Labor Relations and Antitrust: Developments After Connell

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Whether and to what extent labor activities which involve concerted action are subject to antitrust strictures has long been an unsettled question in the courts. Despite relatively frequent attempts by the Supreme Court to precisely define the nature and scope of labor's antitrust immunity—a natural consequence of the national policy favoring concert in the labor area—the debate about the state of the law continues to snarl the results in the lower courts. The authors examine the statutory and case law background of the current dispute, analyze the trends and disparities in the theories that lower courts have recently applied, and offer their views as to the logic and propriety of these developments.

I
Introduction

The Sherman Act1 prohibits restriction of competition in the business market; the National Labor Relations Act2 permits restriction of competition in the labor market.3 When conduct restricts competition in both the business and labor markets, a seemingly insoluble conflict arises: is the conduct outlawed by the Sherman Act, or is it protected by the National Labor Relations Act?

This conflict has been partially resolved by the enactment of statutes which, as interpreted by the Supreme Court, exempt unilateral union conduct from Sherman Act proscriptions.4 Such statutory exemptions to the antitrust laws, however, have no application when unions act with nonlabor groups.5 In those situations not covered by the statutory antitrust exemption, the Supreme Court has attempted to

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3. That is, it countenances elimination of competition over wages and working conditions.
solve the dilemma by accommodating the opposing philosophies of the antitrust and labor laws. Out of this process of accommodation has evolved a nonstatutory antitrust exemption justified by Congressional labor policy.

In Connell Construction Co. v. Plumbers Local 100, the Supreme Court made its most recent attempt at accommodation. There, the Court concluded that the union had forfeited its nonstatutory exemption from antitrust laws because its conduct contravened antitrust policies to an extent not justified by Congressional labor policy. Connell cannot, of course, be read in isolation; rather, it must be interpreted in relation to the long line of Supreme Court decisions which have attempted to define the limits of Sherman Act application to union conduct.

The following review of cases reveals the Supreme Court's persistent application of the Sherman Act to limit labor activities despite Congressional enactments aimed at restricting such application. Following an analysis of the Connell decision and the response of the lower courts to that decision, this article will examine both the actual and the potential impact of Connell.

II

APPLICATION OF ANTITRUST LAWS TO UNION ACTIVITIES BEFORE CONNELL

The Sherman Act was enacted in 1890 in response to what was regarded as a special form of public injury: the operation of "trusts" and "combinations" of businesses that, through market control, suppressed competition, restricted production, and raised prices. The Act was designed to prevent such practices; therefore, it outlawed "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ."

Despite Congress' primary concern with the impact of business combinations on the market place, the Sherman Act was initially applied with vigor to restrict union activities, not business conduct. Under the Sherman Act between 1890 and 1897, the lower federal courts condemned union activities twelve times, but business activities only once.9

The Supreme Court did not itself determine that the Sherman Act

6. 421 U.S. 616 (1975) [hereinafter referred to as Connell].
7. Id. at 625.
was applicable to union activities until 1908, when it decided the *Danbury Hatters* case.\(^{10}\) The Court there held that union activities were governed by the Sherman Act because the Act "provided that 'every' contract, combination, or conspiracy in restraint of trade was illegal."\(^{11}\) The Court, however, did not clearly indicate which union activities were proscribed by the Sherman Act. Although the case only concerned secondary activities, the Court's holding was broad enough to outlaw primary strikes and even the labor organizations themselves.\(^{12}\)

In response to this judicial threat to organized labor, Congress in 1914 enacted sections 6 and 20 of the Clayton Act.\(^{13}\) Section 6 provided that the antitrust laws were not to be "construed to forbid the existence and operation of [labor organizations] from lawfully carrying out the legitimate objects thereof . . . ." Section 20 banned the use of an injunction "in any case between an employer and employees, or between employers and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment . . . ."

Although the Clayton Act could have been interpreted as affording unions a broad antitrust immunity, the Supreme Court chose not to do so. Rather, in *Duplex Printing Press Co. v. Deering*,\(^{14}\) the Court narrowly interpreted the Clayton Act as securing merely the existence of labor organizations, while otherwise subjecting them to Sherman Act proscriptions.

In *Duplex*, the International Association of Machinists (IAM) called a strike in its efforts to unionize one of Duplex's factories. When the strike proved ineffectual, the IAM instituted a nationwide boycott of Duplex products, supported by threats of secondary strikes against customers and haulers. The Supreme Court held that an injunction could issue because the union's activities were illegal under the Sherman Act. The Court ruled that section 6 of the Clayton Act offered no immunity because it was inapplicable where unions depart from "normal and legitimate objects,"\(^{15}\) and that section 20 provided no protection because it only applied to a "case between an employer and employees, or between employers and employees . . . ."\(^{16}\)

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11. *Id.* at 301.
12. *Id.* The Court observed:
   If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and, at the other end, after the physical transportation ended, was immaterial.
15. *Id.* at 469.
16. *Id.* at 470.
The *Duplex* decision has been the subject of extensive criticism\(^1^\) for, among other things, having thrust the courts into an era of "Government by Injunction."\(^2^\) This usurpation of power occurred because the *Duplex* Court interpreted section 6 as empowering the judiciary to determine which union objects were "normal and legitimate." Justice Brandeis disagreed on that key point, observing in dissent that it is not the function of judges to "set the limits of permissible contest . . . . This is the function of the legislature . . . ."\(^3^\)

It took eleven years for Congress to rectify the *Duplex* problem. In 1932 the Norris-LaGuardia Act severely limited the jurisdiction of the courts to issue injunctions in labor disputes.\(^4^\) Meanwhile, the Supreme Court attempted in a series of three decisions to define more precisely the type of union conduct that was a "restraint of trade" prohibited by the Sherman Act.

In *United Mine Workers v. Coronado Coal Co.* (*Coronado I*),\(^5^\) decided in 1922, the Court held that the union’s destruction of Coronado’s mines was merely an indirect restraint of interstate trade and not proscribed by the Sherman Act, even though the destruction prevented nonunion production of coal intended for interstate commerce. The restraint was indirect because the evidence showed merely a local motive evolving from Coronado’s lockout and attempted nonunion operation.

On remand, however, new evidence demonstrated that coal mined at nonunion wages was a serious threat to the wage policies and organization of the local union. Thus, in *Coronado II*,\(^6^\) the Court observed that the union objective was to "stop the production of non-union coal and prevent its [interstate] shipment, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines . . . ."\(^7^\) The Court concluded that such a purpose was proscribed by the Sherman Act because the resulting impact on the business market constituted a direct restraint of trade:

> The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But *when the intent of those unlawfully preventing the manu-

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\(^1^\) See, e.g., Winter, *supra* note 9, at 33, where it is noted that the Court failed to admit that the Clayton Act "even at the technical level of canons of construction" was subject to other reasonable interpretations.


\(^3^\) 254 U.S. at 488.


\(^5^\) 259 U.S. 344 (1922).

\(^6^\) Coronado Coal Co. v. UMW, 268 U.S. 295 (1925).

\(^7^\) Id. at 310.
facture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act . . . .

Thus, after Coronado II, the determination that a restraint was direct, and therefore illegal under the Sherman Act, turned on motivation: if the object of the activities was to restrain or control the market or prices, it was direct restraint.

This analysis was refined in Apex Hosiery Co. v. Leader, which resulted in the first enunciation of a nonstatutory exemption from the antitrust laws. The Court there held that the Sherman Act was not intended to police any actions by a labor organization, or anyone else, unless that activity had or was intended to have a substantial effect upon commercial competition. The Court observed:

[A]ctivities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act . . . . [T]he Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to "monopolize" the supply, control its price, or discriminate between its would-be purchasers.

Rather, the Court held, union activities are not subject to the Sherman Act "unless they are intended to have, or in fact have, the effects on the market on which the Court relied to establish violation in the Second Coronado case . . . ."

Following Apex, the Court again turned its attention to interpretation of the statutory exemption. In United States v. Hutcheson, the Court, applying the Norris-LaGuardia Act as a "harmonizing text" to the Sherman and Clayton Acts, held that union activities were exempt from the antitrust laws, so long as the union "acts in its self-interest and does not combine with nonlabor groups."

The statutory immunity defined in Hutcheson led to an interesting anomaly, which was explored in Allen Bradley Co. v. IBEW Local 3. There, the union had organized most of the electrical contractors and electrical equipment manufacturers within its geographic jurisdiction—New York City. The union’s collective bargaining agreement provided that contractors would only buy equipment from manufacturers who

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24. Id. (emphasis supplied).
25. 310 U.S. 469 (1940). Although Apex Hosiery was decided after the enactment of the Norris-LaGuardia Act, that Act had no perceptible impact on the decision.
26. Id. at 512.
27. 312 U.S. 219 (1941).
28. Id. at 231.
29. Id. at 232.
30. 325 U.S. 797 (1945).
had contracts with the union. In turn, the manufacturers agreed to sell only to those contractors who had contracts with the union. In order to police the accords, the union picketed and boycotted to prevent nonunion operation. The result was a geographic enclave in New York City in which foreign manufacturers and contractors could not participate. This, in turn, caused a rise in prices, employment, and wages.

Although the union had clearly acted in self-interest, it had combined with nonlabor groups and, therefore, was not entitled to the statutory exemption defined in Hutcheson. Thus, the anomaly: “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.”31 When the union does combine with nonlabor groups, the union’s violation of the Sherman Act turns upon the conduct of the nonlabor entities with whom it has combined; if the nonlabor groups’ activities constitute a Sherman Act violation, the union participation would also be a Sherman Act violation.32

Matters remained static for twenty years until the Court in 1965 issued its companion decisions in United Mine Workers v. Pennington33 and Amalgamated Meat Cutters Local 189 v. Jewel Tea Co.34 In Pennington, the union had agreed with certain large coal operators to impose the terms of their collective bargaining agreement on all operators, without regard to the ability of the operators to pay. It was found that the purpose of this agreement was to limit overproduction—deemed a major problem in the industry—by the elimination of smaller companies. The Court concluded that the agreement was not entitled to the antitrust exemption because it contravened labor policy by abridging the union’s obligation to bargain “unit by unit.”35 In addition, the Court found that the agreement violated the antitrust laws because it constituted a conspiracy between labor and nonlabor parties to suppress competition in the business market by eliminating certain competitors.36

Significantly, the Pennington Court observed that immunity would not have been lost if the union had, without prior agreement and on its own, determined that it was in its self-interest to impose the agreement on all employers.37 The Court in Jewel Tea Co. was faced with just that situation. The union there had negotiated with the multiemployer agent a ban on the selling of meats before 9 a.m. and after 6 p.m. One

31. Id. at 810.
32. Id. at 808.
34. 381 U.S. 676 (1965).
35. Pennington, 381 U.S. at 666.
36. Id. at 665-66.
37. Id. at 666.
employer, Jewel Tea Co., at first refused to agree to the ban; later, it signed the contract, but then sued to have the hour restriction declared illegal under the Sherman Act.

Unfortunately, the Court split in its decision to uphold the union's antitrust immunity. Three of the Justices—White, Warren, and Brennan—voted to uphold immunity because the clause was intimately related to wages, hours, and working conditions, and therefore was of substantial concern to union members. Three other Justices—Goldberg, Harlan, and Stewart—voted to uphold immunity because the clause concerned mandatory subjects of bargaining.

Thus, by 1965, the courts had established a tendency to apply the Sherman Act in labor-related cases despite the demonstrated contrary intent of Congress. However, the Jewel Tea Co. decision indicated a marked division among the Justices on the definition of the nonstatutory exemption. The lack of a strong judicial interpretation of that exemption was to remain until 1975, when the high court agreed to rule on the Connell case.

III

Connell Construction Co. v. Plumbers Local 100

In Connell Construction Co. v. Plumbers Local 100, the Supreme Court made its latest attempt to reconcile the Sherman Act with the National Labor Relations Act. The dispute arose when Plumbers Local 100 attempted to obtain an agreement from Connell, a general contractor, that Connell would subcontract plumbing and mechanical work only to firms that had a current contract with Local 100. Connell refused, and Local 100 posted a picket at one of Connell's project sites. Workers walked off the job, construction halted, and Connell eventually capitulated, executing the subcontracting agreement.

It is significant that Connell subcontracted all plumbing and mechanical work on its projects. Since Connell had no plumbing or mechanical workers in its employ, Local 100 could not claim any interest in representing Connell employees. Furthermore, Local 100's multiemployer collective bargaining agreement with the Mechanical Contractors Association of Dallas contained a "most favored nation" clause. That clause guaranteed Association members the most

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39. Id. at 710.
40. 421 U.S. 616 (1975). The majority opinion was written by Justice Powell, with four Justices joining (Chief Justice Burger, and Justices White, Blackmun, and Rehnquist). Two dissenting opinions were written, one by Justice Douglas and one by Justice Stewart (joined by Justices Douglas, Brennan, and Marshall).
favorable terms provided in any collective bargaining agreement that Local 100 might execute with other employers.

When Local 100 commenced its picketing of Connell's project site, Connell at first eschewed all potential federal claims and sought to enjoin the picketing in state court under Texas antitrust laws. Local 100, however, removed the action to federal court, whereupon Connell signed the subcontracting agreement under protest and amended its complaint to allege that the agreement violated sections 1 and 2 of the Sherman Act.41

Connell's action proceeded to trial, where the district court held, inter alia, that the subcontracting agreement was exempt from the federal antitrust laws because it was authorized by the construction industry proviso to subsection 8(e) of the Labor-Management Relations Act.42 The Court of Appeals for the Fifth Circuit affirmed on the ground that Local 100's goal of organizing nonunion subcontractors was a legitimate union interest and the agreement was therefore exempt from federal antitrust laws.43

The Supreme Court reversed, holding that under the circumstances presented, Local 100 had no nonstatutory immunity to prosecution under the Sherman Act in light of its violation of subsection 8(e) of the LMRA. In so ruling, the Court stated:

We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular job site but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it 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.44

In its opinion, the Court determined three matters adversely to the union. First, the Court found that Local 100's subcontracting agreement violated subsection 8(e) of the LMRA. From that point, the

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42. Subsection 8(e) of the LMRA provides:
   (e) 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 . . .
29 U.S.C. § 158(e) (emphasis added). To this, Congress added what is commonly known as the construction industry proviso:
[N]othing in this subsection 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, alteration, painting, or repair of a building, structure, or other work . . .
43. 483 F.2d 1154, 1167 (5th Cir. 1973).
44. 421 U.S. at 635.
Court then ruled that the remedies for a violation of subsection 8(e) are not exclusively within the LMRA. Finally, the Court concluded that circumstances foreclosed the nonstatutory antitrust exemption and brought the case under the Sherman Act. Each of these points will be examined in turn.

A. Protection of the Subcontracting Agreement by the LMRA

The Supreme Court in Connell held that a subcontracting arrangement was not protected by the construction industry proviso to subsection 8(e) unless it arose in the context of a collective bargaining relationship and, perhaps, was restricted to a particular jobsite. Since Local 100 did not seek to represent Connell's employees and the subcontracting agreement was not limited to a particular jobsite, the Court ruled that the agreement violated subsection 8(e). Accordingly, the subsection 8(e) construction industry proviso could not shield the agreement from antitrust scrutiny.

The Court's determination was predicated upon its interpretation of Congressional intent, and not on the literal scope of subsection 8(e). In fact, the Court acknowledged that Local 100's subcontracting agreement literally satisfied the subsection, since the parties involved were a labor organization and an employer in the construction industry, and the agreement only covered work "to be done at the site of construction, alteration, painting, or repair of any building, structure, or other works."

Nonetheless, the Court ascribed to Congress a more narrow purpose than a "plain-meaning" reading would imply. First, the Court posited that the proviso to subsection 8(e) was enacted to partially overrule NLRB v. Denver Building & Construction Trades Council. That decision outlawed picketing to obtain subcontracting agreements, even requiring only that the subcontracting arrangement arise in the context of a collective bargaining relationship, regardless of whether the arrangement is restricted to a particular jobsite. The Board has also indicated, although it has not yet held, that such arrangements may be protected by the subsection 8(e) proviso even in the absence of a collective bargaining relationship, if they are restricted to a particular jobsite. See Colorado Building & Constr. Trades Council (Utilities Services Eng'g), 239 N.L.R.B. No. 41 (1978); Carpenters Local 944 (Woelke & Romero Framing, Inc.), 239 N.L.R.B. No. 40 (1978). However, the Ninth Circuit has disagreed with the Board's interpretation that only a collective bargaining relationship is necessary to come within the 8(e) proviso. Associated Builders v. NLRB, 609 F.2d 1341 (9th Cir. 1979).

The Court's determination of the scope of the subsection 8(e) proviso was the first ingredient mentioned by the Court in its ultimate holding that the agreement had lost its antitrust immunity. Local 100 had argued that its subcontracting agreement was immunized from the antitrust laws because it was explicitly allowed by the construction industry proviso, and that the antitrust policies must therefore defer to the National Labor Relations Act.

45. Id. at 633. The National Labor Relations Board has interpreted the Court's holding as requiring only that the subcontracting arrangement arise in the context of a collective bargaining relationship, regardless of whether the arrangement is restricted to a particular jobsite. The Board has also indicated, although it has not yet held, that such arrangements may be protected by the subsection 8(e) proviso even in the absence of a collective bargaining relationship, if they are restricted to a particular jobsite. See Colorado Building & Constr. Trades Council (Utilities Services Eng'g), 239 N.L.R.B. No. 41 (1978); Carpenters Local 944 (Woelke & Romero Framing, Inc.), 239 N.L.R.B. No. 40 (1978). However, the Ninth Circuit has disagreed with the Board's interpretation that only a collective bargaining relationship is necessary to come within the 8(e) proviso. Associated Builders v. NLRB, 609 F.2d 1341 (9th Cir. 1979).

46. The Court's determination of the scope of the subsection 8(e) proviso was the first ingredient mentioned by the Court in its ultimate holding that the agreement had lost its antitrust immunity. 421 U.S. at 626. Local 100 had argued that its subcontracting agreement was immunized from the antitrust laws because it was explicitly allowed by the construction industry proviso, and that the antitrust policies must therefore defer to the National Labor Relations Act.

47. See note 42 supra for the text of subsection 8(e).

where the union represented the prime contractor's employees and was attempting to avoid the friction caused when union and nonunion employees work alongside each other. Second, the Court suggested that the purpose of subsection 8(e) itself was to limit "top down" organizing campaigns. The Court read this purpose from Congress' enactment of subsection 8(b)(7) (restricting primary recognitional picketing) and the tightening of subsection 8(b)(4)(B) (prohibiting most secondary tactics in organizational campaigns). The Court drew further support from the enactment of subsection 8(f). That subsection, allowing "prehire" agreements in the construction industry, was the only consideration given construction unions in organizational campaigns, and contained carefully-prescribed limitations.

In light of such history, the Court commented that it is "highly improbable" that Congress intended to vest construction unions with unlimited "top down" organizing power when it enacted subsection 8(e). Therefore, the Court concluded that the construction industry proviso permits only "agreements in the context of collective-bargaining relationships and, in light of congressional references to the Denver Building Trades problem, possibly to common-situs relationships on particular job-sites as well."

Local 100's conduct was not protected, then, because Local 100 did not represent, and did not seek to represent, Connell's employees. Furthermore, the subcontracting agreement was not limited to a particular jobsite, and so did not avoid friction caused by union and nonunion employees working together; neither did it restrict subcontracting to nonunion firms whose employees would perform nonplumbing work alongside of Local 100 members. By restricting only union subcontracting of work within the trade jurisdiction of Local 100, the agreement constituted the type of "top down" organizing campaign which Congress meant to prohibit.

49. A "top down" organizing campaign is one where a particular union squeezes out other union competition before approaching the workers, as opposed to a campaign where the workers provide the impetus for the organization and choose their union.
50. 421 U.S. at 632.
51. Id. The Court observed that with respect to those limitations, "[t]he legislative history accompanying § 8(f) also suggests that Congress may not have intended that strikes or picketing could be used to extract prehire agreements from unwilling employers." The Board, however, has since ruled that picketing for an 8(f) agreement for less than 30 days is not proscribed. Building & Constr. Trades Council (Schriver, Inc.), 239 N.L.R.B. No. 42 (1978). See also NLRB v. Iron Workers Local 103, 434 U.S. 335 (1978); Barr & Jacobson, The Enforceability of Construction Industry Prehire Agreements after HiGdon, 3 INDUS. REL. L.J. 517 (1979).
52. 421 U.S. at 632.
53. Id. at 633.
B. Remedy Outside the LMRA for Violation of Subsection 8(e)

For the Connell Court to reach the ultimate issue—whether a Sherman Act remedy was available to plaintiff Connell—it first had to determine whether the remedies for a violation of subsection 8(e) were exclusively contained within the LMRA. The Court held that they were not, and that under the proper circumstances, a remedy could also be found under the Sherman Act.

The Court reached that conclusion, surprising to many, through a crabbed interpretation of the legislative history of subsection 8(e). The Court observed:

There is no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA. 54

The Court also summarily rejected the legislative history relied upon by the dissenters, which showed that there had been unsuccessful efforts to repeal labor's antitrust immunity at the time subsection 8(e) was being considered by the Congress. As the dissenters observed, "The Senate . . . refused to adopt the House's removal of antitrust immunity for prohibited secondary activity, choosing instead to make the remedies available under federal labor law exclusive." 55 The majority swept away this legislative evidence because the proposals to revoke the immunities were broader than the issue in the case and were "extravagant." 56 Thus, the Court determined, notwithstanding the defeat of proposals to revoke antitrust immunity, that Congress did not intend violations of subsection 8(e) to be remedied solely under the LMRA, even to the point of exposing some union arrangements to prosecution under the Sherman Act.

C. The Sherman Act as Applied to Connell

The Connell Court held that under the circumstances presented, it was appropriate to remedy Local 100's violation of subsection 8(e) through application of the Sherman Act. 57 To reach this conclusion,

54. Id. at 634.
55. Id. at 642.
56. The Court stated:
Those proposals, however, were much broader than the issue in this case. The Hiestand-Alger proposal would have repealed antitrust immunity for any action in concert by two or more labor organizations. The Hoffman proposal apparently intended to repeal labor's antitrust immunity entirely. That the Congress rejected these extravagant proposals hardly furnishes proof that it intended to extend labor's antitrust immunity to include agreements with nonlabor parties, or that it thought antitrust liability under existing statutes would be inconsistent with the NLRA.
Id. at 634 n.16.
57. Those circumstances included the facts that the subcontracting agreement did not arise
the Court found that the subcontracting agreement contained "a potential for restraining competition in the business market in ways that do not follow naturally from elimination of competition over wages and working conditions."\(^5^8\)

I. Restraint of Business Market Competition

The Court's finding that the subcontracting agreement had a potential for substantially restraining business market competition was premised on two factors: (1) the "most favored nation" clause contained in Local 100's collective bargaining agreement, and (2) the subcontracting agreement's limitation of subcontracting not just to union firms, but to firms party to a contract with Local 100.

Local 100 was party to a multi-employer collective bargaining agreement with the Mechanical Contractors Association of Dallas, a group of seventy-five mechanical contractors. Although that agreement was not, specifically, under attack, the Court found that the "most favored nation" clause contained therein contributed to the anticompetitive effects of the subcontracting agreement, since it guaranteed Association members the most favorable terms of any collective bargaining agreement that Local 100 might execute with other employers. In fact, the Court found that the clause inhibited Local 100 from entering into any agreements with terms more favorable than those contained in the Association Agreement.\(^5^9\)

Such an arrangement had substantial anticompetitive effects because it sheltered Association members from internal, as well as external, competition. Internal competition, that is, competition among Association members, was prevented because the clause would not allow one member a better "deal" than any other member; external competition—that between Association members and those outside the Association—was prevented because the clause "guaranteed that the union would make no agreement that would give an unaffiliated contractor a competitive advantage over members of the Association."\(^6^0\)

Furthermore, subcontractors in the Association were also sheltered from competition by the "most favored nation" clause. This occurred because the subcontracting agreement permitted subcontracting only to firms with Local 100 contracts. Those Local 100 contracts, because of the operation of the "most favored nation" clause, would not contain terms more favorable than those contained in the Association Agreement. The Court stated:

\[^5^8\] Id. at 635.
\[^5^9\] Id. at 623-24 n.1.
\[^6^0\] Id. at 623.
Subcontractors in the Association thus stood to benefit from any extension of Local 100's organization, but the method Local 100 chose also had the effect of sheltering them from outside competition in that portion of the market covered by subcontracting agreements between general contractors and Local 100. *In that portion of the market, the restriction on subcontracting would eliminate competition on all subjects covered by the multiemployer agreement...*  

The Court also thought that the subcontracting agreement had potential anticompetitive effects. This, the Court said, occurred because the agreement did not merely restrict the business market to union firms; rather, it restricted it to firms that had a contract with Local 100. The Court observed that such agreements vest the union with complete power to control access to the market for mechanical work:

The union thus had complete control over subcontract work offered by general contractors that had signed these agreements. Such control could result in significant adverse effects on the market and on consumers—effects unrelated to the union’s legitimate goals of organizing workers and standardizing working conditions.  

Two hypothetical examples were then set forth to explicate the Court’s thesis. First, if the union felt that it would serve its ends by having fewer subcontractors competing for available work, it could refuse to sign collective bargaining agreements with “marginal” subcontractors (apparently to force them out of business).  

Second, the union could refuse to execute collective bargaining agreements with “traveling” subcontractors and thus create a “geographical enclave” for local contractors, such as that condemned in *Allen Bradley*.  

### 2. Elimination of Competition over Wages and Working Conditions

The Court found that the anticompetitive effects of both the subcontracting agreement and the “most favored nation” clause did not arise solely from the elimination of competition over wages and working conditions. The subcontracting agreement, said the Court, excluded nonunion contractors from the business market, even if their competitive advantage arose from operating more efficiently rather than from paying substandard wages. The Court observed that “[c]urtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers.” Similarly, the “most favored nation” clause, because it covered all subjects contained in the multiemployer agreement, even “subjects unrelated to wages, hours, and working condi-

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61. *Id.* at 623-24 (emphasis supplied).
62. *Id.* at 624.
63. *Id.* at 624-25.
64. *Id.* at 625.
65. *Id.* at 623.
tions,” had anticompetitive effects that would not follow naturally from the elimination of competition over wages and working conditions.\textsuperscript{66} Thus, the Court concluded that the nonstatutory antitrust exemption was lost:

This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a non-statutory exemption from the antitrust laws.\textsuperscript{67}

Finally, the Court noted that the subcontracting arrangement at issue was not contained in a collective bargaining agreement and could not, accordingly, rely upon the “federal policy favoring collective bargaining” to save its antitrust immunity.\textsuperscript{68}

Taken as a whole, the \textit{Connell} decision can be viewed as a potential milestone in the Supreme Court’s persistent “end run” around Congressional labor policy. Its effectiveness can only be evidenced by the use made of it by lower courts.

IV

\textbf{THE TREND OF THE COURTS AFTER \textit{CONNELL}}

In \textit{Connell}, the Supreme Court defined circumstances under which a violation of subsection 8(e) of the LMRA could be remedied under the Sherman Act. It should come as no surprise, therefore, that the limited number of cases decided since \textit{Connell} have focused on the impact of subsection 8(e) on the loss of antitrust immunity. True to the \textit{Connell} decision, the courts have been reluctant to find that an 8(e) violation is determinative of the loss of antitrust immunity, and have tended to uphold immunity, where it is determined that subsection 8(e) has not been violated.

Further, an issue not addressed in \textit{Connell} has received considerable attention: definition of the appropriate test, where immunity has been lost, for determining whether the Sherman Act has been violated. Those courts that have responded to this issue have evidenced a predilection to apply the “Rule of Reason” rather than the “\textit{per se}” rule.

\textbf{A. Judicial Reluctance to Make 8(e) Violation Dispositive}

Since the \textit{Connell} decision, courts have generally refused to find that a violation of NLRA subsection 8(e), in itself, results in a loss of

\textsuperscript{66} \textit{Id}. at 624.
\textsuperscript{67} \textit{Id}. at 625.
\textsuperscript{68} \textit{Id}. at 625-26.
antitrust immunity. Of the five decisions discussed below, one court has specifically stated that an 8(e) violation is not determinative of the antitrust issue.\(^6\) One court, distinguishing between antitrust injunction and damages actions, has held that an 8(e) violation is not determinative of loss of immunity in damages actions.\(^7\) One court, without addressing the implication of an apparent 8(e) violation, has found that immunity may be lost,\(^1\) and one court, having found that antitrust immunity was not lost, found it unnecessary to discuss subsection 8(e).\(^2\) Only one court has held that a violation of subsection 8(e) is always determinative of the antitrust issue.\(^3\)

I. Specific Rejection of Conclusiveness of 8(e) Violation

In *Commerce Tankers Corp. v. National Maritime Union*,\(^7\)\(^4\) the Second Circuit specifically held that an 8(e) violation was not determinative of whether antitrust immunity had been lost. The case arose only after the National Labor Relations Board and the Second Circuit had ruled that there had in fact been a violation of subsection 8(e).

In *Commerce Tankers*, the National Maritime Union (NMU) attempted to enforce, through arbitration and injunction, a "restraint on transfer" clause contained in its collective bargaining agreement with Commerce Tankers Corporation. The clause required that any ship sold to an American Flag Shipper not under contract with NMU had to be sold with a crew of NMU members. The clause also required Commerce Tankers to obtain from the purchaser "a written undertaking" to abide by the NMU contract. Commerce Tankers attempted to sell one of its ships, the *S.S. Barbara*, to Vantage, an American Flag shipper that did not have a contract with the NMU. Since Vantage had a contract in effect with the Seafarer’s International Union, that shipper refused to provide the prescribed undertaking or take on a crew of NMU members.

The NMU initially was successful in its battle to uphold the restraint-on-transfer clause, winning an arbitration award and obtaining a preliminary injunction against the sale of the *S.S. Barbara*. Commerce Tankers then filed an unfair labor practice charge against NMU, claiming that the restraint-on-transfer clause violated subsection 8(e). The Board agreed,\(^7\)\(^5\) as did the Second Circuit.\(^7\)\(^6\)

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70. *Consolidated Express v. New York Shipping Ass'n*, 602 F.2d 494 (3rd Cir. 1979).
Commerce Tankers vigorously pressed its claim that the clause was violative of the Sherman Act, and sought treble damages. It argued, \textit{inter alia}, that the clause involved a group boycott against certain potential purchasers of ships and was therefore a \textit{per se} violation of the Sherman Act. Furthermore, Commerce Tankers argued that pursuant to \textit{Connell}, the clause was not exempt from the antitrust laws. The district court, for reasons not relevant to this discussion, failed to address those arguments.\textsuperscript{77} On appeal, however, Commerce Tankers pressed for summary judgment, arguing that the 8(e) conviction was determinative of all the issues.

The court of appeals rejected that argument and remanded the case for a determination of whether antitrust immunity had been lost. Circuit Judge Feinberg stated that the court did “not believe that our prior holding that the clause violated § 8(e) necessarily determines that antitrust issue, although it lends support to [Commerce Tankers’] position.”\textsuperscript{78} Instead, the court, citing \textit{Connell}, indicated that the availability of the nonstatutory exemption “turns upon whether the restraint-on-transfer clause was a ‘direct restraint on the business market . . . that would not follow naturally upon the elimination of competition over wages and working conditions,’ and whether the inclusion of the clause in ‘a lawful collective-bargaining agreement’ shelters the NMU because of the ‘federal policy favoring collective bargaining.’ ”\textsuperscript{79}

Circuit Judge Lumbard, however, dissented from the majority’s remand of the Sherman Act claims. He argued that the 8(e) violation was determinative of loss of antitrust immunity, since the restraint-on-transfer clause met the \textit{Connell} test of having “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.”\textsuperscript{80} He also rejected the majority’s suggestion that the clause might retain antitrust immunity, arguing that the court had effectively struck the clause from the agreement by finding it in violation of subsection 8(e).\textsuperscript{81}

\textsuperscript{77} The district court erroneously held that Commerce’s damages were limited to the $10,000 injunction bond posted by NMU when it obtained the preliminary injunction enjoining the sale of the ship on terms other than those permitted by the “restraint-on-transfer” clause. 411 F. Supp. 1224, 1240 (S.D.N.Y. 1976), \textit{cert. denied}, 434 U.S. 830 (1977).
\textsuperscript{78} 553 F.2d at 801-02.
\textsuperscript{79} \textit{Id}.
\textsuperscript{80} \textit{Id.} at 803-04.
\textsuperscript{81} \textit{Id.} at 804. Circuit Judge Lumbard’s rationale ignores the fact that the \textit{Connell} Court separately discussed the subsection 8(e) violation and the collective bargaining defense to the loss of immunity. The fairest reading of \textit{Connell} is that even if an 8(e) violation occurred, the inclusion of the violative clause in a collective bargaining agreement might mandate its continued
In Consolidated Express v. New York Shipping Association, the Third Circuit, distinguishing between antitrust injunction and damages actions, observed that an 8(e) violation was determinative of the loss of immunity in injunction actions, but held it was not determinative in damages actions. That case, like Commerce Tankers, arose only after the National Labor Relations Board and the Second Circuit ruled that there had, in fact, been a violation of subsections 8(e) and 8(b)(4).

In a summary judgment motion, Consolidated Express (CONEX) claimed, inter alia, that the defendants, the International Longshoremen’s Association (ILA), and its collective bargaining counterpart, the New York Shipping Association (NYSA), were collaterally estopped from relitigating the facts underlying the Board’s determination. CONEX asserted that the Board’s determination was dispositive of its treble-damages antitrust claim, as well as its claims under section 303 of the LMRA. The district court disagreed with both contentions, and denied the motion. The court of appeals reversed with respect to the section 303 claim, but affirmed the denial of summary judgment on the antitrust claim.

The Consolidated Express litigation was the result of the defendants’ efforts to ameliorate unemployment at the docks caused by containerized shipping. Their efforts focused on cargo lots of less than container size that had been consolidated into a single container within a fifty-mile radius of the docks, and which were to be delivered and unloaded as shipped within a fifty-mile radius. After initially unsuccessful efforts to enforce rules concerning the repacking of such containers, ILA and NYSA agreed to the “Dublin Supplement,” which in part prohibited carriers or direct employers from supplying consolidated containers to any facilities in violation of the previously-adopted rules.

immunity because of the “federal policy favoring collective bargaining.” Connell, 421 U.S. at 625-26.

82. 602 F.2d 494 (3rd Cir. 1979).
83. Id. at 519.
84. Id. at 520.
85. See text at note 74 supra.
86. International Longshoremen’s Ass’n (Consolidated Express, Inc.), 221 N.L.R.B. 956 (1976), aff’d, 537 F.2d 706 (2nd Cir. 1976), cert. denied, 429 U.S. 1041 (1977).
87. 452 F. Supp. at 1036.
88. CONEX was in the business of consolidating cargo lots from several customers into containers. The containers were then trucked from its facilities, which were within 50 miles of the Port of New York, to pierside facilities, where they were then loaded onto ships.
89. The pertinent text is as follows:
No carrier or direct employer shall supply its containers to any facilities operated in violation of the Rules on Containers including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder who is either a consolidator or a distributor. No carrier
CONEX alleged that the NLRB finding that the Supplement violated subsection 8(e) amounted to an inescapable determination that a group boycott had been in effect. Such a determination, according to CONEX, established not only that antitrust immunity had been lost, but also that an antitrust violation had been committed.

Although the Third Circuit found that an 8(e) violation determined the loss of antitrust immunity in an injunction action, the court found that other labor law considerations were present in a damages action, compelling rejection of CONEX’s argument. Thus, the court held that “consideration of the competing public policies which may be implicated indicates the need to recognize a limited labor exemption defense to a claim for money damages under the Clayton Act for conduct which has been held to be illegal under federal labor law.”

The reason that an 8(e) violation was determinative of antitrust injunction immunity, the court opined, was that “no labor policy is advanced by permitting ongoing operation of an illegal contract . . . ,” but that the possibility that the illicit contract was the product of licit negotiations raised different labor law considerations, to wit: “the extent to which antitrust exemption should protect not only lawful labor agreements, but also the collective bargaining process.”

The collective bargaining process, then, must be balanced against the purpose of the antitrust damages remedy, that is, deterrence of illegal arrangements. Since deterrence is only effective when the negotiators are aware of the potential illegality of their arrangement, the court introduced a foreseeability requisite to the maintenance of such actions.

Thus, the Third Circuit held that defendants in an antitrust damages action do not lose immunity unless they are unable to demonstrate that they could not reasonably have foreseen the illegality of their arrangement. However, even if they meet that burden, they may still lose their immunity unless they can demonstrate that the arrangement was

or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all containers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.

A list shall be maintained of consolidation and distribution stations which are operated in violation of the Rules for the information of all carriers and direct employers. Any container consolidated at or distributed from such facilities shall be deemed a violation and subject to the rules on stuffing and stripping.

90. Id. at 1036.
91. 602 F.2d at 519.
92. Id. at 520.
93. Id. at 519. Although the court relied substantially on Connell, it ignored the Supreme Court’s admonition that it was not determining whether an injunction was barred by the Norris-LaGuardia Act. Connell, 421 U.S. at 637 n.19.
94. Id. at 520.
95. Id. at 520-21.
“intimately related” to the object of collective bargaining and was no broader than necessary.96

2. Avoidance of Implication of 8(e) Violation

One court, carefully avoiding a decision on the implication of an apparent violation of subsection 8(e), has found that immunity is still an open question. Larry V. Muko, Inc. v. Trades Council 97 presents a situation which on its face appears to be identical to Connell. Larry V. Muko, Inc., was a nonunion general contractor which had constructed one restaurant for Long John Silver’s, Inc., and was constructing a second such restaurant when difficulties arose: the Trades Council began picketing that site, informing the public that Muko paid its workers substandard wages. Even after the second restaurant was completed, the Trades Council spent one week distributing handbills which urged customers to “protect living standards” by not patronizing Long John Silver’s. Some two months after the handbilling, Long John Silver’s, intending to build additional restaurants in the area, met with the Trades Council to avoid such activities in the future. The Trades Council advised it to have the restaurants built by union workers, and Long John Silver’s agreed. As a result, Muko received no further contracts and sued, alleging that the agreement between the Trades Council and Long John Silver’s violated the Sherman Act by excluding Muko from obtaining construction contracts.

It could be argued that the agreement violated subsection 8(e), since it did not arise out of a collective bargaining relationship—Long John Silver’s had no construction workers in its employ, having subcontracted for all of its construction work—and it was not limited to a particular jobsite. The trial court granted a defense motion for a directed verdict, apparently on the belief that the evidence could sustain no finding other than a unilateral decision on Long John Silver’s part to accept bids only from union contractors.98

On appeal, a sharply divided Third Circuit panel at first affirmed the trial court’s decision and determined that the Trades Council had not lost its antitrust immunity despite the presence of a potential 8(e) violation. The court distinguished both the organizing methods employed by Local 100 in Connell and the resulting market control, and concluded:

[This] case presents a picture entirely different from that in Connell: it is an instance of union activity which is low-key and narrow in scope; an activity “intimately related to wages, hours and working condi-

96. Id. at 521.
98. No opinion was written at the trial level.
tions,\textsuperscript{99}" normal aspirations of a union with a one-employer target; an activity not accompanied by efforts to subject an entire industry to its demands, with the resultant substantial restraint in the products market.\textsuperscript{99}

On rehearing \textit{en banc}, the Third Circuit decided that the grant of a directed verdict was improper, and that the evidence offered was sufficient for the loss-of-immunity question to be presented to the jury.\textsuperscript{100} First, the court observed that sufficient evidence was presented for the jury to find concert of action between Long John Silver's and the Trades Council, thus preventing a directed verdict on a statutory antitrust exemption theory. Second, the court opined that the jury could find, based upon the established record, that the defendants had entered into an agreement with the unjustified anticompetitive effects condemned in \textit{Connell}. Thus, a directed verdict could not be sustained on the theory that any "agreement" which might be found is protected by the nonstatutory labor exemption. Third, the court, addressing the 8(e) proviso defense, held that the jury could find that the "agreement" violated subsection 8(e) and, because of the absence of a collective bargaining relationship or common-situs aspect, would not be protected by the proviso. Thus, a directed verdict could not be defended in reliance on the 8(e) proviso.

Finally, the court emphasized:

> Our holding that the grant of a directed verdict cannot be sustained on the basis of the non-statutory exemption . . . should not be misconstrued as a holding that the defendants cannot establish . . . that they are entitled to that defense. We hold only that Muko has introduced evidence sufficient to entitle it to have a jury determine that issue.'\textsuperscript{101}

Moreover, the court advised that it was not deciding whether "a finding that an agreement made outside of the collective bargaining context violates \S\ 8(e) by itself removes labor's non-statutory antitrust exemption." Finding support in \textit{Connell} for the proposition that "the presence of a \S\ 8(e) violation may not itself decide the exemption issue," the court stated: "We . . . need not and do not rule on the effect of a \S\ 8(e) violation standing alone."\textsuperscript{102}

In a strongly-worded dissent, Judge Aldisert persuasively argued that while the majority opinion is "supported by a respectable body of

\begin{footnotes}
100. The court stated:

> Unlike this case, \textit{Connell} was before the Supreme Court after a full trial. Thus the Court was in a position to hold that nonstatutory labor exemption was unavailable as a matter of law. In the posture of this case, we need not reach so broadly. But if the jury could from the plaintiff's evidence have found facts falling within the principles established in \textit{Connell}, we must remand for a new trial.

609 F.2d at 1373.
101. Id. at 1375.
102. Id.
\end{footnotes}
federal decisions,” a “different set of fundamental values, values less antagonistic to the rights of organized labor and more reflective of the national labor policy judgments made by Congress” was called for. Moreover, he emphatically recommended the limitation of the Connell holding to its peculiar facts.

Judge Aldisent’s rationale in distinguishing the Muko case from Connell, aside from some strictly factual differentiation, concentrates on the scope of the union activity and the methods employed to bring about the sought-after agreement. Comparing Local 100’s “all-out campaign” to obtain agreements with general contractors throughout the area and the general picketing that occurred there to the single-site pickets and the single-week handbilling by the Trades Council, he concluded that the limited nature of the Trade Council’s activities should be determinative. Finally, he found compelling the fact that the agreement at issue was a “direct result of legitimate handbilling on the part of the unions,” protected by the first amendment and section 7 of the NLRA, which would be seriously undercut if it were held that concessions gained through legitimate handbilling could be subject to the antitrust laws.

3. Irrelevance of 8(e) to Determination

In Negotiating Committee v. Operating Engineers, the district court, having determined that the subcontracting clause at issue had not lost its antitrust immunity, found it unnecessary “to consider whether there can be any additional exemption implied from the proviso in Section 8(e) of the LMRA . . . .” The court upheld the antitrust immunity for three reasons. First, there was no tendency to restrict competition from employers outside of a trade association, since the Committee represented individual contractors who had assigned their bargaining rights to the Committee and did not represent a closed association of contractors. The court noted that representation by the Committee was open to any employer who chose to assign its bargaining rights. Second, the contested clause evolved through more than thirty years of collective bargaining and was contained in a current collective bargaining agreement. Third, subcontractors were not required to contract with the union; rather, they needed only to adhere to the contract on a particular project. Notably, the court acknowledged the presence of a “most favored nation” clause, but construed

103. Id. at 1377-78.
104. Id. at 1378.
105. Id. at 1385.
106. Id. at 1385-86.
108. Id. at 1391.
Connell as not rendering such clauses as *per se* illegal restraints. Connell was considered distinguishable because in *Negotiating Committee* no association was involved whose members were shielded from competition. As a final note, the court observed: "If these provisions are to be condemned as 'top down organizing' it is better that restrictions on such activity by unions be made in the regulatory laws governing labor organizations than by attempting to address them under antitrust principles." 109

4. Violation of Subsection 8(e) Conclusive

In perhaps the most simplistic reading of Connell yet, the district court in *Operating Engineers v. Neilson & Co.* 110 held a subcontracting clause to be unenforceable, simply because the clause allegedly directly restrained competition by excluding nonunion contractors. The court also made a determination that subsection 8(e) was violated.

The clause at issue, contained in the collective bargaining agreement between the Operating Engineers and Neilson & Company, required subcontractors to be bound to the terms of the collective bargaining agreement. Neilson had subcontracted to a nonunion contractor, and the union sued to enforce the subcontracting clause. Neilson defended by alleging that the clause violated the Sherman Act.

The problem in *Neilson & Co.*, the court thought, was simply that the clause at issue represented coercive action to exclude nonunion firms from the subcontracting market. 111 In so holding, the court swept away the antitrust immunity and found an explicit violation of the Sherman Act. In considering the legality of the clause, the court summarily interpreted the clause to permit "top down" organizing. Since the clause was not limited to a particular jobsite or to jobsites on which the general contractor’s employees were working, the court found it defective by Connell standards. Although considering it, the court failed to give any weight to the Connell reservation that the existence of a subcontracting clause in a collective bargaining agreement might retain its antitrust immunity.

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109. Id. The subcontracting clause at issue permitted subcontracting only to firms that agreed, on a project basis, to be bound to the terms of the collective bargaining agreement. The collective bargaining agreement was negotiated by the Negotiating Committee on behalf of individual contractors and associations.


111. The court relied primarily on Connell’s statement that the "federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude non-union firms from the subcontracting market." Id. at 2862-63, citing 421 U.S. at 428.
B. The Trend to Uphold Immunity in Absence of 8(e) Violation

The post-Connell decisions have tended to find that arrangements protected by subsection 8(e) do not lose antitrust immunity. For example, in Furriers Joint Council v. Ben Wirtzbaum Furs, the district court rejected an antitrust attack because the clause at issue was protected by the garment industry proviso to subsection 8(e).

The defendant was a manufacturer of mink coats and other fur garments, and was, through his membership in the Associated Fur Manufacturers, Inc., a party to the Association-Furriers Joint Council collective bargaining agreement. In 1977, Wirtzbaum informed the union that he was liquidating his business and discharging his employees; by February 15, 1978, Wirtzbaum claimed that he had completed both actions. The union, however, believing that Wirtzbaum continued to manufacture and sell fur garments through outside nonunion contractors in violation of the collective bargaining agreement, threatened to post informational pickets and file charges with the Board. They settled this dispute with a Memorandum Agreement requiring Wirtzbaum to have production work done by designated union firms. Thereafter, the union claimed that Wirtzbaum violated the Memorandum Agreement, and sued for arbitration. Wirtzbaum resisted, alleging, inter alia, that the Memorandum Agreement violated the antitrust laws.

The court rejected the claim of antitrust violation because the subcontracting limitation of the Memorandum Agreement was protected by the garment industry proviso to subsection 8(e); the legislative intent behind that proviso was found to be "inapposite" to the construction industry proviso explored in Connell.

Similarly, in Orange Belt Council v. Maloney, Inc., the district court rejected an antitrust challenge because the disputed clause was protected by the construction industry proviso to subsection 8(e). In addition, the court held that the controlling distinction between this

113. The Court noted that:
Defendants' second claim that the agreement violates the anti-trust laws is foreclosed by Danielson v. Joint Board of Coat, Suit, & Allied Workers Union (2d Cir. 1974) 494 F.2d 1230, 85 LRRM 2902, and Greenstein v. National Skirt and Sportswear Association Inc. (S.D.N.Y. 1959) 178 F. Supp. 681, 45 LRRM 2617, which recognized the legislature's intent in enacting the "garment industry proviso" in the Labor-Management Relations Act, 29 U.S.C. § 158(b)(7)(e) to provide for the unique problems of that industry. Accordingly, we find Connell, supra to be inapposite since that case dealt with the "construction industry proviso." In fact, the Court in Connell was most clear in spelling out in footnote 13 that the garment-industry proviso reflects different considerations. "The text of the proviso and the treatment in congressional debates and reports suggest that Congress intended to authorize garment workers' unions to continue using subcontracting agreements as an organizational weapon.
Id. at 2119 (citation omitted).
case and Connell was the fact that the clause in this case was contained in a collective bargaining agreement.\textsuperscript{115}

The antitrust attack was made in an unsuccessful attempt to vacate an arbitration award. The clause under attack was contained in the collective bargaining agreement between Maloney, Inc., and the Orange Belt District Council of Painters. The clause required Maloney, in the event it subcontracted any of its work, to obtain a written commitment from the subcontractor to pay all wages and fringe benefits required by the agreement. It also required Maloney to pay any required wages and fringe benefits that the subcontractor failed to pay. Finally, the clause prohibited subcontracting to any firm not “properly licensed and signatory” to the agreement.

When Maloney subcontracted to a firm not “properly licensed and signatory” to the agreement, and the firm failed to pay the fringe benefits due, the dispute arose. The District Council obtained an arbitration award against Maloney, requiring Maloney to pay in excess of $10,000 for delinquent fringe benefit payments. When the District Council moved to enforce the award, Maloney defended, in part, on the ground that the clause violated the antitrust laws.\textsuperscript{116} The court rejected the antitrust defense on the twin grounds that the clause was protected by the construction industry proviso to subsection 8(e) and that it was contained in a lawful collective bargaining agreement.\textsuperscript{117}

In Bullard Contracting Corporation v. Local 91,\textsuperscript{118} the court also held that because the subcontracting agreement arose in a collective bargaining context, the 8(e) construction industry proviso was applicable and, as a result, antitrust immunity was not lost. The litigation arose when Local 91 attempted to enforce, through arbitration, the signatory-only subcontracting clause contained in its collective bargaining agreement with Bullard Contracting Corporation. Bullard moved for a stay of arbitration on the grounds that the clause violated the Sherman Antitrust Act.

Finding that Connell’s thrust was directed at the absence of a collective bargaining relationship, the court held that the clause in issue, contained in a lawful collective bargaining agreement, was protected by the 8(e) proviso and was not subject to antitrust attack. The court also found that Bullard’s common-situs objection was unpersuasive be-

\textsuperscript{115} Id. at 3198.

\textsuperscript{116} Maloney also filed charges under subsection 8(b)(4) against the union, and the General Counsel issued a complaint which was pending at the time of the court’s deliberation. Id. at 3197.

\textsuperscript{117} The court then considered whether it should refrain from rendering a decision pending the Board’s decision on the unfair labor practice case, but held instead that the arbitration award should be enforced unless there already were an authoritative determination that such enforcement would sanction an unfair labor practice or that such a determination was likely to occur. Neither condition was deemed present in this case. Id. at 3198.

\textsuperscript{118} 464 F. Supp. 312 (W.D.N.Y. 1979).
cause "the definition of jobsite in a case such as this one where the
general contractor's entire job may be spread over a considerable geo-
 graphical distance, is unclear."119

In Pio v. Ross B. Hammond Co.,120 the court did not end its in-
quiry after determining that the subcontracting clause in dispute did
not violate subsection 8(e). Rather, the court observed: "A fortiori, the
subcontracting clause is permissible in the construction industry unless
it is in fact employed for a purpose or in a manner condemned in Con-
nell."121

The dispute arose when Hammond, on a project of which the
United States was a party, subcontracted to a firm without requiring
the firm to be bound by the terms of the agreement. Instead of paying
the fringe benefits to the union trust funds, the subcontracting firm paid
that amount directly to the employees. It did so because the Davis-
Bacon Act122 required the payment of "prevailing wages." Even
though the full amount had been paid out, the union sued to collect
portions of the wages that were due to be paid into union-held benefit
funds. Hammond alleged that the double payments so required pre-
vented the economic use of nonsignatory contractors on such projects
and thus constituted a restraint on trade violative of the Sherman
Act.123

The court read the Connell decision as leaving open the question
of whether a subcontracting clause is legal merely because it is con-
tained in a lawful collective bargaining agreement. It further construed
Connell to contain an implied premise that an agreement allowed by
the proviso to subsection 8(e) would also be exempt from the Sherman
Act.

In analyzing the case before it, the court determined that the
clause did not violate subsection 8(e) because it was a primary "labor
standards" clause rather than a secondary "union-signatory" subcon-
tracting clause.124 The court then determined that the clause was not
subject to antitrust attack both because it did not violate subsection 8(e)

119. Id. at 317.
121. Id. at 346-47 (emphasis added).
123. This case arose after the Supreme Court had determined in Walsh v. Schlecht, 429 U.S.
401 (1977), that the subcontracting clause was not violative of section 302 of the LMRA, 29 U.S.C.
§ 186 (1976), despite the fact that the nonunion employees on whose behalf the benefit fund con-
tributions were made could not participate in the benefits. Id. at 410. It also held that the double
payments caused by the interaction of the Davis-Bacon Act did not violate that Act. Davis-Bacon
was designed to protect employees from "substandard earnings by fixing a floor under wages on
Government projects." That objective is not "frustrated" when compensation and benefits are
higher than the floor. Id. at 411.
124. 576 P.2d at 346.
and because no anticompetitive purpose or effect was alleged "that would not follow naturally from the elimination of the competition over wages and working conditions." In the court's view, the effect of the Davis-Bacon Act, not the subcontracting clause, was primarily responsible for the claimed elimination of nonunion employers from subcontracts under the master agreement.

C. Evaluation of Antitrust Violation After Loss of Immunity

Once a court decides that antitrust immunity has been lost, it must determine whether the Sherman Act was, in fact, violated. In making that determination, courts have evolved two approaches: the "Rule of Reason," and the "per se" rule.

The Rule of Reason only outlaws those combinations or conspiracies that "significantly" restrain competition. Whether a particular restraint significantly restrains competition is dependent upon the facts peculiar to the business involved, the nature and history of the restraint, its probable effect, and the reasons for which it was adopted.

The per se rule, on the other hand, outlaws certain conduct because of its inherent unreasonableness, without regard to anticompetitive effects or justifications. Thus, in Northern Pacific Railroad Co. v. United States, the Supreme Court observed:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Group boycotts and concerted refusals to deal are often deemed to be so pernicious as to be illegal per se.

The facts underlying subsection 8(e) violations might often appear to resemble group boycotts and concerted refusals to deal. However, given the balance that must be struck between the competing policies of the Sherman Act and the National Labor Relations Act, applying the Rule of Reason would appear to be a far more appropriate approach in determining whether the Sherman Act was violated. One of the decisions discussed herein specifically adopts that analysis. In three other decisions discussed below, the courts have applied the Rule of

126. Board of Trade v. United States, 246 U.S. 231, 238 (1918).
Reason because of the peculiar facts of the cases. In only two cases discussed did the court outlaw the arrangement per se.131

1. Application of the Rule of Reason

In Commerce Tankers, examined above, the court indicated that the accommodation of the nation's antitrust and labor laws militated against applying the per se rule; rather, the Rule of Reason was deemed to be the proper standard upon which to judge non-exempt labor activities. The question as to which standard applied was considered by the Second Circuit only after the NLRB, affirmed by the Second Circuit, determined that NMU's restraint-on-transfer clause violated subsection 8(e). Commerce Tankers argued, inter alia, that the restraint-on-transfer clause was not exempt from the antitrust laws, and that application of the clause constituted a group boycott, illegal per se under section 1 of the Sherman Act.

The Second Circuit remanded the case for a determination whether the clause had lost immunity under Connell. Then, when it considered the test to be applied if the clause was non-exempt, the court observed: "[E]ven if the "nonstatutory" exemption does not apply, there is at least a substantial question whether a per se approach under the antitrust laws is applicable in the case of a non-exempt labor activity." In a footnote accompanying this language, the court more strongly expressed its view that the Rule of Reason would be more appropriate to such cases. The per se approach was deemed erroneous, in part, because "[a]rrangements may fall outside the scope of mandatory bargaining and yet have no adverse effect on competition." The court opined: "A fair reading of Jewel Tea satisfies me that the court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust."

Significantly, Circuit Judge Lumbard, in his dissenting opinion, agreed that the Rule of Reason was the proper standard to apply to non-exempt union activity. Thus, he stated that a "rule of reason in-

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131. Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 484 (3rd Cir. 1979);


132. 553 F.2d at 802.

133. The Court warned:

The principal danger of these recent rulings is that a finding of antitrust liability will automatically be made whenever the challenged conduct is held to be non-exempt. This would be a per se approach with a vengeance.

Id. at 802 n.8.

134. Id.

135. Id.
quiry in the context of a labor boycott might well be an appropriate means to balance the goals of the antitrust laws with the positive values of collective bargaining.\textsuperscript{136}

2. Application of the Rule of Reason on the Facts of a Case

In three recent decisions, the courts applied the Rule of Reason because of the facts of the cases, and not because they arose in a labor context. In the first two, Mackey \textit{v. National Football League}\textsuperscript{137} and \textit{Smith v. Pro Football, Inc.}\textsuperscript{138} the novelty of the business mandated the result; in the third case, Ackerman-Chillingsworth \textit{v. PECA},\textsuperscript{139} the failure to prove an explicit group refusal to deal was determinative.

In \textit{Mackey}, the Eighth Circuit held that the “Rozelle Rule,” which required NFL teams to compensate each other when they hired free agents, violated the Sherman Act. In making that decision, the court rejected application of the \textit{per se} rule because of the novelty of the business involved and because the district court had already conducted an exhaustive trial over the effects and justifications of the Rozelle Rule.\textsuperscript{140}

The action was brought by a group of former and then current football players, who alleged that the Rule constituted an illegal combination and conspiracy in restraint of trade which denied them the right to freely contract for their services. They sought injunctive relief and treble damages.

After determining that the Rule was not immune from antitrust attack because it was not the subject of arm’s-length bargaining, the court decided that applying the \textit{per se} rule was inappropriate. The court first observed that cases applying that test have generally concerned agreements between business competitors in the traditional sense. The NFL, although composed of twenty-six competing teams, did not constitute a group of competitors in the traditional sense; no team was interested in driving other teams out of business.\textsuperscript{141} The NFL constituted a “unique and novel business situation” about which the court needed more information than a \textit{per se} analysis would reveal. The court relied upon the following language from \textit{White Motor Co. v. United States}:

\begin{itemize}
  \item \textsuperscript{136} \textit{Id.} at 804 n.4. Judge Lumbard, however, would have found, on the facts adduced, that a Sherman Act violation was committed under either the Rule of Reason or \textit{per se} rule. \textit{Id.} at 804.
  \item \textsuperscript{137} 543 F.2d 606 (8th Cir. 1976), \textit{cert. denied}, 434 U.S. 801 (1977).
  \item \textsuperscript{138} 593 F.2d 1173 (D.C. Cir. 1978).
  \item \textsuperscript{139} 579 F.2d 484 (9th Cir. 1978).
  \item \textsuperscript{140} The Rozelle Rule prohibited NFL teams from employing “free agents”—football players no longer obligated to play for a particular team—without compensating the free agent’s previous team. If the teams were unable to agree on compensation, then the NFL Commissioner set the compensation. 543 F.2d at 610-11.
  \item \textsuperscript{141} \textit{Id.} at 619.
\end{itemize}
We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business . . . and within the “rule of reason.” We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a “pernicious effect on competition and lack . . . any redeeming virtue” and therefore should be classified as per se violations of the Sherman Act.\(^\text{142}\)

The district court had also already conducted an exhaustive trial which had produced the information necessary to make the Rule of Reason analysis. Since a primary purpose of the *per se* rule was to avoid “lengthy and burdensome inquiries into the operation of the particular industry in question,” the reasons for applying that rule were irrelevant.\(^\text{143}\)

In its Rule of Reason analysis, the court found that the Rozelle Rule was not justified by any legitimate business purposes and was more restrictive than necessary. As a result, it violated the Sherman Act.\(^\text{144}\)

In *Smith v. Pro Football, Inc.*, the District of Columbia Circuit also held that because of the unique nature of the business involved, more information was required before evaluating non-exempt activity than a *per se* approach would provide. There, the procedure for drafting players in the National Football League was at issue. In finding an antitrust violation under the Rule of Reason, the court observed:

Whether the draft is a group boycott, or not, we think it is clearly not the type of restraint to which a *per se* rule is meant to apply. A *per se*
rule is a judicial shortcut; it represents the considered judgment of courts, after considerable experience with a particular type of restraint, that the rule of reason—the normal mode of analysis—can be dispensed with . . . . A court will not indulge in this conclusive presumption lightly. Invocation of a per se rule always risks sweeping reasonable, procompetitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a "naked restraint of trade with no purpose except stifling of competition."145

Finally, in Ackerman-Chillingsworth v. PECA, a divided Ninth Circuit panel also rejected the per se approach, but not because it arose in a labor context; rather, the per se rule was rejected because of the failure of the plaintiff to allege or prove an explicit group refusal to deal. In that case, the union146 and its collective bargaining counterpart, PECA, agreed to require all signatories to their collective bargaining agreement to purchase workers' compensation insurance through an "Association Dividend Group Plan." The Plan, providing coverage through one insurance company, would reduce premiums because it was a group program and because it contained a safety and rehabilitation program. Pursuant to the collective bargaining agreement, PECA was to administer the Plan. Because the success of the Plan depended upon enrollment of enough PECA members that commissions granted by the insurance company would be sufficient to cover administrative costs, PECA instituted a campaign—characterized by the court as "aggressive" but not "coercive"—which garnered the majority of PECA members.

Ackerman-Chillingsworth, general agents and solicitors, sued. They alleged, in part, that the requirement of the collective bargaining agreement that all signatory contractors enroll in the Plan constituted a group boycott of insurance brokers like themselves, and so was per se illegal. The court disagreed, holding that no evidence existed to demonstrate that the contractors had been coerced to enroll in the Plan147 and that a per se approach was consequently uncalled for. The court went on to rule that the Plan did not violate the Rule of Reason because “[a]ppellants’ losses resulted from the initiative taken by appel- lees in developing a better plan for workmen’s compensation insurance, not from any artificial impediments to appellants’ ability to do likewise or to otherwise compete in a reasonable way."148

145. 593 F.2d at 1181.
146. International Brotherhood of Electrical Workers Local 1186.
147. 579 F.2d at 490-91.
148. Id. at 492.
3. Two Courts Apply the Per Se Rule

In Operating Engineers v. Neilson & Co.,149 discussed above, the court summarily declared that the subcontracting clause at issue was violative of the Sherman Act and was therefore unenforceable. The court made that determination based exclusively upon its finding that the clause had lost its immunity pursuant to Connell. As noted previously, the subcontracting clause at issue in Connell was interpreted by the Neilson & Co. court as requiring subcontractors to be bound by the terms of that agreement. Since in Neilson & Co. the clause was not limited to a particular jobsite or to jobsites on which the general contractor's employees were working, the court held that, under Connell, it violated subsection 8(e). The court reasoned that as an antitrust matter, the clause constituted a group boycott and was, therefore, per se illegal.150

One court of appeals—the Third Circuit, in Consolidated Express—has also utilized a per se analysis in the labor context. As noted above, Consolidated Express reached the Third Circuit only after the NLRB, affirmed by the Second Circuit, had determined that the "Dublin Supplement" negotiated by the defendants was violative of subsections 8(e) and 8(b)(4). CONEX argued, inter alia, that the application constituted a group boycott, illegal per se under the Sherman Act.151

The Third Circuit remanded the case for a determination whether immunity had been lost with respect to the claim for treble damages. The court also advised that if immunity were lost, then the application of the Supplement was a per se violation of the Sherman Act because the Supplement is an agreement "whose nature and necessary effect [is] so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality."152

The court also rejected the defendants' argument that a per se analysis should not be employed in the labor context because of the interest-balancing necessarily involved, maintaining that the balancing was ended when the NLRB ruled the particular activity impermissible under the labor laws:

A holding that the exemption does not apply embodies a judgment that considerations of labor policy are outweighed by the anticompetitive dangers posed by the challenged restraint. The proposed use of the rule of reason would, therefore, simply be an invitation to the court or jury to reweigh under a different label the question of the non-statutory exemption.153

150. Id. at 2863-64.
151. Consolidated Express, 602 F.2d at 501.
152. Id. at 523.
153. Id. at 523-24.
MISCELLANEOUS POST-CONNELL DECISIONS

Three post-Connell decisions, although not necessarily evidencing any trends, are significant in the labor/antitrust area. In *Federal Maritime Commission v. Pacific Maritime Association*, the Supreme Court was called upon to accommodate antitrust policies contained in the Shipping Act of 1916 with national labor policies concerning collective bargaining agreements. In *Utilities Services Inc. v. Building Council*, the Tenth Circuit addressed the impact of the Norris-LaGuardia Act on applications to enjoin alleged antitrust violations. Finally, in *California Dump Truck v. AGC*, the Ninth Circuit gave further support to the proposition that collective bargaining agreements are themselves exempt from the antitrust laws.

A. Antitrust Policies and The Shipping Act

In *Connell*, the Court noted that an otherwise prohibited arrangement might retain antitrust immunity if it is contained in a collective bargaining agreement. *Federal Maritime Commission v. Pacific Maritime Association* is worthy of note because the Court presented a similar argument with respect to the Shipping Act of 1916.

Section 15 of the Shipping Act requires that certain agreements between a common carrier by water or other persons subject to the Act be filed with the Federal Maritime Commission for approval. Among those agreements that must be filed are those "controlling, regulating, preventing or destroying competition." Upon review of the agreement, the Commission may "disapprove, cancel, or modify" any agreement that it finds to be "unjustly discriminatory or unfair . . . or to operate to the detriment of commerce of the United States . . . ." Prior to Commission approval or after its disapproval, all agreements subject to the filing requirement are illegal. Finally, agreements properly approved by the Commission are exempt from the antitrust laws contained in other portions of the United States Code.

*Pacific Maritime* raised two issues which are relevant to the instant discussion: (1) whether national labor policies require exempting collective bargaining agreements as a class from the filing requirements of section 15 of the Shipping Act; and (2) if not, whether the collective bargaining agreement in dispute was nevertheless exempt from these

156. 549 F.2d 173 (10th Cir. 1977).
157. 562 F.2d 607 (9th Cir. 1977).
158. 421 U.S. at 625-26.
filing requirements. The Court held on the first issue that such agreements were not as a class exempt from the filing requirements. It based its decision on Congressional intent to vest in the Federal Maritime Commission, and not the courts, the initial authority to review the anticompetitive impact of such agreements. Such an administrative mechanism does not exist in a Connell-type antitrust action.

Justice Powell, who wrote the majority opinion in Connell, dissented in Pacific Maritime. His view was that it was the broad policies of the Shipping Act that had to be accommodated with the specific policies contained in the National Labor Relations Act. Justice Powell would make the necessary accommodation by exempting collective bargaining agreements from the filing requirement, in part because such agreements would still be subject to scrutiny under the antitrust laws.

On the second issue, the majority affirmed the Commission's findings that the agreement "controlled, regulated, prevented or destroyed competition" because the agreement attempted to impose terms and conditions on employers outside the bargaining unit. It required employers who were not members of the Association to "participate in all fringe benefit plans agreed upon between the PMA and the Union, to observe PMA-determined labor policies in the event of a work stoppage, and to observe the same work rules with respect to the hiring-hall work force." Such practices, observed the Court, run afoul of Pennington. Thus, the Commission had properly determined that the agreement was subject to the filing requirement.

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160. The Court noted:
Because § 15 provides that an approved agreement will not be subject to the antitrust laws, it is apparent that Congress assigned to the Commission, not to the courts, the task of initially determining which anticompetitive restraints are to be approved and which are to be disapproved under the general statutory guidelines. It is equally apparent that as a substantive matter, Congress anticipated that various anticompetitive restraints, forbidden by the antitrust laws in other contexts, would be acceptable in the shipping industry.
435 U.S. at 53.

161. Justice Powell would have held that federal labor policy exempts collective bargaining agreements from the filing requirements of § 15:
The task confronting the Court is one of reconciling the broad language of § 15 with the distinct policy of federal labor law embodied in the [Labor Management Relations Act] . . . . It seems to me that today's ruling undercuts federal labor policy, imposing undue burdens on collective bargaining, without advancing significantly any Shipping Act objective.
Id. at 65.

162. Id. at 68.
163. Id.
164. Id. at 62.
165. Id.
166. Id.
167. Id. at 63.
B. Impact of Norris-LaGuardia on Injunctions of Antitrust Violations

Connell was an action for declaratory and injunctive relief. By the time the action reached the Supreme Court, it appeared that the application for injunctive relief had become moot. The Court observed:

Accordingly, there is no occasion for us to consider whether the Norris-LaGuardia Act forbids such an injunction where the specific agreement sought by the union is illegal, or to determine whether, within the meaning of the Norris-LaGuardia Act, there was a “labor dispute” between those parties. If the Norris-LaGuardia Act were applicable to this picketing, injunctive relief would not be available under the antitrust laws.\(^{168}\)

In Utilities Services Engineering, Inc. v. Colorado Building & Construction Trades Council,\(^ {169}\) a divided Tenth Circuit panel held that the Norris-LaGuardia Act was applicable in a Connell-type antitrust action, and that injunctive relief was therefore not available. In that case, Utilities Services sought injunctive relief under the Sherman Act to halt picketing that had been initiated at its jobsite after it had refused to execute a subcontracting agreement with the Building Council. The subcontracting agreement only applied to work not normally performed by the contractor and, thus, expressly denied that the Building Council sought to represent the contractor’s employees. The agreement required signatories to include in every subcontract for work a provision requiring payment of “prevailing rates of wages.” If a subcontractor failed to pay those rates, then the contractor would be liable for “all losses and damages” incurred.

Utilities Services argued that under section 7 of the Norris-LaGuardia Act,\(^ {170}\) injunctive relief should have been granted, since that section allows injunctions where “unlawful acts have been threatened and will be committed unless restrained.” Since the subcontracting agreement violated the Sherman Act, it was illegal and enjoinderable. Relying on Milk Wagon Drivers’ Local 753 v. Lake Valley Farm Products, Inc.,\(^ {171}\) the court rejected that position: “[F]ederal courts do not have jurisdiction to grant injunctions in cases growing out of labor disputes merely because alleged violations of the Sherman Act are involved.”\(^ {172}\)

The court ruled that Connell did not alter the law because the Court had expressly declined to address the issue.

The dissent, however, argued that an injunction should issue because there was no “labor dispute” within the meaning of the Norris-LaGuardia Act. Reasoning that the controversy here did not involve

\(^{168}\) 421 U.S. at 637 n.19.
\(^{169}\) 549 F.2d 173 (10th Cir. 1977).
\(^{171}\) 311 U.S. 91 (1940).
\(^{172}\) 549 F.2d at 177.
terms, tenure, or conditions of employment, the dissenting judge would have found that the dispute here fell outside the protection of that Act.\textsuperscript{173}

\textit{C. Antitrust Exemption for Collective Bargaining Agreements}

In \textit{California Dump Truck v. AGC}, the Ninth Circuit held that Connell is not controlling where the disputed anticompetitive effects arise from a collective bargaining agreement. Instead, such effects must be reviewed under the standards of \textit{Jewel Tea}.\textsuperscript{174}

The California Dump Truck Owners Association (CDTOA) sued the AGC and Teamsters Local 36, alleging that the AGC/Teamsters collective bargaining agreement violated the Sherman Act. CDTOA's claim rested upon a clause requiring owner-operators to receive the rates of pay contained in the agreement and requiring owner-operators to present themselves and proof of legal or registered ownership at the Teamsters office for clearance.

Distinguishing Connell because of the absence of a collective bargaining agreement there, the \textit{California Dump Truck} court held that it must apply the standard set forth in \textit{Jewel Tea} to determine whether antitrust immunity was lost, noting that "[the agreement] pertains to wages, hours and working conditions. These are mandatory bargaining subjects. Thus, the [agreement], by itself, does not violate the federal antitrust laws."\textsuperscript{175}

The court, however, permitted CDTOA to amend its complaint to plead in greater detail its claim that the AGC and Teamsters Local 36 had unlawfully combined and conspired to restrain trade in ways other than through the agreement. Such allegations, the court held, would support a finding of a non-exempt antitrust violation.

\textbf{VI OVERVIEW AND PRACTICAL SUGGESTIONS}

The Connell opinion has been criticized as an example "neither of sound draftsmanship nor of balanced judgment."\textsuperscript{176} Nevertheless, it may be that the decision will not interfere substantially with traditional collective bargaining.

Connell opens the door to broader application of antitrust princi-
ple to the institution of collective bargaining. Such encroachment, if it in fact occurs, can only render bargaining a more difficult, complex, and perhaps hazardous venture for labor and management. Moreover, the manner in which the Connell Court reached its conclusion is disquieting. Its determination is difficult to justify in light of pertinent legislative history and in light of what would seem to be sound labor law principles. The Court's decision is but an example of the Court's persistence in applying the antitrust laws in labor cases despite apparent contradictory expressions of intent by Congress.

On the other hand, the Connell decision should not be read too broadly, since it dealt with an exceptional combination of facts: Local 100's subcontracting arrangement involved a "stranger" contractor, with whom the union had no collective bargaining relationship and sought none. In such circumstances, the full weight of Congressional labor policy may not come into play. The holding of the case was also apparently influenced by the presence of a "most favored nation" clause. Such clauses have been suspect since Pennington because they allegedly undermine the union's obligation to bargain unit by unit, tending to impose labor standards outside of the bargaining unit and binding the union interests to that of the "most favored" employer group.

The specific holding of Connell, however, is limited to circumstances where subsection 8(e) has been violated. In a case where the disputed arrangement is specifically authorized by the provisos to subsection 8(e), it is doubtful that antitrust immunity would be lost; it is difficult to imagine that general antitrust policies could outlaw an arrangement specifically authorized by Congress in the labor laws.

Decisions rendered after Connell seem to acknowledge the limited application of the case, and have demonstrated generally a realization of the special combination of facts present in that case. Thus, later courts have exercised commendable restraint in applying Connell. In fact, they have been reluctant to impose wholesale antitrust remedies even after immunity is lost, choosing instead to review the activity under the Rule of Reason.

The National Labor Relations Board's recent interpretation of Connell's subsection 8(e) prescriptions will, if upheld by the courts, permit subcontracting agreements in the construction industry of sufficient substance to protect labor's basic interests and yet avoid the strictures of the antitrust laws. The Board has held that the construction industry proviso to subsection 8(e) protects secondary subcontracting clauses that arise in a collective bargaining relationship, regardless of whether the effects are limited to a particular jobsite, if the clauses

177. Carpenters Local 944 (Woelke & Romero Framing, Inc.), 239 N.L.R.B. No. 40 (1978),
are not accompanied by self-help provisions.\textsuperscript{178} The Board has also indicated, although it has not yet held, that even in the absence of a collective bargaining relationship, a subcontracting arrangement may be protected by the 8(e) proviso, if it is aimed at avoiding the \textit{Denver Building Trades} problem of friction caused by union and nonunion employees working side by side.\textsuperscript{179}

Finally, the Board has also held that a sufficient collective bargaining relationship exists to legitimize the 8(e) proviso if it arises out of a subsection 8(f) prehire relationship, that is, so long as the contractor employs or intends to employ some workers in the trade covered by the subcontracting arrangement.\textsuperscript{180}

Thus, any antitrust peril of the type seen in \textit{Connell} might well be avoided simply by restricting the use of subcontracting arrangements to employers with which the union has either an exclusive or a prehire bargaining relationship. Such arrangements may also be safe, even in the absence of a collective bargaining relationship, if they are limited to a particular jobsite and designed to avoid conflict between union and nonunion employees working side by side. An added element of safety, when employing subcontracting clauses, might well be achieved by avoiding “favored nation” provisions; based upon recent labor antitrust decisions, it would appear that such arrangements would be subject to strict examination for their actual and potential anticompetitive effects.

It is noted, however, that the courts are presently divided over the Board’s \textit{Connell} analysis. In \textit{Associated Builders v. NLRB},\textsuperscript{181} the court held that not only a collective bargaining relationship was necessary to come within the scope of the 8(e) construction industry proviso, but that the union’s members must actually be employed on the project site, either by the signatory employer or a subcontractor. By contrast, in \textit{Bullard Contracting Corporation v. Local 91},\textsuperscript{182} the court held that the existence of a bargaining relationship was determinative and that the employment of the union’s members on the project was irrelevant. Finally, presently pending before the District of Columbia Circuit are petitions for review and enforcement of the Board’s order in \textit{Building & Constr. Trades Council (Schriver, Inc.) v. NLRB, 609 F.2d 1341 (9th Cir. 1979).}

\textsuperscript{178} Building & Constr. Trades Council (Schriver, Inc.), 239 N.L.R.B. No. 42 (1978); Operating Engineers Local 701 (Associated Builders), 239 N.L.R.B. No. 43 (1978), enforced as modified sub nom. Associated Builders v. NLRB, 609 F.2d 1341 (9th Cir. 1979).

\textsuperscript{179} Carpenters Local 944 (Woelke & Romero Framing, Inc.), 239 N.L.R.B. No. 40 (1978), enforced as modified sub nom. Associated Builders v. NLRB, 609 F.2d 1341 (9th Cir. 1979).

\textsuperscript{180} Building & Constr. Trades Council (Schriver, Inc.), 239 N.L.R.B. No. 42 (1978).

\textsuperscript{181} 609 F.2d 1341 (9th Cir. 1979).

\textsuperscript{182} 100 L.R.R.M. 2959 (W.D.N.Y. 1979).
Construction Trades Council (Schriver, Inc.),\textsuperscript{183} which held that a sufficient collective bargaining relationship exists to legitimize the 8(e) proviso if it arises out of a subsection 8(f) prehire relationship.

VII

Conclusion

Too few decisions have been rendered since Connell to enable one to draw any definitive conclusions of the precise impact that the decision will have on the institution of collective bargaining. It can only be hoped that the trends observable in the few post-Connell decisions will prevail. Court affirmance of the recent Board decisions on secondary subcontracting will help stabilize the law in this area. The application of the Board's subcontracting standards in the context of a labor antitrust action should greatly confine unwarranted antitrust encroachment in the area of collective bargaining. A contrary trend, one towards broader application of antitrust restrictions to labor/management activities, would place unfortunate strains on the already difficult, but highly desirable, process of collective bargaining.

\textsuperscript{183} 239 N.L.R.B. No. 42 (1978), appeal docketed, Nos. 78-2177, 79-1001 (D.C. Cir. 1979).