Washington and Lee Law Review

Volume 36 | Issue 4 Article 14

Fall 9-1-1979

Labor Activity And The Antitrust Laws: A Need For Flexibility

LABOR ACTIVITY AND THE ANTITRUST LAWS: A NEED FOR FLEXIBILITY

The clash between the national labor laws[1] and the federal antitrust laws[2] has generated legislative and judicial attempts to accomodate the conflicting policies.[3] The national labor policy encourages union organiza-

[1] National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976); Labor Management Relations Act, 1947, 29 U.S.C. §§ 141-144, 171-183, 185-187, 191-197, 557 (1976); Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976).

[2] Sherman Act, 15 U.S.C. §§ 1-7 (1976); Clayton Act, 15 U.S.C. §§ 12-27 (1976); Federal Trade Commission Act, 15 U.S.C. § 45 (1976).

[3] Initially the Sherman Act was applied broadly to condemn virtually every collective activity of labor as an unlawful restraint of trade. *See, e.g.,* Loewe v. Lawlor, 208 U.S. 274 (1908). *But see* Boudin, *The Sherman Act and Labor Disputes: I,* 39 COLUM. L. REV. 1283, 1285-89 (1939) (Congress never intended Sherman Act to apply to labor union activity). Congressional response to this strict application of the antitrust laws to the labor unions was the enactment of sections 6 and 20 of the Clayton Act, 29 U.S.C. § 52 (1976), designed to protect labor unions from antitrust liability by specifically excluding labor as an article of commerce and drastically limiting the injunctive power of federal courts in labor disputes. These sections of the Clayton Act were designed to exempt labor unions from antitrust liability when carrying out legitimate objectives, *see* United States v. Hutcheson, 312 U.S. 219, 229-30 (1941), but the Court seriously limited their effect in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), by interpreting sections 6 and 20 to protect only the existence and lawful activities of union organizations and preventing application of the antitrust laws only to a labor dispute between employees and their immediate employer. *Id.* at 468-69; *see, e.g.,* Bedford Coal Co. v. UMW, 268 U.S. 295 (1925). Concerned that the policy of the Clayton Act was being frustrated by cases such as *Duplex,* Congress clarified its position in the Norris-LaGuardia Act, 29 U.S.C. § 101-115 (1976), by proclaiming the public policy in favor of collective bargaining and organization of individual workers for their mutual aid or protection. 29 U.S.C § 102 (1976). Congress enacted the National Labor Relations Act which created the National Labor Relations Board and reaffirmed the labor policy encouraging labor organization and collective bargaining. 29 U.S.C. §§ 151-169 (1976). However, Congress failed to integrate the Norris-LaGuardia and National Labor Relations Acts with the Sherman Act by not specifying how the conflicting statutes were to be applied in relation to the other. In Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), the Court avoided the statutory integration problem but recognized the congressional labor policy by holding that only union activity having the intended effect of restraint upon price structures and competitive conditions in the product market was subject to antitrust sanctions. *Id.* at 493. However, the Court interpreted the Norris-LaGuardia, Clayton, and Sherman Acts interdependently in United States v. Hutcheson, 312 U.S. 219 (1941), and exempted union's activities from antitrust liability only as long as the union acted out of self-interest and did not combine with nonlabor groups to achieve its goals. *Id.* at 232. In Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945), the Court declared that a union is susceptible to antitrust penalties if it conspires with employers to restrict competition in the product market even though the union could have legitimately brought about the same effects acting unilaterally. *Id.* at 810. While earlier cases shared the common element of union conspiracies with nonlabor groups in pursuit of nonlabor goals, Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965), and UMW v. Pennington, 381 U.S. 657 (1965), raised doubts as to the necessity of the allegation of a conspiracy for antitrust liability to arise. In *Pennington,* the Court held that the legitimate aim of the union to standardize working conditions did not legitimize goals forbidden by the antitrust laws even without any allegation of a conspiracy. 381 U.S. at 665-66. In *Jewel Tea,* the Court carefully delineated a balancing process and concluded that a union can lose its exemption from the antitrust laws by its own unilateral act. The balancing test consisted

tion and collective bargaining to improve labor conditions and to promote industrial harmony.[4] The purpose and effect of every labor organization is to eliminate competition in the labor market over wages and working conditions.[5] A union's use of its power to eliminate competition in the labor market also may affect competition in the product market.[6] The national antitrust policy, on the other hand, seeks to preserve a competitive business economy by prohibiting restraints on competition in business and commercial transactions.[7] The balancing of these two policies has resulted in a two-prong, statutory and nonstatutory, labor exemption from antitrust liability. The basic sources of organized labor's statutory exemption are sections 6[8] and 20[9] of the Clayton Act and the Norris-LaGuardia Act,[10]

---

of weighing the relative impact the agreement would have on the product market against the legitimate union aim. 381 U.S. at 692-93. The *Jewel Tea* Court characterized the alleged "conspiracy" with nonlabor groups as a legitimate bargain over terms and conditions of employment rather than as the forbidden *Hutcheson*-type conspiracy. *Id.* at 695-96. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 621-38 (1977) [hereinafter cited as GORMAN]; L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 723-31 (1977) [hereinafter cited as SULLIVAN]; Cox, *Labor and the Antitrust Laws — A Preliminary Analysis,* 104 U. PA. L. REV. 252 (1955) [hereinafter cited as Cox]; Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws,* 32 U. CHI. L. REV. 659 (1965) [hereinafter cited as Meltzer]; Moeller, *Employee Rights and Antitrust Liability: Organized Labor's Exemption After* Connell, 48 MISS. L.J. 713 (1977); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities,* 73 YALE L.J. 14 (1963) [hereinafter cited as Winter]; Note, *The Labor Antitrust Conflict,* 27 BAYLOR L. REV. 812 (1975); Note, *Labor's Antitrust Exemption After* Connell, 36 OHIO S.L.J. 852 (1975); Note, *Labor Law — Antitrust — Application of Sherman Act to Labor Union,* 50 TULANE L. REV. 418 (1976); Comment, *Labor's Exemption From Federal Antitrust Laws: The Diminishing Protection For Union Activity,* 28 U. FLA. L. REV. 620 (1976).

[4] 29 U.S.C. §§ 141, 151 (1976) (purpose and policy of the national labor acts); *see* Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967); NLRB v. Holly-General Co., 305 F.2d 670 (9th Cir. 1962); NLRB v. Ford Radio & Mica Corp., 258 F.2d 457 (2d Cir. 1958).

[5] Cox, *supra* note 3, at 254. Chief Justice Taft observed in American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921) that:

> [Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer.

Id. at 209.

[6] Union success in organizing employees and the resulting institutionalization of wages and other terms and conditions of employment affect price competition among employers by setting a floor for the employer's labor cost. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975); Handler, *Labor and Antitrust: A Bit of History,* 40 ANTITRUST L.J. 233 (1971) [hereinafter cited as Handler].

[7] SULLIVAN, *supra* note 3, at 14. Section 1 of the Sherman Act declares contracts, combinations, and conspiracies in restraint of trade to be unlawful. 15 U.S.C. § 1 (1976). Section 2 forbids monopolization, combinations or conspiracies to monopolize. 15 U.S.C. § 2 (1976). Section 5 of the Federal Trade Commission Act declares that unfair methods of competition in commerce are unlawful. 15 U.S.C. § 45 (1976).

[8] 15 U.S.C. § 17 (1976).

[9] 29 U.S.C. § 52 (1976).

[10] 29 U.S.C. §§ 101-115 (1976).

which declare that labor unions are not combinations or conspiracies in restraint of trade. The Acts exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws.[11] In attempting to reconcile the policies underlying the labor and antitrust statutes, courts also have recognized a nonstatutory exemption.[12] The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions.[13] Union success in organizing workers and standardizing wages ultimately will affect price competition among employers,[14] but the goals of federal labor law would be frustrated if this effect on price competition was held to violate the antitrust laws.[15] The nonstatutory exemption reflects the Supreme Court's acknowledgement that the proper accomodation of the national labor policy and the national antitrust policy requires tolerance for the decrease in business competition resulting from the standardization of wages and working conditions.[16] The Supreme Court reviewed the scope of the nonstatutory exemption as it applies to employer-union agreements in *Connell Construction Co. v. Plumbers & Steamfitters Local 100.*[17]

In *Connell,* the Court indicated that union-employer agreements that

[11] *See* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621-22 (1975); United States v. Hutcheson, 312 U.S. 219 (1941). The statutory exemption does not protect concerted action or agreements between union and nonlabor parties. UMW v. Pennington, 381 U.S. 657, 662 (1965). The courts have been divided on exactly what constitutes a conspiracy with a nonlabor group. Some have required union involvement in an independent business conspiracy. *E.g.,* Greenstein v. National Skirt & Sportswear Ass'n, 178 F. Supp. 681, 689 (S.D.N.Y. 1959). *But see* McHugh v. United States, 230 F.2d 252 (1st Cir. 1956) (union's successful coercion of boat owner's association sufficient to constitute conspiracy). *See generally* Comment, *Labor's Antitrust Exemption After* Pennington *and* Jewel Tea, 66 COLUM. L. REV. 742 (1966) [hereinafter cited as *Labor's Antitrust Exemption*].

[12] The Supreme Court has recognized that a proper accomodation between the congressional policy favoring collective bargaining under the National Labor Relations Act and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited non-statutory exemption. Connell Constr. Co. v. Plumbers & Steammfitters Local 100, 421 U.S. at 622; Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965).

[13] *See* note 4 *supra.*

[14] *See* note 6 *supra.*

[15] Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622 (1975).

[16] *Id.; see* UMW v. Pennington, 381 U.S. 657, 666 (1965); Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 692-93 (1965). Labor policy does not require that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, *e.g.,* American Federation of Musicians v. Carroll, 391 U.S. 99 (1968), the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in the business market. *See* Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 812 (1945); COX, *supra* note 3, at 270-71; Meltzer, *supra* note 3, at 670-78.

[17] 421 U.S. 616 (1975). *Connell* is the first case in which the terms statutory and nonstatutory exemption have been used. *See* Comment, *Labor Antitrust Law After* Connell Construction Co., 35 FED. B.J. 133, 137 (1976) (arguing classification will help clear confusion in area because commentators more likely to focus on source of exemption).

come within the parameters of the National Labor Relations Act (NLRA)[18] may be protected automatically from antitrust liability by the nonstatutory labor exemption. Nevertheless, the Court held that an agreement between Connell Construction Company and Local 100, which obligated Connell to subcontract work exclusively to subcontractors who had a collective bargaining agreement with Local 100, was not immune from antitrust prohibitions because the agreement was not authorized by the construction industry proviso to section 8(e) of the NLRA.[19] The Court reached this conclusion because the agreement was outside the context of a collective bargaining relationship and was not restricted to a particular jobsite.[20] The National Labor Relations Board (NLRB)[21] recently applied the *Connell* decision to uphold subcontracting agreements between unions and employers where a collective bargaining relationship existed between the parties.[22] Although the NLRB focused directly on the construction proviso to section 8(e) of the NLRA[23] to determine the union's liability under the labor laws, a union's liability for violation of the antitrust laws in cases involving union-employer agreements permitted by the NLRA, remains open for determination by the courts.[24] If the courts interpret *Connell* to exempt automatically any union-employer agreement allowed by the NLRA from antitrust liability, agreements could be protected by the nonstatutory labor exemption that have significant adverse effects on the product market and that are neither directly related to the goals of the national labor policy nor to the union's legitimate goals.[25] However, if *Connell* is interpreted to maintain the balance of the two conflicting policies, and only to protect union-employer agreements that potentially restrain competition resulting from the elimination of competition over wages and working conditions, both policies would be given the effect Congress intended.[26] The balancing approach appears to be more consis-

---

[18] 29 U.S.C. §§ 151-169 (1976).

[19] *See* note 23 *infra*.

[20] 421 U.S. at 635; *see* text accompanying notes 29 & 39 *infra*.

[21] The NLRB is the administrative agency given the exclusive jurisdiction to implement the NLRA. *See* 29 U.S.C. §§ 153-156 (1976). *See generally* GORMAN, *supra* note 3, at 7-39.

[22] Carpenters, Local 944, 99 L.R.R.M. 1580 (1978); Operating Eng'rs, Local 701, 99 L.R.R.M. 1589 (1978); Building & Constr. Trades Council, 99 L.R.R.M. 1593 (1978); Colorado Bldg. & Constr. Trades, 99 L.R.R.M. 1601 (1978); *see* text accompanying notes 61-85 *infra*.

[23] The construction industry proviso allows "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." 29 U.S.C. § 158(e) (1976); *see* note 42 *infra*.

[24] An analysis of the interaction of antitrust and labor policy must take into account three distinct factual contexts: 1) union activities; 2) employer-union agreements; and 3) employer combinations. This note will focus on employer-union agreements. For a discussion of union activities and employer combinations, *see, e.g.*, Cox, *supra* note 3; Meltzer, *supra* note 3; Sovern, *Some Rumination on Labor, the Antitrust Laws and* Allen Bradley, 13 LAB. L.J. 957 (1962); Note, *Cooperative Collective Bargaining Conduct Among Trade Competitors and the Nonstatutory Labor Exemption from Antitrust Liabiltiy*, 9 RUT. CAM. L.J. 477 (1978).

[25] *See* text accompanying notes 86-95 *infra*.

[26] *See* text accompanying notes 105-09 *infra*.

tent with the Supreme Court's efforts to limit labor's restriction of the product market to that strictly necessitated by the national labor policy.[27]

In *Connell,* Plumbers Local 100 picketed Connell to compel Connell to enter into an agreement with Local 100 to subcontract mechanical work only to subcontractors who had a collective bargaining agreement with Local 100.[28] Local 100 did not have a collective bargaining agreement with Connell and admitted that it was not attempting to become the representative for any of Connell's employees.[29] Under pressure of picketing, Connell agreed to sign the subcontracting agreement with Local 100.[30] Connell then brought an action asserting that the agreement was invalid under sections 1 and 2 of the Sherman Act.[31] Local 100 responded that its activities were immune from federal antitrust statutes and that since the subcontracting agreement was explicitly allowed by the construction industry proviso to section 8(e) of the NLRA, antitrust policy must defer to the NLRA.[32] The Supreme Court reversed the circuit court[33] holding that the union could be subject to federal antitrust liability because the union-employer agreement did not come within the statutory and nonstatutory exemptions from the antitrust laws and was outside the parameters of the section 8(e) proviso.[34]

The *Connell* Court stated that the statutory exemption only protected

---

[27] Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust,* 89 HARV. L. REV. 904, 915 (1976).

[28] 421 U.S. at 620. Local 100 was also a party to a multi-employer bargaining agreement with the Mechanical Contractors Association of Dallas, a group of about 75 general contractors. That multi-employer bargaining agreement contained a "most favored nations clause" by which the union agreed that if the union granted a more favorable contract to any other employer, the union would extend the same terms to all members of the Association. *Id.* at 619. "Most favored nation" clauses come from the jargon on international trade agreements. *See* Kurt S. Adler, Inc. v. United States, 343 F. Supp. 943, 947 (Cust. Ct. 1972), *aff'd,* 496 F.2d 1220 (C.C.P.A. 1974) (explaining most favored nation principle). "Most favored nation" clauses are fairly common in labor contracts, especially those in the construction industry. *See* Feller & Anker, *Analysis of Impact of Supreme Court's Antitrust Holdings,* 59 L.R.R.M. 103 (1965). *See also* Comment, *Antitrust Law — Most Favored Nation Clause and Labor's Antitrust Exemption,* 19 J. PUB. L. 399, 404-09 (1977).

[29] 421 U.S. at 620.

[30] *Id.* at 620.

[31] *Id.* at 620-21; *see* note 7 *supra.* Connell filed suit in state court to enjoin the picketing as a violation of Texas antitrust laws. Local 100 removed the case to federal court. Connell then signed the subcontracting agreement under protest and amended its complaint to claim that the agreement violated the Sherman Act and was therefore invalid. Connell sought a declaration to this effect and an injunction against any further efforts to force it to sign such agreements. 421 U.S. at 620-21.

[32] The District Court held that the subcontracting agreement was authorized by the construction industry proviso to section 8(e) of the NLRA and thus was exempt from antitrust liability. 78 L.R.R.M. 3012 (N.D. Tex. 1971). The Fifth Circuit Court of Appeals affirmed the district court, holding that Local 100's goal of organizing nonunion subcontractors was a legitimate union interest and that efforts toward that goal were therefore exempt from the antitrust laws. Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 483 F.2d 1154 (5th Cir. 1973).

[33] *Id.*

[34] 421 U.S. at 635.

unilateral action by union groups. The Court noted that Local 100 was engaged in concerted activity with Connell, a nonlabor group, and therefore the statutory exemption did not protect the union activity.[35] In order to determine whether the agreement was protected by the nonstatutory exemption, the Court weighed the validity of the union's objective and the reasonableness of its means against the extent to which the agreement restricted competition.[36] Although admitting that the union's goal of organizing was legal,[37] the Court nevertheless determined that Local 100's use of direct restraints on the product market to support its organizational campaign was not a reasonable means of achieving its organizational goal due to the agreement's serious anticompetitive effects.[38] The Court also noted that the union could not claim the exemption based on the strong federal policy favoring collective bargaining because no collective bargaining relationship had been sought in this case.[39] The Court therefore concluded that the union activity contravened antitrust policy to a degree not justified by national labor policy and thus was not protected by the nonstatutory exemption.[40]

The *Connell* Court then addressed the union's contention that the anti-

---

[35] *Id.* at 621-22; *see* text accompanying notes 7-10 *supra.*

[36] *Id.* at 623.

[37] *Id.* at 625. The *Connell* Court stated that Local 100's goal of organizing as many subcontractors as possible was legal even though a successful organizing campaign would ultimately reduce competition that unionized employers face from nonunion firms. *Id.*

[38] *Id.* at 623-25. The Court stated that the agreements between Local 100, Connell, and the other general contractors to contract or subcontract work only to firms that were parties to an executed, current collective bargaining agreement with Local 100 indiscriminately excluded nonunion subcontractors from a portion of the market. *Id.* at 623. The *Connell* Court also determined that the multiemployer bargaining agreement between Local 100 and the Mechanical Contractors Association of Dallas was relevant in determining the effect that the agreement between Local 100 and Connell would have on the business market. *Id.* The "most favored nations" clause in the multiemployer agreement promised to eliminate competition between members of the association and any other subcontractors that Local 100 might organize. Thus, the subcontractors stood to benefit from any extension of Local 100's organization, and Local 100's method also sheltered the subcontractors from outside competition in the portion of the market covered by subcontracting agreements between Local 100 and general contractors. In that portion of the market, the restriction on subcontracting also would eliminate competition in all subjects covered by the multiemployer agreement, even on subjects unrelated to wages, hours, and working conditions. *Id.* at 624. The Court also stated that the agreements Local 100 had with general contractors would give Local 100 power to control access to the subcontracting market. *Id.* Since the agreements prohibited subcontracting to any firm that did not have a contract with Local 100, Local 100 had complete control over the subcontracting work offered by general contractors that had signed these agreements. Such control could have significant adverse effects on the business market unrelated to the union's legitimate goals of organizing workers and standardizing working conditions. For example, if the union thought the interests of its members would be served by having fewer subcontractors competing for the available work, it could refuse to sign collective bargaining agreements with marginal firms and could also exclude traveling subcontractors by refusing to deal with them. *Id.* at 623-25.

[39] *Id.* at 626; *see* text accompanying note 29 *supra.*

[40] 421 U.S. at 625.

trust policy must defer to the NLRA because the Connell-Local 100 subcontracting agreement was explicitly allowed by the construction industry proviso to section 8(e).[41] Section 8(e) prohibits a union and an employer from voluntarily agreeing to engage in secondary boycotts in all industries except the construction industry and the clothing industry.[42] The construc-

[41] *Id.* at 626; *see* note 23 *supra.*

[42] Section 8(e) of the NLRA states that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void; *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alternation, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

29 U.S.C. § 158(e) (1976). The construction industry and the clothing industry were given special treatment in 8(e) because of special problems inherent in those two industries. *See generally* GORMAN, *supra* note 3, at 270-73; Brinker, *Hot Cargo Cases in the Construction Industry Since 1958,* 22 LAB. L.J. 690 (1971). If a subcontracting clause is unlawful under 8(e), a strike or other coercive action to obtain that clause is an unfair labor practice under the express language of section 8(b)(4). 29 U.S.C. § 158 (b)(4) (1976). *See* International Org. of Master, Mates and Pilots v. NLRB, 575 F.2d 896, 906 (D.C. Cir. 1978); NLRB v. Amalgamated Lighographers of Am., 309 F.2d 31, 42-43 (9th Cir. 1962), *cert. denied,* 372 U.S. 943 (1963).

Although a literal reading of section 8(e) would proscribe even the conventional "no subcontracting" provision common in collective bargaining agreements whereby the employer agrees to give work to bargaining unit employees rather than subcontract to another employer, the Board and courts have applied 8(e) to maintain the distinction between valid primary activity and illegal secondary activity which is the basis of section 8(b)(4). The Supreme Court set forth guidelines for construing section 8(e) to outlaw only agreements having an unlawful secondary objective in National Woodwork Mrgr's Ass'n v. NLRB, 386 U.S. 612 (1967). The *National Woodwork* Court stated that the touchstone in determining whether the activity was primary was "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." *Id.* at 645; *see* Carrier Air Conditioning Co. v. NLRB, 547 F.2d 1178 (2d Cir. 1976); Griffith Co. v. NLRB, 545 F.2d 1194 (9th Cir. 1976); Enterprise Ass'n of Steam, Etc., Local 638 v. NLRB, 521 F.2d 885 (D.C. Cir. 1975); Local 636, United Ass'n of Journeymen v. NLRB, 430 F.2d 906 (D.C. Cir. 1970). *See generally* GORMAN, *supra* note 3, at 264-70; Lesnick, *The Gravamen of the Secondary Boycott,* 62 COLUM. L. REV. 1363 (1962) [hereinafter cited as *Secondary Boycott*]; Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e),* 113 U. PA. L. REV. 1000 (1965) [hereinafter cited as *Job Security*].

tion industry proviso of section 8(e) permits an agreement between an employer and a union to engage in a secondary boycott at a particular jobsite.[43] Although the specific language of the proviso[44] permits the type of subcontracting agreement between Local 100 and Connell, the Court discussed the statutory setting and the circumstances surrounding the proviso[45] and concluded that Congress passed section 8(e) to plug the loopholes in section 8(b)(4).[46] Section 8(b)(4) permits a union to encourage an employer to voluntarily engage in a secondary boycott, but prohibits a union from striking or picketing to coerce an employer to agree to a secondary boycott.[47] The Court stated that the construction industry proviso was adopted to alleviate special problems in the construction industry. Those special problems included picketing a single nonunion subcontractor on a multi-employer building project and the frictions that may arise when union men work alongside nonunion men on a particular jobsite.[48] The Court concluded that Congress intended the proviso to alleviate the special problems encountered in the construction industry by limiting the construction industry proviso by allowing subcontracting agreements only in relation to work done on a particular jobsite, but did not allow construction unions the free use of subcontracting agreements as a broad organizational weapon.[49]

The *Connell* Court stated the Local 100 sought the agreement with Connell solely as a way of pressuring the mechanical subcontractors in the Dallas area for recognition as the representative of their employees,[50] and not to alleviate any of the problems the proviso was designed to eliminate.[51] The Court then analyzed Local 100's activity in light of the NLRA provi-

---

[43] 29 U.S.C. § 158(e) (1976); *see* note 42 *supra*.

[44] *See* note 23 *supra*.

[45] 421 U.S. at 628-34. The Court noted its authority to go beyond the statute by citing National Woodwork Mnf'rs Ass'n v. NLRB, 386 U.S. 612 (1967), which stated the rule that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers'". *Id.* at 619 (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1891)).

[46] 421 U.S. at 628; *see* 29 U.S.C. § 158(b)(4) (1976). Section 8(b) provides:

> It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or . . . restrain any person engaged in commerce, . . . where in either case an object thereof is forcing or requiring any employer or selfemployed person to join any labor or employer organization or to enter into agreement which is prohibited by subsection (e) of this section. . . .

29 U.S.C. § 158(b) (1976).

[47] 29 U.S.C. § 158(b)(4) (1976); *see* Local 1976, United Bhd. of Carpenters v. Labor Board, 357 U.S. 93 (1958).

[48] 421 U.S. at 629-30.

[49] *Id.* at 628-33.

[50] *Id.* at 618-19.

[51] *Id.*

sions concerning organizational campaigns of all unions.[52] The NLRA limits "top down" organizing by prohibiting unions from using economic weapons to force recognition from an employer regardless of the wishes of his employees.[53] To construe the 8(e) proviso to allow construction unions to seek subcontracting agreements from any general contractor vulnerable to picketing could seriously undermine the limits on economic pressure unions may use in aid of their organizational campaign. This construction would result in the type of "top down" organizing the NLRA seeks to prevent.[54] Therefore, the Court reasoned that the section 8(e) proviso only extended to "agreements in the context of collective-bargaining relationships and . . . possibly to common-situs relationships on particular jobsites as well."[55] Since the agreement was outside the context of a collective bargaining relationship and not limited to a particular jobsite, the *Connell* Court concluded that Local 100's activity was not protected by the 8(e) proviso.[56]

Local 100's final contention was that, even if the subcontracting agreement was not sanctioned by the construction industry proviso and was therefore illegal under 8(e), the agreement could not be the basis of antitrust liability because the remedies of the NLRA were exclusive.[57] In ana-

[52] *Id.; see* 29 U.S.C. §§ 158-159 (1976). *See generally* GORMAN, *supra* note 3, at 40-132, 220-39.

[53] 29 U.S.C. § 158 (1976). While the specific objective of Congress in enacting section 8(e) was to prohibit "hot cargo" agreements in most industries, the section can be viewed as part of Congress' overall objective of limiting "top down" organizational campaigns, which are situations where a union boycotts an employer until his employees join the union. Section 7 of the NLRA gives employees the right to join a union, or refrain from joining one. 29 U.S.C. § 157 (1976). The subcontracting agreement in *Connell* could have forced the nonassociated subcontractors to violate their employees' section 7 rights to refrain from union membership because the employer would have been faced with the choice of either remaining nonunion and being unable to compete, or coercing his employees into joining the union. *See* 29 U.S.C. § 158(a) (1976) (employer unfair labor practice to interfere with, restrain or coerce employees in exercise of section 7 rights).

Congress futher manifested its disapproval of top down organizing by enacting section 8(b)(7) of the NLRA. *See* 29 U.S.C. § 158(b) (1976). Section 8(b)(7) allows a union to picket an employer whose employees are not represented by a union, but the union must file a petition with the NLRB for a representative election within 30 days after the start of the picketing. 29 U.S.C. § 158(b)(7)(C) (1976). One of the major purposes for the requirement of filing an election petition is to prevent the union's picketing from forcing the employer to coerce his employees to join the union without an election, which would clearly violate section 7 and constitute an instance of top down organizing. *See* Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 MINN. L. REV. 257, 262-63 (1960).

[54] 421 U.S. at 632-33.

[55] *Id.* at 636; *see* 21 VILLANOVA L. REV. 342, 350 (1976).

[56] 421 U.S. at 635; *see* text accompanying notes 29 & 39 *supra.*

[57] 421 U.S. at 633-34. The remedies for unfair labor practices under the NLRA include NLRB orders to cease an desist from unfair labor practices and affirmative action including reinstatement of employees with or without back pay. 29 U.S.C. § 185 (1976). Section 303 of the Labor Management Relations Act permits recovery of damages and cost of suit by anyone injured in his business or property by reason of any violation of 8(b)(4). 29 U.S.C. § 187 (1976). Since the enactment of section 8(e), the Board and courts consistently have upheld

lyzing the union's contention, the Court considered the legislative history of the NLRA and concluded that Congress did not intend labor law remedies for section 8(e) violations to be exclusive. The Court also reasoned that antitrust remedies in cases like *Connell* would not lead to a result inconsistent with the remedial scheme of the NLRA.[58] The Court therefore concluded that Local 100's agreement may be the basis of a federal antitrust suit because the agreement has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions.[59]

Because the exact scope of labor's nonstatutory exemption from antitrust liability as applied to union-employer agreements was not explicitly defined in *Connell,* and therefore remains to be clarified by the courts, recent NLRB decisions applying the construction industry proviso to union-employer agreements could substantially impair antitrust enforcement. The NLRB held that agreements between unions and employers, in which the employers agreed to subcontract only to subcontractors that have a collective bargaining relationship with the union involved or are signatories to the agreement, were within the parameters of the section 8(e) proviso where a collective bargaining relationship existed.[60] Such agreements indiscriminately exclude nonunion subcontractors from a portion of the market even though their competitive advantages were not derived from substandard wages and working conditions but rather were derived from more efficient operating methods.[61] Since the NLRB only required the existence of a collective bargaining relationship to afford section 8(e) protection, a court's interpretation of *Connell* automatically to protect any agreement allowed by the NLRA from antitrust liability would require courts to ignore the positive value of competition resulting from efficiency that the antitrust laws strive to protect, in favor of deference to the NLRA, where such curtailment is not a necessary effect of the elimination of competition among workers nor required by the national labor policy.

---

contract provisions between employers and unions in the construction industry which permit the employer to subcontract work to be performed at the site of the construction only to subcontractors who are signatories to contracts either with a particular union or with unions having jurisdiction over the type of work involved. Although the Board initially held that picketing to obtain such union signatory contracts violated section 8(b)(4) of the NLRA, such holding were denied enforcement by several courts of appeals. Construction, Production & Maintenance Laborers' Union, Local 383 & United Brotherhood of Carpenters & Joiners of America, Local 1089, 137 N.L.R.B. 1650 (1962), *enforced in part,* 323 F.2d 422 (9th Cir. 1963); Essex County and Vicinity Dist. Council of Carpenters, Etc., 141 N.L.R.B. 858 (1963), *enforcement denied,* 332 F.2d 636 (3rd Cir. 1964). *See also* Local 48 of Sheet Metal Workers Int'l Ass'n v. Hardy Corp., 332 F.2d 682 (5th Cir. 1964).

[58] 421 U.S. at 634.

[59] *Id.* at 635.

[60] Carpenters, Local 944, 99 L.R.R.M. 1580, 1585-86 (1978); Operating Eng'rs, Local 701, 99 L.R.R.M. 1589, 1592 (1978); Building and Constr. Trades Council, 99 L.R.R.M. 1593 (1978); Colorado Bldg. and Constr. Trades, 99 L.R.R.M. 1601, 1603-04 (1978).

[61] 421 U.S. at 623.

In *Carpenters, Local 944,*[62] the NLRB held that the subcontracting agreement between the union and the employer was lawful.[63] In analyzing the agreement sought by the union for compliance with the NLRA, the Board considered whether the subcontracting clauses were primary or secondary in nature.[64] If the union's objective was preservation of the employer's employees' work which had customarily been performed by them or preventing the undermining of the work opportunities and standards of the employees by subcontractors who do not meet the prevailing wage rates and employees benefits covered by the agreement,[65] the subcontracting clause was primary and therefore automatically protected by section 8(e).[66] However, if the agreements were tactically calculated to satisfy union objectives elsewhere, the touchstone being whether the agreement is addressed to the labor relations of the employer vis-a-vis his own employees, the agreements would be secondary and thus presumptively unlawful unless they came within the construction proviso to section 8(e).[67] Although the union contended that the agreement was primary,[68] the NLRB concluded that they were secondary because the subcontracting clauses went beyond the primary work preservation or area standards justification.[69] Upon finding that the agreement was secondary, the NLRB then had to determine the agreement's lawfulness under the construction proviso to section 8(e). The NLRB examined the Court's decision in *Connell* and concluded that either the existence of a collective bargaining relationship between the parties or a clause covering only a particular jobsite would satisfy the *Connell* test.[70] Since the union and the employer had a preexisting collective bargaining relationship,[71] the NLRB held that the subcontracting clause was protected by the 8(e) proviso.[72]

---

[62] 99 L.R.R.M. 1580 (1978).

[63] *Id.* at 1588.

[64] *Id.* at 1583-85. It is well settled that contract clauses which are limted to primary considerations are not proscribed by section 8(e) of the NLRA. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 645 (1967); *see* note 42 *supra.*

[65] Heavy, Highway, Bldg. and Constr. Teamsters Comm. for N. Cal., 227 N.L.R.B. 269, 270 (1976).

[66] *Id.; see* National Woodwork Mfr's Ass'n v. NLRB, 386 U.S. 612 (1967); Carrier Air Conditioning Co. v. NLRB, 547 F.2d 1178 (2d Cir. 1976); Griffith Co. v. NLRB, 545 F.2d 1194 (9th Cir. 1976); Enterprise Ass'n of Steam, Etc., Local 638 v. NLRB, 521 F.2d 885 (D.C. Cir. 19775); Local 636, United Ass'n of Journeymen v. NLRB, 430 F.2d 906 (D.C. Cir. 1970). *See generally* GORMAN, *supra* note 3, at 264-69; *Secondary Boycott, supra* note 42, at 1363; *Job Security, supra* note 42, at 1000. Contract clauses which purport to acquire work which has traditionally been performed by employees of other employers, so called work acquisition clauses, have been held to violate the NLRA for the same reasons. Heavy, Highway, Bldg. and Constr. Teamsters Comm. for N. Cal., 227 N.L.R.B. 269 (1976).

[67] 99 L.R.R.M. at 1584-86; *see* National Woodwork Mrf's Ass'n v. NLRB, 386 U.S. 612, 644-45 (1967).

[68] 99 L.R.R.M. at 1583.

[69] *Id.* at 1585.

[70] *Id.* at 1587-88.

[71] The existence of the collective bargaining relationship was stipulated. *Id.* at 1581-82.

[72] *Id.* at 1588.

In three companion cases decided by the NLRB involving similar agreements, the NLRB applied the same analysis used in *Carpenters, Local 944* to determine the legality of the agreements under section 8(e) of the NLRA. In *Operating Engineers, Local 701,*[73] the NLRB found the requisite existing collective bargaining relationship[74] but held that the agreement was not protected by the section 8(e) proviso because the agreement contained a provision permitting the union to use economic power to enforce the subcontracting clause.[75] In *Building and Construction Trades Council,*[76] the NLRB found the collective bargaining relationship sufficient for section 8(e) proviso purposes even though the unions did not represent a majority of the employees covered by the agreements.[77] The NLRB held that when a union is seeking a prehire agreement in anticipation of becoming the bargaining representative under section 8(f) of the NLRA,[78] such a relationship is sufficient to fulfill the collective bargaining relationship requirement of *Connell.*[79] However, the NLRB found this clause violative of section 8(e) because the clause also contained a self-help enforcement provision similar to the one in *Operating Engineers, Local 701.*[80] In

---

[73] 99 L.R.R.M. 1589 (1978).

[74] *Id.* at 1591. The collective bargaining relationship was stipulated in the facts. *Id.* at 1590. The Board cited *Carpenters, Local 944* as authority for holding that a collective bargaining relationship is sufficient for section 8(e) proviso protection. *Id.* at 1591.

[75] *Id.* at 1593. The use of self-help measures to enforce union signatory subcontracting clauses is not protected by the NLRA. *See, e.g.,* Heavy, Highway, Bldg. & Constr. Teamsters Comm. for N. Cal., 227 N.L.R.B. 269 (1976); Ets-Hokin Corp., 154 N.L.R.B. 839, 842 (1965), *enforced sub nom.,* NLRB v. IBEW, Local 769, 405 F.2d 159, 162-63 (9th Cir. 1968), *cert. denied,* 395 U.S. 921 (1969). Rather, the union must seek judicial enforcement. Griffith Co. v. NLRB, 545 F.2d 1194 (9th Cir. 1976).

[76] 99 L.R.R.M. 1593 (1978).

[77] *Id.* at 1597-98.

[78] Section 8(f) of the NLRA exempts agreements between employers and unions with less than majority support in the construction industry from unfair labor practice prohibitions of section 8(a) and (b) of the NLRA. 29 U.S.C. § 158(f) (1976). The Board noted that 8(f), like the 8(e) construction proviso, was designed to accomodate the unique situation in the construction industry where contractors and subcontractors are in close relationship on the jobsite, employment is sporadic in nature, and employers need a ready supply of skilled employees and advance information concerning labor costs. 99 L.R.R.M. at 1599; *see* National Woodwork Mfr's Ass'n v. NLRB, 386 U.S. 612 (1967). The Board stated that the coordination of 8(f) and the section 8(e) proviso was reasonable, and concluded that the 8(e) proviso did not require a majority union representative. The Board reasoned that a union, as collective bargaining representative under 8(f), had the same interest in restricting subcontracting in order to protect continuity of work and fringe benefits for the employees and to insure stable and harmonious jobsite relations, as a union that possessed majority support and had been certified by the Board under election procedure of section 9(a) of the NLRA. 99 L.R.R.M. at 1599. The Board further stated that although the *Connell* Court did not speak to the type of collective bargaining relationship that would or would not be sufficient, *Connell* nevertheless implied that an 8(f) relationship would be sufficient. *Id.*

[79] *Id.* at 1599. The Board concluded that the union was seeking an 8(f) relationship because the agreement it sought with the employer was complete, setting forth wages and other terms and conditions of employment. *Id.*

[80] *Id.* at 1600. The Board had previously held that subcontracting agreements may not

Colorado Building and Construction Trades Council,[81] the NLRB concluded that since there was no collective bargaining relationship between the union and employer[82] and the union did not seek the subcontracting agreement to alleviate the problems posed by the common situs relationships on a particular jobsite or the reduction of friction between union and nonunion employees on a jobsite,[83] the subcontracting agreement was not protected by the construction proviso to section 8(e) of the NLRA.[84]

In these four cases, the NLRB focused directly on the section 8(e) proviso to determine whether the subcontracting agreements violated the NLRA. However, when cases involving union-employer agreements similar to those found in these cases are brought before a court on antitrust grounds, courts will have to decide whether such agreements come within the labor exemption. Although the *Connell* Court indicated that the nonstatutory labor exemption may automatically immunize all union-employer agreements from the reach of antitrust prohibitions,[85] before such an extension of the exemption is adopted the courts should consider the serious implications of such a decision.

The extension of the nonstatutory exemption to include automatically any union-employer agreement permitted by the NLRA could result in protection of agreements from antitrust liability that violate the antitrust laws where the effect of the activity is neither a goal of the federal labor policy[86] nor a necessary effect of the elimination of competition among workers.[87] The nonstatutory exemption developed through the courts' ac-

be enforced by coercion and that 8(e) proviso protection is lost where contract terms permit strikes or other economic pressure for enforcement of secondary agreements. *See* International Union of Operating Eng'rs, Local 12, 220 N.L.R.B. 530 (1975); Fresno, Madera, Kings and Tulare Counties Bldg. and Constr. Trades Council, 218 N.L.R.B. 39 (1975); note 76 *supra*.

[81] 99 L.R.R.M. 1601 (1978).

[82] *Id.*

[83] *Id.* at 1604. The *Connell* Court stated that the 8(e) proviso would perhaps protect agreements limited to a particular jobsite. 421 U.S. at 633.

[84] 99 L.R.R.M. at 1604. The Board determined that the subcontracting clause was secondary because its object was to aid and assist union members generally and was not intended to aid the employees in the contractual unit. *Id.* at 1603; *see* text accompanying notes 64-69 *supra*.

[85] The *Connell* Court, consistent with its interpretation of 8(e), held that the agreement between Local 100 and Connell did not come within the parameters of section 8(e) of the NLRA because that agreement was outside the context of a collective bargaining agreement and not limited to a particular jobsite. 421 U.S. at 635. The Court also concluded that labor law remedies were not intended to be exclusive for section 8(e) violations. *Id.* at 634. A logical implication, therefore, of these determinations is that activity that comes within section 8(e) is protected from antitrust liability. Such an implication gains support from the fact that Congress authorized such agreements in the NLRA, and if Congress had felt that they were unacceptable, it would not have permitted them in a statute that was enacted long after the Sherman Act under which the agreements would clearly be unlawful.

[86] *See* text accompanying notes 4-6 *supra*.

[87] If a court refuses to find antitrust liability whenever the union acts lawfully under the NLRA, the union may then achieve by legal means precisely the same result condemned by *Connell*, direct restraint on and elimination of competition in the product market. For exam-

knowledgments that the national labor policy requires acceptance of some anticompetitive effects in the business market.[88] However, the extent of tolerance of anticompetitive effects in the business market should bear a direct relation to the goals of the national labor policy.[89] This approach would be consistent with judicial decisions concerning the application of the nonstatutory exemption to union-employer agreements from antitrust liability.[90] The fact that the subject matter of the agreement is not prohibited under labor law[91] or that it is a mandatory subject of collective bargaining[92] should not necessarily guarantee the protection afforded by the exemption. Rather, the exemption should protect the agreement only if the subject matter of the agreement is intimately related to wages, hours, and working conditions[93] and will not potentially restrain competition in ways that would follow naturally from the elimination of competition over wages and working conditions.[94] Thus, extension of the nonstatutory exemption to protect any union-employer agreement permitted by the NLRA, if read literally, would require the reversal of prior judicial decisions as well as repeal of the antitrust laws to an extent not warranted by national labor policy.[95]

Before extending the nonstatutory exemption to protect any union-employer agreement permitted by the NLRA, courts should also consider

---

ple, if Local 100 represented the general contractor's employees, Local 100 could approach each general contractor with the same agreement as the one in *Connell*. Such agreements would fall within the section 8(e) proviso because of the collective bargaining relationship. Thus, the union would be protected by the nonstatutory exemption from antitrust liability though the market impact would be the same. *See* Note, *Antitrust - Labor Law - Labor Union Subject to Antitrust Liability as Well as Unfair Labor Practice Remedies When Its Unlawful Activity Directly Affects the Marketplace,* 1976 WISC. L. REV. 271, 286 n.83.

[88] *See* text accompanying notes 6, 14-16 *supra*.

[89] *See* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622 (1975); UMW v. Pennington, 381 U.S. 657, 666 (1965); Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 692-93 (1965).

[90] Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); UMW v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945).

[91] UMW v. Pennington, 381 U.S. 657 (1965).

[92] *Id.*

[93] Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965). In a concurring opinion in *Jewel Tea* and a dissenting opinion in *Pennington,* Justice Goldberg, joined by Justices Harlan and Stewart, suggested that all collective bargaining activity on mandatory subjects of bargaining should be exempt from antitrust liability. That test, however, has never been adopted by a majority of the Supreme Court. *See* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976).

[94] Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 625 (1975).

[95] The *Connell* Court, by holding that labor law remedies for violations of section 8(e) are not exclusive, made clear its view that federal labor law legislation has not wholly displaced the Sherman Act. 421 U.S. at 634. To have held otherwise would have violated the established judicial principle permitting a statutory repeal by implication only under the clearest of circumstances. *See,* e.g., Universal Interpretive Shuttle Corp. v. Washington Metro. Area Transit Comm'n, 393 U.S. 186, 193 (1968). *See also* J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 23.09 (4th ed. 1972); Meltzer, *supra* note 3, at 701-21.

the inequities that could occur from such an extension. In cases involving similar agreements, one agreement may be permissible under the applicable NLRA provision but the other agreement may not because of some technicality, and liability might turn on that technicality. The unfairness of this result is apparent from the labor cases discussed above. In those cases, the subcontracting agreements would have similar effects of lessening competition in the product market by limiting the number of subcontractors who could perform the work the general contractor was seeking to have done. However, in *Operating Engineers and Building and Construction Trades Council,*[96] the NLRB held that the subcontracting clauses did not come within the 8(e) proviso because an additional clause that provided for enforcement of the subcontracting clause by economic force, such as striking or picketing, violated the labor principle that the union must use judicial action to enforce their agreements and therefore may not resort to self-help measures.[97] To extend the nonstatutory exemption to protect only those agreements permitted by a literal reading of the NLRA would subject those two unions to antitrust liability and not others even though the anticompetitive effects of the business market were the same. Although labor unions might benefit from such an inflexible rule, the application of the antitrust laws to result in such inequities outweighs any benefits such a rule would accrue to the unions.

A third result the courts should consider before extending the nonstatutory exemption is the additional burden such an extension would place on the judicial system. To protect any union-employer agreement permitted by the NLRA would require a determination of the parameters of the NLRA. That determination would require courts to either analyze and interpret the NLRA to determine if the agreement was permitted under the applicable provision or accept the interpretation and analysis of the NLRB. Neither is an effective alternative. The NLRB has exclusive jurisdiction for interpreting and enforcing the NLRA[98] and if courts engage in their own interpretation of the Act, inconsistent interpretation and application of the NLRA may result. Such a result is particularly possible in cases involving anticompetitive conduct because courts will consider all the economic ramifications of particular constructions, whereas the NLRB is only concerned with the effect on the labor segment. *Connell* and the labor cases discussed above provide good examples of the inconsistencies that may arise. *Connell* held that the subcontracting agreement did not come within the 8(e) proviso because it was neither made within the context of a collective bargaining relationship nor limited to a particular jobsite.[99] The NLRB defined the parameters of the 8(e) proviso to deny protection for agreements that met the *Connell* test but which also included an

[96] *See* text accompanying notes 76-80 *supra.*

[97] 99 L.R.R.M. at 1600; *see* note 75 *supra.*

[98] 29 U.S.C. §§ 153-156 (1976). *See generally* GORMAN, *supra* note 3, at 7-39.

[99] 421 U.S. at 635.

additional clause permiting economic enforcement of the subcontracting agreement.[100] The NLRB also stretched the meaning of collective bargaining relationship to include a dubious 8(f) relationship in order to afford protection under 8(e).[101] This disparity in the determination of the parameters of the NLRA could have a significant impact on a union's antitrust liability should the nonstatutory exemption protect agreements permitted by the literal language of the NLRA. On the other hand, if the courts give complete deference to the NLRB's interpretation of the scope of the NLRA provisions,[102] the NLRB would be in the position of judging cases involving union activity which had serious anticompetitive effects in the product market, with the decision resting on the labor policy without regard to antitrust policy.[103]

After considering the serious problems an extension of the nonstatutory labor exemption could create, the logical conclusion should be to continue to balance the conflicting policies in light of the facts of each case to determine antitrust liability. In balancing the two policies, the courts should weigh the legitimacy of the union's objective,[104] the means em-

---

[100] *See* Operating Eng'rs, Local 701, 99 L.R.R.M. 1589, 1593 (1978); Building & Constr. Trades Council, 99 L.R.R.M. 1593, 1600 (1978).

[101] Building & Constr. Trades Council, 99 L.R.R.M. 1593, 1599-1600 (1978); *see* text accompanying notes 76-80 *supra*.

[102] The NLRB's interpretation and application of the NLRA are entitled to weight in doubtful situations. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951); *see* NLRB v. International Union of Operating Eng'rs, Local 542, 532 F.2d 902 (3d Cir. 1976).

[103] *See* Marriot Corp. v. Great Am. Serv. Trades Council, 552 F.2d 176 (7th Cir. 1977); Meltzer, *supra* note 3, at 696-700.

[104] Legitimate union objectives include the elimination of competition over wages, hours, and other terms and conditions of employment, organization of employees, maintenance of area standards, and the preservation of work for union members. *See Recent Developments — Labor Law — Supreme Court Holds That Labor Unions Are Not Exempt From Antitrust Statutes,* 44 FORDHAM L. REV. 191, 196 (1975). The "self-interest" of a union and its members has been treated as synonomous with the legitimate objects of organized labor. Republic Prods., Inc. v. American Federation of Musicians, 245 F. Supp. 475, 481 (S.D.N.Y. 1965). The "legitimate object" phrasing undoubtedly came from section 6 of the Clayton Act which proscribes interference with members of the labor organization and labor organizations themselves "carrying out the legitimate objects thereof." *See* 15 U.S.C. § 17 (1976); Great Atl. & Pac. Tea Co. v. Amalgamated Meat Cutters, Local 88, 410 F.2d 650,653 (8th Cir. 1969). The "self-interest" test noted in United States v. Hutcheson, 312 U.S. 219 (1941), was initially interpreted to include anyghing that would inure to the benefit of the union. *See, e.g.*, Hunt v. Crumboch, 325 U.S. 821, 825 (1945). Self-interest since has been interpreted to mean anything that comes within the scope of the legitimate objects of labor or anything concerned with a labor dispute. "The test of whether labor union action is or is not within the prohibitions of the Sherman Act is (1) whether the action is in the union's self-interest in an area which is a proper subject of union concern. . . ." Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884, 887 (2d Cir. 1970). *See generally* GORMAN, *supra* note 3, at 296-325; Winter, *supra* note 3, at 44; Meltzer, *supra* note 3, at 659; *see also* Willis, *In Defense of the Court: Accomodation of Conflicting National Policies, Labor and the Antitrust Laws,* 22 MERCER L. REV. 561, 566-78 (1971).

ployed to achieve that objective,[105] and whether the activities and their effects comport with the goals of the national labor policy[106] against the extent of the anticompetitive effect those activities have on the product market. After a court considers whether union activity comes within the labor exemption and concludes that the union-employer agreement does not, the court must then apply antitrust analysis to determine whether there has been a violation of antitrust laws.[107]

The courts have struggled with labor's exemption from the antitrust laws for many years in an attempt to preserve flexibility in antitrust cases. Although labor unions might benefit from an inflexible rule fixing the boundaries of labor's exemption, courts' need for flexibility to guard the public interest in maintaining some semblence of free market competition makes such a delineation undesirable. If the courts adopt an interpretation of *Connell* which extends the labor exemption from antitrust liability, an inflexible rule may be created that would directly benefit the unions. The courts would, however, substantially impair to an unacceptable degree their ability to protect the competitive economy. Therefore, the courts should maintain the balancing approach to determine a union's exemption from antitrust liability to ensure their continued ability to strike a desirable and constructive balance between the rights of labor and the need for competition.

SUSAN M. YODER

[105] *See generally* GORMAN, *supra* note 3, at 296-325. The means a labor union may use to achieve its objectives are limited by the NLRA. For example, section 8(b)(7) prohibits unions from picketing an employer for recognitional or organizational reasons beyond an initial 30 day period without petitioning the NLRB for an election under 9(c) of the NLRA. 29 U.S.C. § 158(b)(7) (1976); *see* note 53 *supra*. *See generally* GORMAN, *supra* note 3, at 220-39.

[106] *See* text accompanying notes 4-5 *supra*.

[107] *See* note 2 *supra*. In construing the Sherman Act, the Supreme Court has developed a "rule of reason" approach to determine whether a given practice, agreement, or activity constitutes an unreasonable restraint of trade. Under this theory, only acts, contracts, agreements, or combinations that operated to the prejudice of the public interest by undulying restricting trade are deemed unlawful. *See* United States v. American Tobacco Co., 221 U.S. 106, 175-80 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 58-62 (1911). Because of the evidentiary problems involved in applying the rule of reason, courts recently have utilized the rule of per se illegality, under which certain agreements are presumed to be unreasonable without inquiry into the factual circumstances of each case. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-18 (1940). Among the practices and agreements held to be illegal per se, "because of their pernicious effect on competition and lack of any redeeming virtue," Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958), are price fixing, division of markets, group boycotts, competitor exclusion and tying agreements. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-18 (1940); Northern Pac. Ry. Co., 85 F. 271 (1958). The agreements involved in *Connell* and the four labor cases involved group boycotts and competitor exclusion and would therefore be illegal per se if the antitrust laws are applied to labor unions in the same manner as they are to businesses. The remedies for a violation of the antitrust laws depend upon the character of the litigation. *See* 15 U.S.C. §§ 1-3, 15, 45 (1976).