and courts where a union is accused of violating the antitrust laws. The jury would be charged that the union must clearly have intended to help some employers at the expense of others, rather than to get better "terms or conditions of employment" from the contracting employer. Another way for the Supreme Court to control the free-ranging power of the lower courts would be to demand specific findings of fact on evidence which is disputed or attacked as not credible, and to leave the question of union purpose to restrain trade as a question of law to be decided by the judge. The question of illicit purpose involves a judgment as to whether union conduct gives rise to an inference that the union was "conspiring" to restrain trade rather than merely "agreeing" on "terms or conditions of employment" within the section 13 Norris-LaGuardia exemption. That judgment should be made by persons more familiar than a jury with competing legislative policies which on the one hand encourage union-employer agreements on working conditions and on the other hand heavily penalize agreements among employers which unjustifiably restrain trade. The factors contributing to an inference of unlawful activity should

163 Id. at 399.
164 Id. at 411.
166 381 U.S. at 665. (Emphasis added.)
be clearly spelled out in opinion form to provide guidelines for future union conduct and to facilitate review by appellate courts. The detailed findings of underlying fact made by the trial judge in *Jewel Tea* are to be contrasted with the virtually unreviewable jury finding in *Pennington*:

The Foreman: . . .

"Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiff Phillips Brothers Coal Company?"

Answer: Yes.167

It might be objected that encouraging the jury to make more specific findings will have no practical effect. A jury which feels that union policy was, on balance, censurable because harmful to the employer will simply answer the questions put to it in such a way as to ensure union liability. This argument has considerable force, but it is really an argument for what is probably Mr. Justice Goldberg's position: a jury should not be allowed to speculate as to union purpose unless direct market restraints such as price fixing clearly are involved.

The use of *Noerr Motor Freight*168 in *Pennington* could be cited in support of this position. The latter case held that union attempts to influence public officials could not be the basis in whole or part, for a finding of antitrust law violation, irrespective of whether done in "combination" with employers and for the purpose of restraining trade: "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."169 Appeals to public officials are not to be discouraged, but neither are unions and employers to be discouraged from making agreements about conditions of employment. Therefore a collective bargaining agreement should not be made the basis of an antitrust violation unless the union clearly had no immediate purpose other than restraint of trade—as is the case where it overtly attempts to fix prices, limit production or allocate markets.

---


169 381 U.S. at 670.

Mr. Justice White spoke of the "obviously telling nature of this evidence," *ibid.*, but left to the trial judge the question of admissibility on the issue of union purpose as to other transactions. *Id.* at 670 n.3. If appeals to public officials might be evidence of illicit purpose as to other acts—seeking high wages from all employers, for example—the resulting discouragement of such appeals is almost as severe as if antitrust violations were predicated upon them. It is suggested that Mr. Justice White should have instructed the trial judge that such evidence was inadmissible for any purpose.
VII. A Suggested Approach

Mr. Justice White showed the possible unwisdom, from the union's point of view, of an agreement which restricts the union's future bargaining flexibility, but he did not convincingly demonstrate why such an agreement violates the antitrust laws. He conceded the validity under the Sherman Act of elimination by a union of competition based on differences in labor standards. Why, then, should the union be penalized by way of treble damages, perhaps even criminal punishment, for guaranteeing to an employer that it will maintain a policy of eliminating such competition, in exchange for a promise of better working conditions? As support for his conclusion that a promise to impose uniform standards is or may be unlawful under the antitrust laws, Mr. Justice White argued by analogy from the assumption that it clearly would be unlawful for one group of employers to demand that the union impose higher wages on other employers, "and if the conspiracy presently under attack were declared exempt it would hardly be possible to deny exemption to such avowedly discriminatory schemes." The situations, however, are not analogous, and exempting the type of "conspiracy" (agreement) alleged in Pennington would not force the courts to exempt the other. First, an agreement to impose higher wages on other employers is not, under the Apex Hosiery test, an agreement to eliminate competition based on differences in labor standards, but is rather an agreement to encourage or preserve differences in labor standards. Further, where the union agrees to impose on one set of employers higher wages than the contracting employer promises to pay, it is apparent that the only immediate purpose the union has in making such a promise is to disadvantage the other employer. On the other hand, a clause whereby the union agrees to impose similar standards on other employers by itself shows no anticompetitive purpose on the union's part, unless it is certain that other employers cannot meet the standards, so that the demand for equal standards is effectively a demand to close down. Except in the latter extreme case, the most probable construction of union purpose where it agrees to impose similar terms is that the union sees such a promise as the only practical way to achieve its desired standards in the face of plausible arguments from employers that they cannot otherwise afford the raise.

Mr. Justice Goldberg argued that Mr. Justice White's view unduly elevated form over substance since agreements with multi-employer units have the same effect as agreements to affect employers outside the bar-

\(^{170}\) Id. at 666.

\(^{171}\) Id. at 668.

\(^{172}\) An exception to this statement might exist where the union expected to get higher wages from other employers anyway, in which case it did not really give up anything to the contracting employer and made the "concession" only because the contracting employer was unduly insecure in what it thought the union would do. The union could avoid the effect of Mr. Justice White's dictum here by getting a collective bargaining agreement from the high-wage employer first.
gaining unit. That is, a union agreement with employer $A$ to impose similar terms on employers $B$ and $C$ has the same effect as an agreement on the same terms with employers $A$, $B$ and $C$ as members of a multi-employer bargaining unit. Yet it must be pointed out that the difference is not merely formal. In the case of the multi-employer unit, each employer has voluntarily designated its bargaining representative. When a union agrees with some employers to impose terms on others, however, the employers outside the original unit have not had an opportunity to participate in negotiating the terms the union presumably now inflexibly will demand from them under threat of strike. Thus the proper focus is on employers outside the original unit which are affected by these kinds of agreements.

Mr. Justice White's seeming concern about the union's sacrifice of control over its bargaining policy is misplaced if a union is able to use this sacrifice of freedom to get higher standards of employment. More importantly, this sacrifice by the union is not a sacrifice to allow certain employers to have complete discretion to formulate union policy; it is a sacrifice made by the union voluntarily, to obtain certain definite terms. In reality, it seems that Mr. Justice White was primarily concerned with protecting employers, and this concern is apparent in his opinion:

Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group.

Although it seems clear that a union may be unwise to agree to impose similar terms on other employers, and that such agreements may hurt those employers if they are unable to meet the pre-agreed terms, it is questionable that the antitrust laws are the appropriate means of curtailing these agreements.

Mr. Justice White demonstrated that an employer's insistence on a union promise to impose similar terms outside the bargaining unit as a precondition to agreement would be a failure to bargain in good faith, and

---

172 The position of the NLRB has been:
An employer can withdraw from a multipurpose bargaining unit at will, provided only that the withdrawal request is made before the date set by the contract for modification, or before the agreed-upon date to begin the multi-employer negotiations, and the withdrawal is unequivocal. The Evening News Ass'n, 154 N.L.R.B. No. 121, p. 2 (Sept. 24, 1965). (Footnotes omitted.) See generally Retail Associates, Inc., 120 N.L.R.B. 388 (1958).

174 Cases cited by Mr. Justice White, 381 U.S. at 668-69, did have this vice of complete sacrifice of control. Associated Press v. United States, 326 U.S. 1 (1945); Fashion Originators' Guild of America, 312 U.S. 457 (1941); Anderson v. Shipowners Ass'n, 272 U.S. 359 (1926).

175 UMW v. Pennington, 381 U.S. 657, 668 (1965). (Emphasis added.)
therefore an unfair labor practice. Assume, however, that the union accepted the demand voluntarily, so that no unfair labor practice proceeding was instituted against the employers who demanded such a clause. The union might now attempt to impose pre-agreed terms on employers outside the original group. If these employers rejected the terms, and the union threatened to strike, it would be appropriate to hold that the union was not bargaining in good faith and thus was committing an unfair labor practice. Merely acting out the terms of a prior agreement would not constitute "bargaining."

The General Electric case, decided by the NLRB in 1964, lends support to the view that a union's demand for terms pursuant to an agreement with another employer or set of employers is an unfair labor practice quite apart from Sherman Act considerations. In that case the employer, General Electric, was held to have violated its duty to bargain in good faith, in part because it presented an accident insurance proposal on a take-it-or-leave-it basis:

In practical effect . . . [General Electric's] "bargaining" position is akin to that of a party who enters into negotiations "with a predetermined resolve not to budge from an initial position," an attitude inconsistent with good-faith bargaining.

The Board stated that "our decision rests . . . upon a consideration of the totality of . . . [General Electric's] conduct," so it is unclear whether merely coming to the bargaining table with a take-it-or-leave-it position is itself an unfair labor practice. The Board found that General Electric went beyond mere stubbornness in adhering to its desired contract goal:

It consciously placed itself in a position where it could not give unfettered consideration to the merits of any proposals the Union might offer. Thus, . . . [General Electric] pointed out to the Union after . . . [General Electric's] communications to the employees and its "fair and firm offer" to the Union, that "every-

---

176 Id. at 666-67.

177 Entering into the agreement itself would not be an unfair labor practice, because the parties to it cannot be said to have refused to bargain with each other. At any rate, where the parties are in harmony with one another the agreement would probably not be brought to the attention of the NLRB (prior to union action pursuant to the agreement).

178 This result is reached under Mr. Justice White's rule anyway, because the union in this situation would be acting pursuant to an agreement which is probably illegal on its face.


180 Id. at 5.

181 Id. at 6.
thing we think we should do is in the proposal and we told our employees that, and we would look ridiculous if we changed now."  

The Board may decide that take-it-or-leave-it bargaining is permissible if the company or union which pursues such a course has not placed itself in a position where there is external pressure on it to adhere to its stated "final" position. Thus the Board may distinguish between a union which has agreed with some employers to impose terms on others and one which simply has decided unilaterally to pursue a course of seeking uniform terms from all employers, just as it may find employer bad faith where the employer publicizes that it will not retreat from its offer to the union but not find bad faith where the employer simply adheres to a take-it-or-leave-it offer. The distinction is one of degree, but in the generality of cases the union making a demand pursuant to an agreement with other employers has rendered its bargaining policy more inflexible than a union which simply has made its own policy decision to seek uniform terms, a decision it can change without breaching an agreement.  

Similarly, an employer which publicizes to its employees its intention to stand firm on a "final offer" will be less susceptible to compromise, with concomitant loss of face, than an employer which has not publicized its intentions.  

---

182 Id. at 5.  
183 See NLRB v. Superior Fireproof Door & Sash Co., 289 F.2d 713 (2d Cir. 1961), where the union made an agreement with employer $A$ with a proviso that no other Employer . . . shall be accorded terms and conditions in a collective bargaining agreement which are more favorable than those contained herein; including classifications and minimum rates of pay. The foregoing however, shall not apply to general wage increases and rates of pay.  

Id. at 715. The court rejected the contention by employer $B$, which had been held by the NLRB to have violated its duty to bargain in good faith with the union, that the clause prevented the union from bargaining in good faith, and thus absolved it of any duty toward the union. The evidence showed that the union had entertained proposals by employer $B$ for terms different from those in employer $A$'s agreement and that the union had agreed on more favorable terms with other employers. The court said, however:

Nevertheless it does not follow from our rejection of this contention that the impact of the . . . [employer $A$] contract should be wholly disregarded. A union that has thus limited its freedom at the bargaining table can hardly expect that this will not have an effect upon the conduct of the employer; and the course of the negotiations here must be viewed in that light.  

Id. at 718.  
184 The Board might also find an unfair labor practice in a union's rigid insistence on terms the employer clearly cannot afford, on the theory that since the union cannot reasonably expect the employer to accept such terms, it has evidenced an intention not to reach an agreement. See NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953), where the employer submitted a brief proposal with a working hours provision from an old contract, but with no provision on wages, grievance procedure or other matters proposed by the union. The court said:

It is difficult to believe that the Company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining.  

Id. at 139. In unclear cases, where the employer realistically is capable of producing more efficiently and thus might be able to meet the terms, the union should not be
The product of this approach would be, in practice, that unions would not make agreements to impose terms of employment on other employers because they would commit an unfair labor practice by attempting to carry them out in the face of employer resistance. The difference between the unfair labor practice approach and the antitrust violation approach is that under the former the union would be subject to a cease and desist order,\textsuperscript{185} instead of treble damages\textsuperscript{186} or penal sanction,\textsuperscript{187} if it were found to have carried out such an agreement, and the finding as to whether such an agreement existed would be made in the first instance by the NLRB.

It is submitted that, except in extreme cases such as \textit{Allen Bradley} where the union clearly agrees to impose on other employers terms relating directly to the product market, such as price fixing, product limitation or market allocation, the labor law approach is preferable to the antitrust approach for several reasons. First, the good faith bargaining approach forces the employer to complain about the union's conduct before it has been injured, rather than first to make an agreement and then seek redress by bringing suit against the union as a quasi-insurer. If an employer thinks the union's inflexible demand for a high wage is the product of an agreement with another employer or other employers to impose uniform wages outside the bargaining unit, it seems reasonable to expect that employer to bring its case before the NLRB and complain that the union is violating its duty to bargain in good faith.

Second, Congress has placed a duty on union and employer to bargain in good faith on mandatory bargaining subjects, which are those areas most directly related to wages, hours and working conditions.\textsuperscript{188} The legislative policy stated in the Taft-Hartley Act encourages peaceful agreement between labor and management:

\begin{quote}
It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of
\end{quote}


\textsuperscript{188}See the approach taken in Local 24, Teamsters Union v. Oliver, 358 U.S. 283, 293-95 (1960).
representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.\textsuperscript{189}

Where there is no express union-employer agreement it may be impossible to distinguish between situations in which the union is unilaterally carrying out its own policy, and those in which it is acting pursuant to a tacit or oral agreement. If a judge or jury is permitted to infer an agreement to impose terms from the fact of uniform agreements prevailing in the industry and the business failure of a number of employers,\textsuperscript{190} the line between activity the union is encouraged to engage in and that which it is prohibited from engaging in may become quite blurred. Treble damages or criminal punishment seems too harsh a punishment to inflict on a union whose only mistake may have been to adopt a vigorous uniform wage policy, causing some employers to go out of business.\textsuperscript{191}

Third, because of its experience in the labor area, the NLRB may be expected to be more competent than a court or jury at divining whether a union is acting pursuant to an agreement or pursuant to its unilaterally adopted wage policy. NLRB familiarity with the bargaining history of the union involved may be valuable. Further, a jury chosen from the locality in which employers went out of business may be biased against the union to the point of being too ready to infer the kind of union-employer agreement Mr. Justice White places outside the union exemption. Where evidence of great union economic power has been introduced,\textsuperscript{192} a jury may hold the union liable as a better risk bearer.

Fourth, unless current jury practice is changed, fact finding by the NLRB would have the added advantage of providing a reviewing court with a written finding of facts with supporting reasons, rather than an unexplained jury finding that the union did violate the antitrust laws.\textsuperscript{183}

Even though the NLRB has made a final determination that a union has agreed with some employers to impose terms of employment on others, this finding should not provide the basis for an antitrust suit, because the employer should not be encouraged to delay bringing his action and thus increase his damages, and because treble damages would still be too harsh a consequence to follow a finding that a union has crossed the delicate line between encouraged and prohibited conduct.


\textsuperscript{190} This may be what happened in the \textit{Pennington} case. See notes 73-132 \textit{supra} and accompanying text.

\textsuperscript{191} Indeed, Mr. Justice White specifically stated that this activity would not itself constitute a violation. UMW v. Pennington, 381 U.S. 657, 665 n.2 (1965).


\textsuperscript{183} See the jury finding in \textit{Pennington}, note 167 \textit{supra} and accompanying text.
The practical effect of this approach would be that a complaint alleging a union-employer agreement in which the union has promised to impose terms other than direct market restraints would be dismissed by the court. An allegation that the union has agreed to impose direct market restraints on other employers, or has agreed to enforce the terms of an agreement which creates direct market restraints among employers party to it, should not be dismissed. Since in cases where the evidence is circumstantial it will be difficult to distinguish agreements to impose terms other than direct market restraints from agreements to impose direct market restraints, the clear evidence rule should be retained where direct restraints are alleged.

VIII. UNION CONTROL OF EMPLOYERS

In Pennington the evidence was uncontradicted that the union had acquired a substantial amount of stock in one of the large coal producers. There was conflicting evidence as to union purpose in acquiring this stock and the use made of it. The UMW testimony was that its intention was merely to make an investment and to expand employment opportunities for union members.194 Phillips claimed the union had used the mining company to drive prices down in the TVA spot market in order to hurt small mines.195 Mr. Justice Goldberg criticized the court of appeals for "in effect holding that the ownership of a controlling or substantial interest in a company which violates the antitrust laws subjects the owner of that interest to personal antitrust liability."196 To attribute the alleged price cutting to the UMW, Mr. Justice Goldberg contended, "the owner must be shown to have participated knowingly and actively in the alleged illegal activity."197 While this view is justified with respect to the ordinary shareholder, a different rule might be proposed in the case of labor unions. In the present case it was uncontested that several small unionized companies had been forced to close down. This additional evidence may warrant an inference of destructive purpose behind seeking high wages from less efficient producers. Were Mr. Justice Goldberg's approach adopted, the Supreme Court might justifiably fashion an exception that unions forego their exemption from antitrust liability and subject their actions to the rule of reason when they become too closely identified with an employer or employers.198 However, close identification of a union with an employer lends itself to abuses quite without the scope of the antitrust laws. It is suggested that these potential abuses call for additional legislation.

195 Id. at vol. 2, pp. 609a-611a.
197 Ibid.
198 A justifiable reason for union control of the employer might be that the company would go out of business without new capital, and only the union was willing to make the investment, in order to preserve jobs.
John L. Lewis testified in *Pennington* that UMW control of West Kentucky was not a conflict of interest,¹⁹⁹ but surely such a conflict might arise in a given case. Union officials might decide to benefit the general coffers of the union via corporate profits rather than to seek high wages. In the case of a union-controlled company which the union then attempts to organize, the employees have a right to make an informed choice on whether they want to belong to the union. Officials of a union-controlled company probably will not be as diligent in informing employees of the possible detrimental aspects of unionization as they would in a company not union-controlled. In this case, the evidence was that the remaining shareholders of West Kentucky were not made aware of the large union interest in the company.²⁰⁰ Fairness to other shareholders demands that they be fully informed that the management might be oriented toward giving employees high wages rather than fighting union demands.

Much of the concern expressed so far could be remedied by requiring full disclosure of substantial direct or indirect union investments in companies, including disguised investments whereby stock is taken as security for loans, to shareholders of the companies and to union members. It is arguable, however, that Congress would want unions to have the bargaining power of employee representation, but not of employer control. Therefore, Congress might want to prevent union control of companies it has organized, or even union control of any substantial interest in them. It might also want to prevent a union from organizing a company in which it has made a substantial investment.


²⁰⁰ Id. at vol. 2, pp. 591a-93a.