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Collective Bargaining and the Antitrust Laws

Excerpts from a speech given at the 19th Annual Meeting of the Industrial Relations Research Association in San Francisco, December 28, 1966

by
Theodore J. St. Antoine
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A central aim of the antitrust laws is the promotion of competition. A central aim of collective bargaining is the elimination of competition—according to classical trade union theory, the elimination of wage competition among all employees doing the same job in the same industry. Given these disparate aims, the antitrust laws and collective bargaining will also inevitably tend to clash. To harmonize them, the type of competition which the law is intended to foster must be carefully distinguished from the type of competition which union-employer bargaining can properly displace. The Supreme Court's last major effort to draw the demarcation line produced the *Pennington* and *Jewel Tea* decisions of 1965. . . .

Earlier, two quite different legal theories were thought to shield labor activities from antitrust attack. First, unions that are "acting alone" and not in combination with non-labor groups are exempt from Sherman Act coverage. Presumably unions "act alone" when they strike, picket, or boycott. When a union enters into a collective bargaining relationship with an employer, however, it hardly seems to be acting alone. Here a second theory limiting antitrust liability may come into play. The Supreme Court has said that the Sherman Act was intended to outlaw only "restraints of trade" as understood at common law, that is, restraints on "commercial competition." But "an elimination of price competition based on differences in labor standards" was not prohibited. . . .

In *Pennington* it was alleged that the United Mine Workers and the major coal producers had conspired to drive smaller, less efficient operators out of business by establishing a uniform industry-wide wage rate higher than the small producers could afford. . . . Yet the competition which was to be eliminated was competition "based on differences in labor standards . . ." Moreover, wages are at the core of those subjects about which unions and employers are required to bargain under the National Labor Relations Act. . . . Surely, the unions argued, a matter on which the labor laws compelled bargaining could not be the basis of a prosecution under the antitrust laws!

"... It is probably easier to say a union and employers may not have a 'predatory purpose' in a wage agreement than to determine . . . what is the purpose . . ."

Inherent in this argument, of course, was the notion that the "purpose" of any wage pact is irrelevant—even if the purpose is to liquidate competitors. This proved the fatal flaw. But the flaw is perhaps more apparent in the abstract than in the concrete; it is probably easier to say a union and employers may not have a "predatory purpose" in a wage agreement than to determine, in any given case, what *is* the purpose. And the history of judicial assessment of union "purpose" is hardly reassuring.

At any rate, Justice White in delivering the opinion of the Court in *Pennington* was plainly troubled by the union argument, but he didn't buy it. He conceded that the bounds of the duty to bargain under the National Labor Relations Act have "great relevance" in considering the scope of labor's antitrust immunity. He then proceeded, however, to turn the union argument into a boomerang as applied to *Pennington* by introducing the new concept that the statutory duty to bargain exists only on a unit-by-unit basis. Unions and employers must negotiate about the wages and employment standards of workers in a particular bargaining unit, but apparently not about the standards outside a given unit. Thus, a union "forfeits" its antitrust "exemption" when it is "clearly shown" that it has agreed with one group of employers "to impose a certain wage scale on other bargaining units." Moreover, a union is "liable" if it becomes a party to an employer conspiracy to eliminate competitors, even though the union's role is limited to

securing certain wages, hours, or working conditions from the other employers.

This approach immediately raises a fistful of new questions. To begin with, Justice White suggests a distinction between the union's loss of antitrust immunity and its commission of a substantive violation. Does this mean an agreement with extra-unit implications merely removes the exemption, without necessarily resulting in a *per se* violation? If so, what added elements must be shown to establish an offense? As you know, the Supreme Court long ago declared that only "unreasonable" restraints on trade run afoul of the Sherman Act. It may well be that resort to the "rule of reason" will enable the courts to exercise considerable flexibility in dealing with "extra-unit" agreements. A substantive violation might require a "predatory intent," a definite "purpose" to impede or destroy business competitors. The trial court on the remand in *Pennington* in effect so held. I would contend this result is supported by the practical demands of meaningful collective bargaining; as we shall discuss in a moment, there are times when it is simply unrealistic to insist that an employer has no valid interest in the wage scale a union gets from the employer's competitors.

Another inquiry is whether the Supreme Court was proposing a special evidentiary standard in declaring that the extra-unit agreement must be "clearly shown." The Court explicitly refrained from passing on the sufficiency of the evidence in *Pennington*. Before a union can be held liable for the acts of an agent, "clear proof" of the authorizing of the acts is required by the Norris-LaGuardia Act, one of the statutory bases of labor's antitrust exemption. I recognize the desirability of finding some way to insulate union-employer bargaining from ill-founded inferences of "conspiracy" by overly suspicious or credulous juries. But I confess I think it takes a bit of stretching to extend Norris-LaGuardia's agency provision far enough to cover the antitrust evidentiary question. Nonetheless, the district court which handled *Pennington* on remand expressly held that Norris-LaGuardia makes "clear proof" necessary to establish predatory intent. Perhaps it would be more straightforward to say that a proper reconciliation of antitrust and labor policies calls for the Sherman Act to be interpreted, without reference to Norris-LaGuardia, as requiring evidence of an explicit union-employer agreement to force competitors out of business before a case could go to a jury. Mere knowledge that some marginal operators could not pay the prescribed industry wage scale would not, in itself, be sufficient.

> ". . . I see no essential difference between permitting discussion and permitting agreement, so long as there is no specific purpose of killing off competition . . ."

The practical implications of *Pennington's* new unit-by-unit bargaining rule are illustrated by the so-called "most favored nation" clause. This is a fairly common provision in labor contracts, especially in the construction industry, requiring the union to give the signatory employer the benefit of the most favorable terms the union subsequently accords any other employer. In actual operation, naturally, the usual effort is to freeze labor standards at the level of the initial contract. In the language of *Pennington,* the union has agreed, at least impliedly, "to impose a certain wage scale on other bargaining units." This undoubtedly is a form of restraint, but is it not just another way of advancing the accepted labor policy of taking wages out of competition? In any event, a union recently charged an employer with a refusal to bargain under the National Labor Relations Act for insisting on a "most favored nation" clause, and the General Counsel of the National Labor Relations Board issued a complaint "to place the issue before the Board." The General Counsel acted quite correctly, considering Justice White's dictum that mandatory bargaining is confined to working conditions in an individual unit. But the Board should not feel itself foreclosed by *Pennington's* sweeping talk about units (which may command the assent of only three Justices) from making an independent appraisal of the problem.

What, after all, is more natural than for an employer to want assurance that his competitors will have to match any concessions he gives the union? As long as we endorse the policy of eliminating competition based on wage cutting, I see no reason to boggle at a means so well adapted to attaining that end. Indeed, I find it hard to imagine how collective bargaining could stay healthy if discussion were choked off on some of the most vital subjects—the competitive position of various firms in an industry, the demands the union will make in other negotiations, and so on. And I see no essential difference between permitting discussion and permitting agreement, so long as there is no specific purpose of killing off competition. I find unpersuasive Justice White's argument that a union cannot be allowed to "strait-jacket" itself in subsequent bargaining by commitments to "favored" employers in earlier negotiations. Those commitments may be the price the union has to pay to get the concessions in the first place. The employees in the original unit will hardly complain. The employees in the other units are more likely to gain than to lose when a "floor" is placed under wages. In the long run, upholding "most favored nation" provisions would probably do no more than hasten what the labor economists in this group know better than I is the usual result of union organization anyway, namely, the gradual "leveling" of wage rates throughout an industry.

The plight of the employer charged with an unfair labor practice because of *Pennington* underscores another important aspect of this decision. Its impact falls not so much upon organized labor as upon the institution of collective bargaining. Indeed, Justice White stressed that a union acting unilaterally, in furtherance of its own policies, still has the right to seek uniform wages in an industry. It is only when this is done pursuant to a union-employer agreement that antitrust issues arise. But *Pennington* applied literally may seriously hamstring collec-

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tive bargaining as an instrument for coping with today's critical problems in industrial relations. For example, management's need to introduce technological improvements to increase productivity and meet competition is countered by labor's anxiety over the possible loss of job security and craft skills. Reconciling these opposing interests through attritional reductions in force, retraining allowances, and so forth, may be severely hampered if employers cannot be reassured on what will be demanded of their competitors. . . .

In *Pennington* a key question was whether a labor agreement dealing with wages would violate the antitrust laws if its purpose was to put certain competitors out of business. The answer was "yes." In *Jewel Tea* the question was quite different. Was it a violation of the Sherman Act for a butchers' union to compel a grocery chain to agree to a limitation on the hours fresh meat could be sold, after the union had entered into a multi-employer contract containing such a restriction? In essence, as viewed by a majority of the Court, the problem was one of characterization: did this clause involve wages, hours, or working conditions, legitimate subjects of collective bargaining, or did it constitute a forbidden restraint on the product market?

> ". . . antitrust policy too readily tends to become a special branch of moral philosophy, and involvement with labor questions is likely to aggravate that tendency . . ."

The Court split three ways, with three Justices in each group. Justice White, Chief Justice Warren, and Justice Brennan found that the marketing hours restriction, which in effect defined the butchers' working hours and their job content, was "intimately related" to labor conditions. Thus the union's effort to secure the provision through arm's-length bargaining in pursuit of its own labor policies, and not in furtherance of a union-employer conspiracy, was exempt under the Sherman Act. Justices Goldberg, Harlan, and Stewart concurred for the same reasons that led them to dissent in *Pennington.* They accepted the union argument that agreements dealing with mandatory subjects of bargaining are wholly outside the antitrust laws. Justices Douglas, Black, and Clark dissented in *Jewel Tea* on the ground the operating hours limitation was an obvious restraint on the product market, and was not needed to fix employees' working hours. The multi-employer collective agreement itself was considered sufficient to show an illegal union-employer conspiracy to impose the marketing hours restriction on the holdout chain. . . .

Pennington establishes that unions and employers violate the antitrust laws when they execute a labor contract whose purpose is to eliminate competitors, even if the agreement deals only with wages, hours, and working conditions. My feeling is that in the absence of such a predatory purpose there should be no substantive violation, regardless of whether antitrust "immunity" is lost because the contract covers labor standards outside a particular bargaining unit.

Jewel Tea indicates that even a direct restraint on the product market is exempt from the antitrust laws if the restraint is also "intimately related" to wages, hours, and other components of the labor market, at least where the union securing the agreement is acting on its own and not at the behest of employers. If the Court is hinting at a possible return to some effort to "weigh" the workers' stake in their job standards against the public's stake in a competitive economy, I suggest there is an urgent need for empirical data to enable the courts to strike a reasonably informed balance. Antitrust policy too readily tends to become a special branch of moral philosophy, and involvement with labor questions is likely to aggravate that tendency. "Weighing" interests here is risky business at best, but at least the operation should be performed with the humbler, and more appropriate instruments of economic analysis.