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Muko and Conex: The Third Circuit Responds to Connell

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MELVIN L. MOSER**

The authors discuss the application of federal antitrust laws to organized labor. The article, written for practitioners, defines the elements necessary to obtain a recovery in labor antitrust actions. The authors analyze the standard of review, burden of proof, and the elements which the unions must show in order to be exempted from antitrust law. The focal point of the article is the comparison between the Supreme Court's most recent discussion of the labor exemption in Connell Construction Co. v. Plummers & Steamfitters Local Union 100 and the Third Circuit's application of that exemption in Larry V. Muko v. Southwestern Pennsylvania Building Trades Council and Consolidated Express, Inc. v. N.Y. Shipping Association.

I. INTRODUCTION

The interaction of federal labor and antitrust policies has long proved to be a troubling area. Combining express statutory provisions1 with a judicial gloss on those legislative terms has created uncertainty regarding the extent to which union activities, particularly those in cooperation with non-union groups,2 are within the purview of federal antitrust law. Practitioners delving into this amorphous and conceptually difficult area are faced with a myriad

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of unanswered questions as they attempt to resolve holdings and concepts that are, in a sense, irreconcilable. It is the purpose of this article to identify and respond to some of these questions, the most important of which concerns what must be proved in order to obtain recovery in a labor antitrust action as well as what obstacles must be surmounted. To highlight these matters, the innovative judicial resolutions that the United States Court of Appeals for the Third Circuit developed in *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building Trades Council (Muko)* and *Consolidated Express, Inc. v. N.Y. Shipping Association (Conex)* will be analyzed, to provide the practitioner with a guide to getting his client’s case before a jury.

II. A BRIEF HISTORY OF THE LABOR EXEMPTION TO FEDERAL ANTITRUST LAW

The road to *Muko* and *Conex* is long and convoluted, as courts have attempted to grapple with an antitrust policy, based on a concededly ambiguous statute that has been amended from time to time to reflect congressional response to unfavored decisions interpreting it. The Supreme Court’s last decision involving the labor exemption to antitrust laws, *Connell Construction Co. v. Plumbers & Steamfitters Local Union 100*, is to be appreciated, if not for its substantive content, at least for its effort to reconcile and capsize a rather slippery concept which had been tradition-

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4. 609 F.2d 1368 (3d Cir. 1979).

5. 602 F.2d 494 (3d Cir. 1979), vacated and remanded, 48 U.S.L.W. 3849 (1980).


ally used to circumvent the aims of those very laws.9

A. The Early History

Federal statutory antitrust law may be traced to its origins in the Sherman Act of 1890.10 Aimed at eliminating the evils that monopolies and trade restraints had visited on society,11 the Act was nevertheless utilized as a tool by which a growing trade union movement could be controlled. In the infamous Danbury Hatters12 case, the Court made it clear that labor unions were not beyond the purview of the Sherman Act when their activity was aimed at commerce. The decision also demonstrated that direct restraints of trade effected by the use of secondary boycotts of goods, in an effort to gain unionization, would create antitrust liability.13

Congress responded in 1914 with passage of the Clayton Act, which by definition removed the “labor of a human being” from articles or commodities of commerce14 and limited the ability of the federal courts to grant injunctive relief in relation to labor disputes.15 The labor euphoria that accompanied this legislative re-

12. Loewe v. Lawlor, 208 U.S. 274 (1908). The case derived its popular name from the fact that the activity in question involved a boycott of non-union hats.
13. See Kryvoruk, supra note 3, at 66.
14. 15 U.S.C. § 17 provides:
   The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
15. 29 U.S.C. § 52 provides:
   No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
   And no such restraining order or injunction shall prohibit any person or
response was short-lived. The Court promptly limited the antinjunction section to disputes between employees and immediate employers. Thus, the Court interpreted these provisions in a manner so as to sap their vitality.16

Eleven years later, Congress again legislated to restrict the availability of the injunction weapon in labor relations through passage of the Norris-LaGuardia Act.17 This Act restrained injunctions growing out of labor disputes and began to articulate a

persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ a party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

16. In Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), the Court limited the anti-injunction section to disputes between employees and their immediate employers, and indicated that since 15 U.S.C. § 17 was limited to "lawful" activities, secondary activity was still included in the antitrust examination. See Bedford Cut Stone Co. v. Journeyman Stone Cutter's Ass'n, 274 U.S. 37 (1927).

17. 29 U.S.C. §§ 101-115 (1976). The operative provision is § 104, which provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;
(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or her moneys or things of value;
(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.
sweeping national policy that would foster continued development of collective employee activity. The Supreme Court's initial pronouncement relating these clear statements of congressional displeasure with its prior holdings to antitrust law came in *Apex Hosiery Co. v. Leader.* In *Apex,* Justice Stone enunciated a view of the reach of antitrust policy that reflected on the purpose underlying the Sherman Act and found that only union activity which directly restrained commercial activity was within the Act's concern. To accommodate the legitimate labor concerns with the Sherman Act, the Court would only be concerned with "prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers." Thus, *Apex* served to remove from antitrust consideration those union activities which restrained the labor market, but did not restrain commercial activity.

The next link in the exemption chain came in *United States v. Hutcheson,* in which Justice Frankfurter announced a "harmonizing" approach to labor antitrust analysis. Described as a *tour de force,* the Court broadly outlined an exemption from antitrust liability. This exemption was produced by an integrated reading of the anti-injunction provisions of the Clayton and Norris-LaGuardia Acts. The Court indicated that there would be no criminal prosecution for activity which the courts could not enjoin and summarized the scope of a union's protected activity stating:

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

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21. 310 U.S. at 493. Justice Stone indicates that concerted union activity will often have significant effect on competition, but that such effect will not bring the activities within the Sherman Act, *id.* at 503. See generally Coronado Coal Co. v. UMW, 268 U.S. 295 (1925) and UMW v. Coronado Coal Co., 259 U.S. 344 (1922).


wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. There is nothing remotely within the terms of § 20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer.25

The result of Hutcheson was to provide antitrust immunity for labor activity in the course of a labor dispute taken to further only the interests of the union and not in combination with a non-labor group.

Then, the situation posited to fall outside this exemption came before the Court in Allen Bradley v. IBEW Local 3.26 In Allen Bradley, an electrical workers union combined with electrical equipment manufacturers and contractors to effectively isolate the New York City area from competition by parties who were not signatories to the union agreement.27 With Allen Bradley, the Court seemed to complete the initial development of a labor antitrust relationship which allowed for labor immunity, so long as a union did not combine with non-labor groups, and avoided imposing direct restraints outside of the labor market.28

The Hutcheson exemption has come to be known as labor's "statutory"29 exemption to antitrust liability, as its origin is in direct legislative proscription of judicial interference with collective employee action. Parallel to this is a "non-statutory" exemption, based on the need to reconcile antitrust policy with a desire to favor association of employees to eliminate wage competition.30 Even this judicially created exemption, however, has its basis in congressional action which serves as the basis of the national labor policy.31 This exemption is utilized when employee groups

25. 312 U.S. at 232.
27. This agreement had the effect of preventing the sale of equipment manufactured outside of New York City to contractors, increasing wages of electricians in the city, driving up prices for equipment in the city, and increasing profits for manufacturers and contractors. The agreement required contractors to buy only from local manufacturers; manufacturers could sell locally only to contractors using Local members. The agreement also required contractors and manufacturers to maintain closed shops with only Local members being employed. 325 U.S. at 799. See Kryvoruka, supra note 3, at 74.
28. See At. Antoine, supra note 3, at 608.
31. See notes 24 and 25 supra. The choice of "statutory exemption" may be inaccurate, but it does provide a shorthand method of differentiating Hutcheson-type exemptions from those resulting from judicial balancing. See Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (White, J.). But see 381 U.S. at 697 (Goldberg, J., dissenting and concurring).
join with non-labor parties, outside the *Hutcheson* standard, to enter into agreements which tend to eliminate a competitive advantage based solely on wage differentials. The contours of this exemption from antitrust scrutiny were outlined in *Connell*, in which the Court stated:

The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.\(^{32}\)

### B. Pre-Connell Development

The Court seemed to foreshadow this conclusion in the companion cases of *United Mine Workers of America v. Pennington*\(^ {33}\) and *Amalgamated Meat Cutters v. Jewel Tea Co.*\(^ {34}\). In each case, a fragmented\(^ {35}\) Court attempted to add further definition to this non-statutory exemption for joint union-employer activity.

The *Pennington* case concerned a national agreement entered into by the United Mine Workers and large coal concerns. The antitrust complaint alleged that the agreement was an effort to force smaller coal operators out of the market by agreeing on wage schedules beyond their capability. The gist of the agreement was a trade-off whereby the union would receive higher wages in return for not opposing large company development of automated operations. The union defended on grounds that it was exempt from antitrust coverage. The union claimed that since the agreement centered on wages, the agreement was

\(^{32}\) 421 U.S. at 622.

\(^{33}\) 381 U.S. 657 (1965).

\(^{34}\) 381 U.S. 676 (1965).

within the policy announced in *Apex Hosiery* which allowed union activity if that activity was concerned with such union interests as wages and did not restrain commercial activity.

The Court rejected the claimed exemption on multiple grounds. It noted that had the union become party to a collusive arrangement to remove small operators from the market, an exemption claim would be frivolous. Further, and more importantly, the plurality indicated that an exemption is not automatically available because the agreement involved a mandatory bargaining subject. The Court summarized the relationship between multi-employer bargaining, wage negotiation, and antitrust exemption when it stated:

[T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.

We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union’s part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

Thus, *Pennington* paralleled *Hutcheson*: a union may act unilaterally in a manner that will result in driving some employers from business, but once combined with a non-labor group, the union loses its exempt status when the same end result is reached.

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37. 381 U.S. at 663.
38. Id. at 664-65; see 29 U.S.C. § 158(d) (1976).
40. See Kryvoruka, *supra* note 3, at 78. The notion that “predatory intent” is required to lose the exemption is undercut in *Pennington*, where Justice White stated:

On the other hand, the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit. One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious, but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry. And if the conspiracy presently under attack were declared exempt it would hardly be possible to deny exemption to such avowedly discriminatory schemes.  

*From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified
Pennington was reaffirmed in Ramsey v. United Mine Workers⁴¹ wherein the Court stated: “[w]here a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct.”⁴²

In Jewel Tea, the Court was again faced with juggling the competing policies of labor and antitrust law. There, Chicago meatcutters and butchers entered an agreement whereby meat sales were restricted to the hours of 9:00 A.M. to 6:00 P.M. The Jewel Tea Company reluctantly agreed to this provision, but sought antitrust action to enjoin its enforcement, alleging that this agreement was a conspiracy which prevented marketing on its own terms. The Court upheld the agreement as being within the non-statutory labor exemption, as there was no showing that the union was acting beyond its own labor interests, nor that it acted at the behest of non-labor groups.⁴³ In Jewel Tea, the restriction on marketing hours was “so intimately related to wages, hours and working conditions,” that the reconciliation of national labor policy and the Sherman Act tilted toward exemption.⁴⁴ The plurality stated that:

[w]e think that the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of “wages, hours, and other terms and conditions of labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union’s interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy.

employment" about which employers and unions must bargain. . . . And, although the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement, the concern of union members is immediate and direct. Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act, nor is the union's unilateral demand for the same contract of other employers in the industry.

It should be noted, however, that the Court was not willing to grant automatic exemption solely on the ground that an agreement was centered on a mandatory bargaining subject.

After *Jewel Tea*, it appeared that the labor exemptions could be classified as follows:

1. Labor, acting alone and not in concert with non-labor groups, was exempt from antitrust scrutiny, under the statutory exemption in *Hutchinson*.
2. Labor acting in concert with non-labor groups to effect direct product market restraints was within antitrust scrutiny under *Allen Bradley* and *Apex Hosiery*.
3. Labor agreeing with non-labor groups, even over wage scales, would be within the scope of antitrust policy, if such agreement with one employer seeks to impose that scale on other bargaining units, under *Pennington*.
4. Agreements regarding subjects intimately related to wages, hours, and conditions of work, made in the union's self-interest and not at an employer's urging, would be exempt, notwithstanding a real and apparent effect on market competition. *Jewel Tea*.

*Connell*, ten years later, appears to be an attempt by the Court to create a definitive statement of the reach of these exemptions, and *Muko* and *Conex* serve as illustrations of the *Connell* standard in action.

III. RECENT DEVELOPMENTS OF THE LABOR EXEMPTION

A. The *Connell Decision*

The latest word from the Supreme Court on the scope of the labor exemption from antitrust liability came in *Connell Construction Co. v. Plumbers & Steamfitters Local Union 100*. In *Connell*, a local union sought to compel general contractors to become signatories to an agreement requiring them to use only subcontractors who were represented by Local 100. Upon *Connell*’s refusal

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45. *Id.* at 691.
46. See *Kryvoruka*, *supra* note 3, at 83. Justice Goldberg would have gone further and concluded the federal labor laws were the exclusive regulatory scheme for activity within the sphere of mandatory bargaining subjects. 381 U.S. at 709 (Goldberg, J., dissenting and concurring).
48. *Id.* at 618-19. The agreement provided:

"WHEREAS, the contractor and the union are engaged in the construction industry, and

"WHEREAS, the contractor and the union desire to make an agreement
to enter into such an agreement, the union posted a single picket at one of Connell’s larger construction sites. This resulted in a halt to construction work at that site, as approximately 150 workers walked off the job. The district court had upheld this subcontracting agreement as being exempt from federal antitrust law by virtue of its legality under section 8(e) of the National Labor Relations Act. The court of appeals affirmed, holding that the union’s goal of organizing subcontractors was a legitimate labor interest, and its actions in realizing that goal were exempt from federal antitrust proscription.

In reversing the holding as to antitrust immunity, the Connell majority focused on the effect of this agreement between a

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applying in the event of subcontracting in accordance with Section 8(e) of the Labor-Management Relations Act; “WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and “WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms; “THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alternation, painting or repair of any building, structure, or other works, that [if] the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.”

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49. Id. at 620.
50. Id.
51. Id. at 621. See 29 U.S.C. §§ 151-170 (1976). The district court also held that state antitrust law was preempted by federal labor legislation. This holding was affirmed by the court of appeals, 483 F.2d 1154, 1175 (5th Cir. 1973), and by the Supreme Court, 421 U.S. at 621, 637.
52. 483 F.2d 1154 (5th Cir. 1973).
53. Id. at 1167, 1169. Justice Powell agreed that this was the union’s goal, stating, “the union’s sole objective was to compel the general contractors to agree that in letting subcontracts for mechanical work they would deal only with firms that were parties to the union’s current collective-bargaining agreement.” 421 U.S. at 618-19. This is critical when one considers the weight given the union’s motivation when the court considered the protection granted to the construction-industry subcontracting agreements by § 8(e) of the NLRA, 29 U.S.C. § 158(e). See notes 62-65 infra and accompanying text.
54. 421 U.S. at 621.
55. The opinion of the Court was delivered by Justice Powell, with whom Chief Justice Burger and Justices White, Blackmun and Rehnquist joined. Justice
union and a non-labor group on competition in the business market. The Court also focused on the significance of agreements between labor groups and non-labor parties outside of the collective bargaining process.

The Court observed that national labor policy favors reduction in competition over wages and working conditions and this national policy serves as the foundation for the non-statutory labor exemption.\textsuperscript{56} \textit{Connell}, however, presented a broader restraining effect on union activity. The subcontracting agreements with Local 100 not only prohibited agreements with subcontractors who were non-union and were presumably paying less than union scale, but prevented the use of any subcontractor, union or non-union, that did not have an agreement with Local 100.\textsuperscript{57} This agreement resulted in the union having complete and unilateral control over subcontractor work with signatory general contractors. By restricting the number of collective agreements it entered into with subcontractors, the union could limit the number of subcontracting firms available to signatory general contractors.\textsuperscript{58}

Douglas dissented separately, and joined with Justices Brennan and Marshall in a dissenting opinion by Justice Stewart.

\textsuperscript{56} Justice Powell noted:

The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect the price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.\ldots Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members.

\textsuperscript{421} U.S. at 622 (citation omitted).

\textsuperscript{57} 421 U.S. at 623-24.

\textsuperscript{58} As the Court stated:

Success in exacting agreements from general contractors would also give Local 100 power to control access to the market for mechanical subcontracting work. The agreements with general contractors did not simply prohibit subcontracting to any firm that did not have a contract with Local 100. 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. For example, if the union thought the interests of its members would be served by having fewer subcontractors competing for the available work, it could refuse to sign collective-bargaining agreements with marginal firms.\ldots Or, since Local 100 has a well-defined geographical jurisdiction, it could exclude "traveling" subcontractors by refusing to deal with them. Local 100 thus might be able to create a geographical enclave for local contractors, similar to the closed market in \textit{Allen Bradley}.\ldots

\textsuperscript{421} U.S. at 624-25 (citations omitted).
This broad ability to expand and contract the range of choices open to general contractors resulted in potential antitrust liability for two reasons. First, the effect of the restrictive subcontracting agreement was beyond limiting competition based on wage rates. It effectively eliminated from the market those non-union subcontractors whose competitive advantage arose from efficiency of operation rather than sub-standard wages and working conditions.\textsuperscript{59} Second, the non-statutory antitrust exemption has its basis in the reconciliation of two pre-eminence federal policies, that of market competition as embodied in the antitrust laws, and that of collective employee action. When the goals of the labor policy are only minimally furthered, if at all, by granting an antitrust exemption, this reconciliation is not required, and the full range of statutory antitrust liability will attach. In \textit{Connell}, the Court found that the agreement to organize the subcontractors was lawful, but the Court focused on the fact that the means of achieving that goal were beyond the scope of the labor policy. The Court reasoned that the restraint on the business market did not follow naturally from the legitimate elimination of competition over wages and working conditions.\textsuperscript{60} Hence, as exemption from antitrust liability would not serve to further the national labor policy, Local 100's activities would be subject to antitrust scrutiny. The Court, in dicta, further indicated that the inclusion of a restraint of this degree in a legal collective bargaining agreement would not save the exemption since the reach of a provision such as this went beyond that necessary to preserve valid objectives of reducing com-

\textsuperscript{59} The Court noted this effect of a \textit{Connell}-type agreement:
In this case Local 100 used direct restraints on the business market to support its organizing campaign. The agreements with Connell and other general contractors indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect among workers of the elimination of competition. Moreover, competition based on efficiency is a positive value that the antitrust laws strive to protect.
421 U.S. at 623.

This raises the question of whether or not the employer, who derives a competitive advantage by a means other than disparate wages and conditions, may use that as a defense to what otherwise would be an agreement within the labor antitrust exemption. This defense could also serve to preclude a union's showing that its agreement is "intimately" concerned with wages and conditions of employment under \textit{Jewel Tea}.

\textsuperscript{60} 421 U.S. at 635. The Court felt that the organization of subcontractors was a legitimate goal of labor unions.
petition over wages and working conditions.\textsuperscript{61}

The lower courts in \textit{Connell} each resolved the question of antitrust immunity on the basis that section 8(e) of National Labor Relations Act explicitly allowed this type of agreement, and hence, antitrust policy must defer to clearly pronounced labor law considerations.\textsuperscript{62} The Supreme Court rejected this analysis. The Court noted that section 8(e) exempted construction sites from its provisions. The Court then found that the intended effect of 8(e)’s construction proviso was not served by the agreement in \textit{Connell}. The elimination of jobsite friction between union and non-union employees was not presented as a justification for the subcontracting agreement.\textsuperscript{63} The Court effectively limited the scope of section 8(e) to collective bargaining situations and to those common-situs relationships on particular jobsites which are unique to the close community of interests in the construction industry.\textsuperscript{64} Finally, the \textit{Connell} majority dismissed a claim that, regardless of the legality under section 8(e) of this type of subcontracting agreement, remedies under the National Labor

\begin{itemize}
\item \textsuperscript{61} 421 U.S. at 625-26. This may be a further definition of a concept that seemed to underpin Justice White’s opinion in \textit{Jewel Tea}, that even an agreement which concerns areas within the legitimate sphere of union interest must be no broader than necessary to protect those interests. See Consolidated Express, Inc. v. N.Y. Shipping Ass’n, 602 F.2d 494, 517 (3d Cir. 1979), \textit{vacated and remanded}, 48 U.S.L.W. 3849 (1980) (\textit{Conex}).
\item \textsuperscript{62} 421 U.S. at 626. Section 8(e) of the National Labor Relations Act provides:

\begin{quote}
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: \textit{Provided}, That nothing 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: \textit{Provided further}, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms ‘any employer,’ ‘any person engaged in commerce or an industry affecting commerce,’ and ‘any person’ when used in relation to the terms ‘any other producer, processor, or manufacturer,’ ‘any other employer,’ or ‘any other person’ shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the good or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: \textit{Provided further}, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.
\end{quote}

\item \textsuperscript{63} 421 U.S. at 631. The Court relied on its own interpretation of section 8(e)’s purpose as stated in National Woodwork Mfrs v. NLRB, 386 U.S. 612, 639-40 (1967), and that of the District of Columbia Court of Appeals in Drivers Local 695 v. NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966).
\item \textsuperscript{64} 421 U.S. at 633.
\end{itemize}
Relations Act were exclusive.\(^6\)

**B. The Conex Decision**

*Consolidated Express, Inc. v. N.Y. Shipping Association*\(^6\) involved the much litigated\(^6\) rules on containers which regulate the use of pre-loaded freight containers in and around the Port of New York.\(^6\) The plaintiff, a freight consolidator, brought suit against the New York Shipping Association (NYSA) and the International Longshoremen’s Association (ILA) alleging that their enforcement of these rules constituted a group boycott of the plaintiff in violation of the Sherman Act.\(^6\) The consolidator sought treble damages under section 4 of the Clayton Act,\(^7\) alleging injury to its business.

NYSA is a collective bargaining agent for shippers in the Port of

\(^6\)Id. at 634.

\(^6\) 602 F.2d 494 (3d Cir. 1979), vacated and remanded, 48 U.S.L.W. 3849 (1980) (*Conex*). Also named as defendants in the action were the following: Sea-Land Services, Inc., Seatrain Lines, Inc., International Longshoreman’s Association, AFL-CIO, International Terminal Operating Co., Inc., John M. McGrath Corp., Pittston Stevedoring Corp., United Terminals Corp., and Universal Maritime Services Corp. The Court remanded *Conex* to the United States Court of Appeals for the Third Circuit for reconsideration in light of NLRB v. International Longshoreman’s Ass’n., 100 S.Ct. 2305 (1980). Crucial to the Third Circuit’s holding in *Conex* was the affirmance by the Second Circuit of a Labor Board finding that the ILA had violated §§ 8(e) and 8(4)(B) of the NLRA, 29 U.S.C. §§ 158(e) & 158(4)(B) (1976). The Court in *International Longshoremen* refused to enforce a NLRB order against the ILA in a case litigating the propriety of the rules on containers and the Dublin supplement. *See* NLRB v. International Longshoreman’s Ass’n., 613 F.2d 890 (D.C. Cir. 1979), *cert. granted*, 100 S.Ct. 727 (1980). The Court noted that this refusal to enforce the NLRB order was contrary to the result reached by the Second Circuit in *International Longshoreman’s Ass’n* v. NLRB, 537 F.2d 606 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), *reh. denied*, 430 USS. 911 (1977). Thus, there was a need to remand the *Conex* case to the Third Circuit for reconsideration.

\(^6\) *See* International Longshoreman’s Ass’n. v. NLRB, 560 F.2d 439 (1st Cir. 1977); Humphrey v. International Longshoreman’s Ass’n., 548 F.2d 494 (4th Cir. 1977); *International Longshoreman’s Ass’n* v. NLRB, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), *reh. denied*, 430 U.S. 911 (1977); *Intercontinental Container Transp. Corp. v. N.Y. Shipping Ass’n*, 426 F.2d 884 (2d Cir. 1970).

\(^6\) For a concise statement of the enforcement and scope of these rules, *see* 602 F.2d at 498.

\(^6\) 602 F.2d at 511.

\(^7\) 15 U.S.C. § 4 (1976);

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.
New York and as such, has an agreement with the ILA.\textsuperscript{71} The rules on containers and the Dublin supplement are part of that agreement and serve to regulate the pre-dockside “stuffing” of containers for use on container cargo vessels.\textsuperscript{72} Essentially, the rules provide that all consolidated cargo originating from or to be shipped to a point within fifty miles of the dock must be stripped by longshoremen at dockside. Outbound cargo was to be containerized or “stuffed” into a container, while inbound goods would be left on the pier for pickup. The rules provided a monetary penalty against the employer for each container which passed over the docks without being unloaded or “stripped” and restuffed. By 1970, the penalty was $1,000 per violation.\textsuperscript{73}

Shortly after effective date of the rules, a consolidator similar to Conex brought antitrust and unfair labor practice claims against NYSA and ILA.\textsuperscript{74} Both of these claims were rejected by the Second Circuit on the grounds of the labor exemption to the antitrust laws and valid work preservation measures.\textsuperscript{75}

In 1973, the rules were supplemented since the ILA was concerned that they were not being effectively enforced.\textsuperscript{76} In an effort to tighten the control the agreement would have over the container shipping industry, the rules were augmented to provide that off-pier consolidators, such as Conex, operating within fifty miles of the Port of New York would be considered to be violating the rules. Further, moving to a point outside that zone would be of no avail, as the supplement contained a “runaway-shop” clause.\textsuperscript{77} According to the new terms, vessel owners were to be fined $1,000 for each container furnished them by a consolidator violating the supplement. In March of 1973, several vessel owners stopped providing Conex and another consolidator\textsuperscript{78} with containers, and on April 13 of that year, the NYSA and ILA named Conex as a consolidator operating in violation of the rules. This acti-

\textsuperscript{71} 602 F.2d at 498. For a detailed history of NYSA-ILA relations, see Justice Marshall’s discussion in NLRB v. International Longshoreman’s Ass’n., 100 S.Ct. 2305 (1980).
\textsuperscript{72} 602 F.2d at 498-99.
\textsuperscript{73} \textit{Id}.
\textsuperscript{74} \textit{Id.}; see Intercontinental Container Transp. Corp. v. N.Y. Shipping Ass’n., 426 F.2d 884 (2d Cir. 1970).
\textsuperscript{75} 426 F.2d at 888.
\textsuperscript{76} 602 F.2d at 499. The meeting consisted of ILA representatives and agents of CONASA, (Council of North Atlantic Shipping Associations), an employer bargaining unit of which NYSA was a member. \textit{See} NLRB v. International Longshoremen’s Ass’n., 100 S. Ct. 2305, 2310 (1980).
\textsuperscript{77} This clause provided that an employer could not escape the rules “stuffing and stripping” requirements by relocating beyond the fifty mile limit. 602 F.2d at 499.
\textsuperscript{78} \textit{Id}. The other consolidator was Twin Express, Inc., who was joined as a plaintiff in \textit{Conex}. 

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vated terms of the rules which required all NYSA members to refuse to provide shipping containers to Conex.\textsuperscript{79} This action effectively terminated Conex's freight consolidation business in the New York-Puerto Rico trade.\textsuperscript{80}

Conex filed unfair labor practice charges with the Labor Board, alleging that the agreement violated section 8(e) of the National Labor Relations Act\textsuperscript{81} and that the actions taken by ILA to enforce it were illegal secondary activity under section 8(b)(4)(ii)(B) of that Act.\textsuperscript{82} The Board found a violation and its order was enforced by the Second Circuit.\textsuperscript{83}

Critical to the resolution of the Conex case was whether or not a contract or combination adjudicated to violate section 8(e)'s prohibition against contracts calling for secondary boycotts can be within the labor exemption from antitrust liability as part of a collective bargaining agreement. The court responded in the negative.\textsuperscript{84} After tracing the development of the "non-statutory" exemption to the antitrust laws, the court concluded that the key factor was protection of the mandatory bargaining process. The protection of this mandatory bargaining process would develop harmony between labor and antitrust law. Even the plurality in Jewel Tea was unwilling to grant blanket antitrust immunity for any agreement regarding mandatory bargaining subjects. Jewel Tea had found that agreements outside the range of legitimate labor goals necessarily fail in determining the exempt status of an agreement.\textsuperscript{85} Once an agreement is found to violate section 8(e), it is precluded from antitrust exemptions a fortiori, as national labor policy does not warrant non-enforcement of federal antitrust policy. Therefore, once the labor agreement is outside section 8(e), the labor exemption is precluded as a matter of law.\textsuperscript{86}

\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} 29 U.S.C. § 158(e) (1976). This section forbids "hot cargo" agreements whereby an employer agrees to cease dealing with another employer. \textit{See} note 62 supra.
\textsuperscript{84} 602 F.2d at 512.
\textsuperscript{86} 602 F.2d at 518. While the narrow holding relates only to § 8(e) violations,
In *Conex*, the court noted the anticompetitive impact of the rules and that efforts to enforce them were significant and uncontested.\(^\text{87}\) Thus, the rules and supplement were not exempt under the Sherman Act. The court further noted that under *Connell*, the union activity could clearly be enjoined. Here however, as in *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building Trades Council*,\(^\text{88}\) the employer's action was for money damages under section 4 of the Clayton Act.\(^\text{89}\) The court noted that the purposes of injunctive relief and Clayton Act damages are not one and the same.\(^\text{90}\) The court thus determined that a separate defense should be available when the action was for money damages, because it may be overly harsh to apply the Clayton Act treble damage sanctions to conduct the parties had a reasonable basis for believing to be legal.\(^\text{91}\) Foreseeability is the touchstone of this defense;\(^\text{92}\) the union must show that the illegality was un-

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\(^{87}\) Id.
\(^{88}\) 609 F.2d 494 (3d Cir. 1979).
\(^{89}\) 602 F.2d at 495. See note 70 supra and accompanying text.
\(^{90}\) The court stated:

Where an action seeks only declaratory or injunctive relief, a finding that an agreement violates § 8(e) should always remove the antitrust exemption. Once it is clear that a § 8(e) violation has occurred no labor policy is advanced by permitting ongoing operation of an illegal contract, and injunctive relief pursuant to § 16 of the Clayton Act is appropriate. In considering the availability of § 4 relief, however, a more refined analysis is required. For while the agreement which resulted from the collective bargaining process may have been found to be illegal, it is possible that at the time when the negotiating session took place the parties reasonably believed that their agreement was directly related to the lawful goals of work preservation. That possibility raises a labor policy consideration which the Supreme Court has not yet addressed: the extent to which antitrust exemption should protect not only lawful labor agreements, but also the collective bargaining process. In our view, 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.

602 F.2d at 519-20.

\(^{91}\) Id. at 520-21.
\(^{92}\) 602 F.2d at 521. The court spelled out the foreseeability defense stating:

The proper accommodation, we think is recognition, in the collective bargaining context of a defense to § 4 damage recovery involving several elements. Where, as here, a collective bargaining agreement, or conduct taken pursuant to it, has been shown to be illegal under federal labor law, a secondary party injured in his business or property by either has made out a prima facie case under § 4. At that point, to accommodate the labor policy favoring collective bargaining, the defendants may assert, first, that at the time they acted (here, the Dublin meeting and later) they could not reasonably have foreseen that the subject matter of the agreement being challenged would be held to be unlawful under § 8(b)(4) or § 8(e). If they fail to prove that the illegality determination was unforeseeable, the defendants should not be exempt from liability for damages under § 4. A

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foreseeable, that the contract provisions are “intimately” related to the object of collective bargaining, and that the agreement did not restrain unreasonably secondary markets. The burden of meeting this test is “formidable,” particularly when judicial or administrative proceedings serve to forewarn bargainers that their agreement may well be entering a proscribed zone.93 Thus, the court created an affirmative defense which would shield a union from liability for actions otherwise proscribed by antitrust laws.

The court concluded by indicating that an agreement found to violate the antitrust laws as being a group boycott and falling outside the labor exemption would warrant per se antitrust analysis.94 Collateral illegal conduct by the plaintiffs was found to be no defense to liability.95

C. The Muko Decision

Larry V. Muko, Inc. was a non-union general contractor specializing in the construction of fast-food restaurants.96 In 1973, Long John Silver’s, Inc., a national chain of seafood restaurants, began development in western Pennsylvania. It hired Muko to construct

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93. Id. The burden was met in Feather v. UMW, No. 76-955 (W.D. Pa., filed June 27, 1980), in which section II(g) of the 1974 National Bituminous Coal Workers Agreement was held to violate § 8(e), and the union action taken to enforce it violated § 8(b)(4)(ii)(B). The court held the defendant union had carried its burden under Conex foreseeability defense as:

A. The plaintiffs did not allege a "predatory" intent to restrain competition nor was one found by the court. See United Mine Workers v. Pennington, 381 U.S. 657, 668 (1965);

B. There was no warning, in the form of a judicial or administrative ruling, suggesting the agreement was illegal;

C. The parties reasonably believed the agreement was legal; and

D. Activity undertaken to enforce the agreement went no further than necessary to enforce the agreement.

The effect of this test on Muko is uncertain, as the court failed to discuss it in the opinion reversing a directed verdict.

94. 602 F.2d at 522.


96. 609 F.2d 1368, 1371 (3d Cir. 1979). As the defendant's motion for a directed verdict was granted at the end of plaintiff Muko's case, the question of resolving factual differences never went to a jury. Therefore, the following factual description is based on the facts as a jury might have found them. Id. at 1370.
its first restaurant and subsequently contracted with Muko to build a second facility in late 1973. During the building of the first restaurant, the construction site was picketed by representatives of the Southwestern Pennsylvania Building and Construction Trades Council. After the restaurant opened, patrons were given leaflets by Council representatives, asking them to refuse to patronize Long John Silver's, alleging that the restaurant used contractors paying less than the prevailing wages for construction jobs in the area.

Long John Silver's was concerned that picketing at the site of the second restaurant, construction of which Muko had begun, would follow from this leaflet activity at the first facility. Restaurant officials proceeded to meet with representatives of the Council in order to curtail Council activity at its restaurants. The Council representatives indicated that they wanted future Silver's restaurants built only by union labor. The Council gave the company representative a copy of the agreement used between the Council's local unions and union contractors and a list of contractors with whom there were collective agreements in force. The Council then agreed to curtail leafleting and picketing pending Silver's decision regarding the use of non-union contractors. Silver's responded in a letter indicating a desire to create a "good working relationship" with the Council and evidencing an intent to use only "certified" contractors in the future. It had been Silver's policy to award construction jobs on a competitive basis, without regard to whether union or non-union labor had been

97. Defendants in Muko were Long John Silver's, Inc., and two labor groups: the Southwestern Pennsylvania Building and Construction Trades Council, and the Building and Construction Trades Council of Pittsburgh, Pennsylvania and vicinity.
98. 609 F.2d at 1371. Muko utilized a construction system whereby its only employees were non-union "supervisors," with most of the actual construction work done by subcontractors. Neither of the labor defendants indicated any interest in organizing Muko's employees. Id. at 1372.
99. The letter stated:

I believe that we can serve the same purpose with this letter to show intent that Long John Silver's, Inc. plans to use only union contractors certified by the affiliated Building and Construction Trades Councils of Pittsburgh and Allegheny—Kiski Valley and vicinity. We will also request that all investors (property owners) developing for us use union contractors. By operating in this manner, we will accomplish a good working relationship with you. We have visited several of the contractors, the names of which we mentioned to you. As soon as we have firm bids on several construction sites, we will contact you to insure that these contractors are in good standing with the union.

In any relationship between two parties there must be mutual need and assistance. . . . It is . . . extremely important to both parties that our location at Monroeville, Pennsylvania and the one under construction in Lower Burrell Township, Pennsylvania not be subjected to any kind of informational picketing.

Id. at 1371. The letter was authored by Silver's vice-president for development.
used. After this letter to the Council, Silver's asked Muko if it would use union labor on future projects. Muko refused and was not asked to bid on the twelve other restaurant projects in western Pennsylvania. Prior to the meeting between Silver's and Council's representatives, Muko had been led to believe that, based on satisfaction with its previous work, it could construct the remaining restaurants, provided its work quality remained high and prices remained competitive. Upon completion of the final twelve facilities by union contractors, the aggregate cost to Silver's was approximately $250,000 greater than what Muko would have charged. According to Muko's estimate, a profit would have been realized at the lower price.

Muko brought suit against both Silver's and the Council, alleging that Silver's entered into an agreement with the labor organizations whereby Silver's would not award further construction contracts to contractors who did not have collective bargaining agreements with either organization. Muko contended that this violated federal antitrust laws, and sought relief under the Clayton Act. Without written opinion, the trial court granted a defense motion for a directed verdict, apparently on the ground that there had been no "agreement" as required by section 1 of the Sherman Act.

A panel of the Court of Appeals for the Third Circuit af-

100. Id.
101. Id. at 1372. This calculation makes the "efficient operations" language in Connell, 421 U.S. at 623, critical in Muko because proof of this profit making ability would indicate that even if the labor group's activities were arguably exempt, they may have been fatally overbroad, going beyond the elimination of competition over wages and conditions of work. See Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-93 (1965) (White, J.).
102. 609 F.2d at 1370.
103. As Justice Aldisert stated in the panel decision in Muko:

After hearing evidence on the issue of liability, the trial judge granted defendant-appellees' motions for a directed verdict. The judge rendered an oral decision. Although he gave no specific reasons for his determination, it appears from one of his statements his decision was based primarily upon his view that the requisite Sherman Act § 1 agreement did not exist.

1978-2 Trade Cases ¶ 62,184 at 75,293 (1978). Footnote four reads as follows:

4. The trial court stated: "I am so satisfied you haven't made out a case and it is a management decision, unilateral decision on the part of Long John Silver's, there is no violation of anything." Trial Transcript at 221.

Appellees' motions to dismiss and for directed verdict alleged numerous additional grounds, including failure to show injury; failure to show a conspiracy with the purpose and effect to restrain trade; failure to establish that an unfair labor practice had been committed; failure to establish tortious interference with contract; and protection of the union activity under
firmed, basing its decision on what it believed to be fundamental differences between the facts in Connell and those in Muko, the methods used by the labor group in each case to attain their goals, and the fact the concessions made by Silver's came as a result of peaceful handbilling protected by both section 7 of the NLRA and the first amendment.

The full court on reargument reversed the panel's decision and remanded for a new trial. The court initially noted that since the agreement was not embodied in a collective bargaining agreement, the strong labor policy considerations that buttress the non-statutory exemption were lacking. The court focused on what it discerned to be the test announced in Connell:

We understand Connell to hold, then, that an agreement between a union and a business organization, outside a collective bargaining relationship, which imposes a direct restraint upon a business market, and which is not justified by congressional labor policy because it has actual or potential anticompetitive effects that would not flow naturally from the elimination of competition over wages and working conditions, is not exempt from antitrust scrutiny.

When measured against this standard, the court concluded a jury could have found the agreement in Muko not to be exempted from the antitrust laws. Further, as there was no common-situs or collective-bargaining relationship in Muko, the construction in § 6 and 20 of the Clayton Act, 15 U.S.C. §§ 17, 52. In view of our disposition of this appeal, it is not necessary to analyze these contentions.

104. 609 F.2d at 1388 (3d Cir. 1979).
105. Among these differences were the variations in the terms of the agreements: the agreement in Muko required the use of “certified” contractors, and the agreement in Connell required contractors having collective bargaining agreements with Local 100. Further, a “most favored nation” clause, present in Connell, was absent in Muko. Additionally, Justice Aldisert saw a fundamental difference between the “widespread, dominating union action” in Connell and the “limited” picketing and handbilling in Muko. See 1978-2 Trade Cases at 75,297. Beside the factual differences, the panel in Muko indicated that the labor group’s activities were within the range of protected actions under § 7 of the NLRA, 29 U.S.C. § 157 (1976), and the first amendment of the United States Constitution. Id.

106. Id. at 1373.
107. This statement raises the questions of whether or not proof of all of these factors is necessary to defeat a claimed restraint, whether or not the union must negative each factor, or whether or not the dissent in the en banc rehearing of Muko is correct in finding that Connell is really confined to a narrower situation that the majority would believe. 609 F.2d at 1383. Perhaps the most credible reading of this clause is in conjunction with the Supreme Court’s opinion in Group Life Health Ins. v. Royal Drug Co., 440 U.S. 205 (1979), reh. denied, 441 U.S. 917 (1979), that all exemptions to antitrust statutes are to be narrowly construed. This would indicate that the most valid interpretation of this critical language is one that narrows a labor group’s ability to claim the exemption to the point that the exemption is only viable when it is shown that a competitive advantage is achieved solely as a result of desperate wage and working conditions.

108. 609 F.2d at 1374.
dustry proviso of NLRA section 8(e), under the Connell formulation, did not apply. Finally, the court declined to rule on whether a restraint outside of exempt activity, if shown, should be judged under a per se or rule of reason analysis.110

Judge Aldisert, in a lone dissent,111 questioned both the result and the manner in which it was reached. Initially, he perceived an overbalancing in favor of antitrust concerns, when weighing competing interest under the Jewel Tea formulation which exempted unilateral union actions in the union's self interest.112 Second, he indicated, as he did in authoring the panel decision, that Muko simply was not Connell revisited, and one could not simply dispose of the directed verdict in Muko by analogizing fact-by-fact with Connell. In his mind, the methods utilized by the Trade Council against Silver's and Larry V. Muko, Inc. were by no means as pervasive or wideranging as those utilized by Local 100 in Connell, and, in addition, they were federally protected, both constitutionally and by statute.113

IV. THE IMPACT OF CONEX AND Muko

Two basic questions remain open after Connell and the Third Circuit's Muko and Conex opinions: namely, who must prove or disprove that the challenged activity falls within the labor exemption to the antitrust laws and by what standard will antitrust liability be adjudged.

A. Standards of Antitrust Liability in Labor Exemption Cases

While the terms of the Sherman Act are absolute on their face,114 over the years the Supreme Court has indicated that not every activity restraining competition constitutes an antitrust violation. This "exception" to liability arises as a result of differences between those restraints that are violative of antitrust law

110. Id. at 1376. See Consolidated Express, Inc. v. N.Y. Shipping Ass'n, Inc., 602 F.2d 494, 527 (Weis, J. concurring and dissenting), vacated and remanded, 48 U.S.L.W. 3849 (1980).
111. 609 F.2d at 1377.
Every 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, is declared to be illegal. . . .
on their face and those that escape liability under an application of the "Rule of Reason."\textsuperscript{115}

The Court has indicated that only undue or unreasonable restraints on competitive activity are violative of the Sherman Act.\textsuperscript{116} The Court, however, has also illustrated situations in which certain restraining activity is conclusively presumed to be unreasonable and thus violative of antitrust proscriptions.\textsuperscript{117} Among those activities proscribed are price fixing,\textsuperscript{118} division of markets,\textsuperscript{119} and group boycotts.\textsuperscript{120}

Alternatively, agreements which do not have only one "necessary effect," have been scrutinized under that standard of the "Rule of Reason." The Court provided the classic statement of the factors to be considered in applying this rule:

\begin{quote}
Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.\textsuperscript{121}
\end{quote}

\textsuperscript{115} The rule of reason is a shorthand term for a mode of analysis that considers a number of factors in determining if a particular activity works an unreasonable restraint of trade. Such factors include the nature of the agreement, whether the agreement was intended to restrain completion, and its effect on free market forces that determine price. See National Soc'y. Professional Eng'rs. v. United States, 435 U.S. 679, 686-98 (1978). See generally L. SULLIVAN, ANTITRUST §§ 65-66 (1977).

\textsuperscript{116} Standard Oil of N.J. v. United States, 221 U.S. 1 (1911).

\textsuperscript{117} As the Court stated in Northern Pac. R'wy. Co. v. United States, 356 U.S. 1 (1958):

\begin{quote}
However, there 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. This principle of \textit{per se} unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.
\end{quote}


\textsuperscript{118} United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

\textsuperscript{119} Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

\textsuperscript{120} United States v. General Motors Corp., 384 U.S. 127 (1966); Fashion Originators Guild v. FTC, 312 U.S. 457 (1941).

\textsuperscript{121} Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
Later cases have added considerations of the percentage of business controlled by the restraining parties, the strength of remaining competition, and whether the actions are triggered by business requirements or a monopolistic intent.\textsuperscript{122}

The Court in \textit{National Society of Professional Engineers v. United States}\textsuperscript{123} recently illuminated the distinctions between the \textit{per se} analysis and the rule of reason by stating:

> There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal \textit{per se}." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.\textsuperscript{124}

It is, therefore, these considerations that govern the application of antitrust analysis to activities outside the labor exemption.

As the federal courts have attempted to clarify the labor exemption from antitrust laws, the question of the standard by which non-exempt competitive restraints are to be tested has remained essentially unanswered.\textsuperscript{125} While the Third Circuit's holding in \textit{Consolidated Express, Inc. v. N.Y. Shipping Association (Conex)}\textsuperscript{126} may have little precedential value, the sharp difference between the majority and the dissent over the application of a \textit{per se} analysis serves to illustrate the arguments on each side of the \textit{per se} rule of reason question in relation to the labor exemption.

In \textit{Conex}, the majority held that in cases raising the specter of

\begin{itemize}
\item \textsuperscript{122} See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 615 (1953).
\item \textsuperscript{123} 435 U.S. 679 (1978).
\item \textsuperscript{124} \textit{Id.} at 692.
\item \textsuperscript{125} See Larry V. Muko, Inc. v. Southwestern Pa. Bldg. Trades Council, 609 F.2d 1368, 1376 (3d Cir. 1979); Feather v. UMW, No. 76-955 (W.D. Pa., filed June 28, 1980).\textsuperscript{126} 602 F.2d 494 (3d Cir. 1979), vacated and remanded, 48 U.S.L.W. 3849 (1980).
\item As the Third Circuit and the trial court in \textit{Conex} may have never reached the \textit{per se} rule of reason question without reliance on the collateral estoppel effect of the order in International Longshoremen's Ass'n v. NLRB, 537 F.2d 706 (2d Cir. 1976), \textit{cert. denied}, 429 U.S. 1041 (1977), \textit{reh. denied}, 430 U.S. 911 (1977), the vitality of the case as a rule of law is questionable. Nevertheless, the opinion does serve to illuminate the state of the labor exemption post-\textit{Connell}, and to focus the questions surrounding the proper standard of antitrust analysis when the labor exemption is lost.
\end{itemize}
the labor exemption a dual-stage analysis is in order, with initial focus being on the exemption's applicability and then, and only then, on the standard of antitrust liability.\footnote{602 F.2d at 522.} Using this approach, the court concluded that the facts in Conex warranted a \textit{per se} analysis, as the rules on containers and Dublin supplement constituted a "group boycott."

In addition to using traditional factors to determine that the necessary effect and nature of the defendant's activities were anticompetitive, the court went further, indicating that when a particular case warrants a finding that the labor exemption is unavailable, the application of the rule of reason would be redundant.\footnote{Id. at 523. See Ackerman-Chillingworth v. Pacific Elec. Contractor's Ass'n, 579 F.2d 484 (9th Cir. 1978); Altemose Const. Co. v. Building & Const. Trades Council, 443 F. Supp. 492 (E.D. Pa. 1977). See also South-East Coal Co. v. Consolidated Coal Co., 434 F.2d 767 (6th Cir. 1970), \textit{cert. denied,} 402 U.S. 983 (1971). \textit{But see} Kryvoruka, \textit{supra} note 3, at 81 (rule of reason mandated in labor situation).}

As Judge Gibbons posited:

\begin{quote}
The justification offered for application of the rule of reason is the need to recognize, in the antitrust context, labor's legitimate interest in the collective bargaining process. That interest, however, is precisely the same one that must be taken into account in determining the scope of the nonstatutory labor exemption. 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. The appellees have suggested no reason why a second such inquiry is necessary or appropriate.
\end{quote}

In addition, the court noted that to give weight to public interest considerations, such as those that foster the advancement of the national labor policy, would be plainly unwarranted in light of the Supreme Court's warning that the "reason" in the rule goes only to the impact of the restraint on competition and not to the underlying social value of the particular restraining activity.\footnote{602 F.2d at 523-24.}

The \textit{Conex} dissent argued that the prevailing mode of antitrust analysis eschewed the \textit{per se} approach,\footnote{Id. As the Court recently reminded:
\begin{quote}
The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. \textit{Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.} National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978) (emphasis added).
\end{quote}
\textit{Citing} Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).} and indicated that partial overlap of inquiry should not preclude use of the "reasonable-
ness" test by labor groups, when noncompetitor boycotts by religious, racial, or consumer groups are not subjected to per se liability.132 This dissent, of course, is based on the initial premise that a labor boycott that is non-exempt falls outside the classic "group boycott," long proscribed by antitrust decisions interpreting applicable statutes.133 It is this question that requires the closest scrutiny in evaluating the standard by which non-exempt activity is to be judged.

B. The Group Boycott

The "group boycott" category of per se violations has engendered an unswerving scrutiny on the part of federal courts fearful of a knee-jerk labelling of activity that may be reasonable, as measured by its anti-competitive effect. A hallmark of group boycott is a concerted refusal by traders to deal with other traders.134 This, however, only begs the question of whether or not the restraint in question is sufficiently analogous to this classic statement to warrant per se disposition. Historically, the group boycott was personified by a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level.135 The key element is exclusion of competition.136 This raises several significant questions in the labor exemption setting.

Initially, it has been generally recognized that the harmonizing of labor and antitrust policy mandated by Apex Hosiery Co. v. Leader,137 United States v. Hutcheson,138 and their progeny recognizes that a legitimate goal of labor unions is the elimination of competition over wages and working conditions. Keeping this in mind, it may be that the proper reconciliation of the exemption policy and the abhorrence of group boycotts harkens back to the readings of Jewel Tea and Connell exempting only those union

132. 602 F.2d at 528.
133. See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959). In Klor's, an agreement between a retailer and several wholesalers prevented sales to a second retailer on any terms except those which were unfavorable and discriminatory. Id. at 209. See also Altemose Const. Co. v. Building & Const. Trades Council, 443 F. Supp. 492, 499 (E.D. Pa. 1977).
136. 593 F.2d at 1178.
137. 310 U.S. 469 (1940).
138. 312 U.S. 219 (1941).
activities within the union’s legitimate interest in wages, hours, and working conditions. This indicates that the union’s antitrust sins were not in their methods, but in their excesses. By going beyond the legitimate interests of labor groups, wages, and working conditions, the exemption was lost. Therefore, it seems that the proper rejoinder to a claim that the labor exemption presumes a certain degree of anticompetitiveness is that activities within the union’s sphere of concerns are not only outside per se analysis, but beyond antitrust scrutiny. Conversely, once the exemption is lost through overbreadth, traditional group boycott analysis is warranted.

A second concern is whether or not a Muko-Connell situation can be within the historically recognized group boycott. At first blush, the non-exempt agreement may not be between competitors; if it is within this recognized group, it may not work a competitive exclusion.

In Muko, the agreeing parties were Long John Silver’s, Inc., who purchased contractor services, and the labor groups. While neither is in horizontal competition with each other, nor is either a direct competitor of the boycott target, the underlying attribute of a group boycott, the removal of freedom to deal in an open competitive market, is clearly present. The “necessary effect” of the Muko agreement was to exclude Muko from the market and it makes little difference that the concerted refusal to deal was effected on a target having limited economic impact. The Muko situation is analogous to that in Klor’s, Inc. v. Broadway Hale Stores, Inc. In the Muko-type situation, the union, via coercive action, prevents the non-union contractor from dealing on terms other than those which the union has extracted from customers of the contractor’s services. In Klor’s, the restraining agreement prevented wholesalers from selling to the target retailer at the prices they chose. In a Muko situation, the purchaser of services is restrained from buying on its own terms from the target contractor. This seems to be a difference without distinction, as the net effect is the same: the prevention of entry into the market on terms other than those specified by the challenged agreement. Further, it appears that the Court is not willing to restrict the term “boycott” to the so-called “classic” definition.

141. 359 U.S. at 213.
but recognizes the pervasive anti-competitive effect of pressuring a party with whom one has a dispute by enlisting another to withhold patronage from the target.\textsuperscript{144} In light of the foregoing, it seems evident that a \textit{Muko}-style agreement is one whose "nature and necessary effect [is] so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality."\textsuperscript{145} Therefore, once the exemption for permitted anti-competitive activity of labor groups is lost, the necessary effect of a \textit{Muko}-type agreement is to unreasonably restrain trade, hence triggering a \textit{per se} analysis.

\textbf{C. Burdens of Proof and the Labor Exemption}

Two unanswered questions remain after the decisions in \textit{Connell}, \textit{Conex}, and \textit{Muko}: what precisely will a plaintiff have to prove in order to successfully obtain a damage award in an antitrust suit which may involve the labor exemption, and conversely, what must a union do to reap the benefits of the exemption? \textit{Feather v. United Mine Workers}\textsuperscript{146} serves as a case study of the interaction of section 8(e), the \textit{Muko} reading of the \textit{Connell} standard and \textit{Conex}'s monetary damage defense.

The \textit{Feather} case involved efforts by the United Mine Workers to gain additional employer agreement to the 1974 National Bituminous Coal Workers Agreement\textsuperscript{147} (NBCWA) which it had with the Bituminous Coal Operator's Association (BCOA), an employer's bargaining group.\textsuperscript{148} One of the clauses in the agreement provided what the parties believed to be a "work preservation" provision for coal hauling.\textsuperscript{149} The union engaged in strike and picketing activity to force the plaintiff coal haulers to sign an

\textsuperscript{144} The Court stated in \textit{St. Paul}:
The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target. The word gained currency in this country largely as a term of opprobrium to describe certain tactics employed by parties to labor disputes. Thus it is not surprising that the term first entered the lexicon of antitrust law in decisions involving attempts by labor unions to encourage third parties to cease or suspend doing business with employers unwilling to permit unionization. \textit{Id.} at 541 (citations and footnotes omitted).


\textsuperscript{146} Feather v. UMW, No. 76-955 (W.D. Pa., filed June 28, 1980).

\textsuperscript{147} \textit{See id.} at 6 for details of that agreement.

\textsuperscript{148} Feather v. UMW, No. 76-955, at 14 (W.D. Pa., filed June 29, 1980).

\textsuperscript{149} \textit{Id.} The clause provided the following:
agreement containing section II(g) of the NBCWA, and the court found that this activity was proscribed by section 8(b)(4)(ii)(B) of the NLRA, as the agreement itself was an illegal "hot cargo" clause under section 8(e).

In regard to the plaintiff's antitrust action for damages under section 4 of the Clayton Act, Judge Knox applied the standards announced in Conex to determine the applicability of the labor exemption. Initially, the court in Feather concluded that the statutory exemption was unavailable, as there was concerted activity between the union and the BCOA in agreeing to the offending clause as part of the collective agreement. In analyzing the availability of the non-statutory exemption, the court relied on the Conex interpretation of the Connell standard for claiming the exemption: "[T]he Connell requirements for antitrust exemption are, first, that the market restraint advance a legitimate labor goal, and, second, that the agreement restrain trade no more than is necessary to achieve that goal."

The court in Feather concluded that the agreement in question failed to meet the first part of this test, as it had been adjudged to

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"Article II: Scope and Coverage
Section (g) — Contracting and Subcontracting.
(1) Transportation of Coal—The transportation of coal as defined in paragraph (a) may be contracted out only to a contractor employing members of the UMWA under this Agreement and only where contracting out such work is consistent with the prior practice and custom of the employer.
(2) Repair and Maintenance Work—Repair and maintenance work customarily performed by classified employees at the mine or central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under warranty or (b) where the employer does not have the available equipment or regular employees with necessary skills available to perform the work at the mine or central shop, provided, however, that the work at the mine or central shop shall be performed by UMWA members to the extent and in the manner permitted by law.

150. Feather v. UMW, No. 76-955, at 17 (W.D. Pa., filed June 28, 1980).
151. Id. at 33.
152. Id. at 29. Upon testing the agreement in question against the Conex foreseeability standard, the court concluded that there was a reasonable belief on the union's part that the agreement would preserve work rather than acquire it, see International Longshoreman's Ass'n v. NLRB, 48 U.S.L.W. 4765 (1980), and there was no indication that the agreement produced § 8(e) or § 8(b)(4)(ii)(B) risks.
154. The hallmark of the statutory exemption is an agreement exclusively between labor groups. A collective bargaining agreement necessarily includes a non-labor party.
155. See notes 30-33 supra.
156. Feather v. UMW, No. 76-599 at 25 (W.D. Pa., filed June 28, 1980). While this is a nice condensation of the bottom line in Connell, it is difficult to capsulize Conex's complicated treatment of the standards for the exemption, and the collateral finding that the traditional labor exemption begets a monetary damage defense in a Clayton Act damage action in one sentence.
violate section 8(e), as an illegal "hot cargo" clause. At this point the Feather court, in applying the Conex test, becomes somewhat ambiguous as to the allocation of the various burdens of proof in a Clayton section 4 action for treble damages.

The ability of labor groups to escape antitrust liability for certain activities has usually been referred to as an "exemption," a term usually defined as meaning that one is not subject to a certain liability or authority. In Conex however, the court spoke of the labor exemption, as posited by Jewel Tea and Connell, as a defense and further framed its newly-defined Clayton section 4 monetary damage defense in the same terms. In Feather the court, following the circuit's lead, stated that the finding of the section 8(e) violation removed the first prong of the labor exemption because the market restraint did not advance a legitimate labor goal. As a result, the plaintiff had made out a prima facie case.

This possible variance of interpretation of the plaintiff's burden of proof raises the question of on whose shoulders the proof of applicability or nonapplicability of the exemption falls. In Feather, it was the court which concluded that the agreement, as to coal haulers, had a significant anti-competitive effect, yet held there was no antitrust liability on the union's part. The Conex court concluded the rules on containers and the Dublin supplement restrained competition, and in Muko the court determined that it was the jury which could have found an agreement falling within the language in Connell defining the basis for an antitrust suit.

157. Id. at 30. The court also seemed to read Muko as indicating that the only legitimate labor goal that can permissibly work at market restraint is a collective bargaining agreement. Id. at 26. See also Altemose Constr. Co. v. Building Trades Council, 49 U.S.L.W. 2033 (D. N.J. 1980) (violence and vandalism defeats labor exemption).

158. To release, discharge, waive, relieve from liability. To relieve, excuse, or set free from a duty or service. BLACKS LAW DICTIONARY 513 (5th ed. 1979).

159. 602 F.2d at 511, 527.

160. Id. at 521.


162. Id. at 22. "The natural effect of the agreement was to lessen, if not destroy competition in the coal hauling business." Id. A nice question is whether a per se analysis would be required on the basis of this statement, had the Conex monetary damage defense been unavailable. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

against a labor organization. Viewing each of these decisions together, it appears that the labor exemption in a damage action creates a burden of proof that is continually shifting.

D. Agreements Outside the Collective Bargaining Process

The first consideration in the allocation of burdens of proof is whether or not the alleged agreement is within a collective bargaining relationship. If it is not, then Muko and Connell are controlling. In Connell's crucial formulation, the Supreme Court stated that an agreement not within a collective bargaining relationship, outside of section 8(e)'s construction industry proviso, and which has a potential for restraining business market competition in a manner that would not follow naturally from elimination of competition over wages and working conditions would serve as the basis for a federal antitrust suit. In Muko, the Third Circuit stated that a jury could have found such an agree-

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On the record before us jury could have found such an agreement. Like Connell Construction, Silver's purchases the services of building contractors. Like Connell, it has no collective bargaining relationship, actual or potential, with the Councils or their member locals. As in Connell, the jury could have found that the defendants entered into an agreement not to deal with nonunion contractors, which operated as a direct restraint on the business market by marking those contractors "ineligible to compete for a portion of the available work." The plaintiff introduced evidence that this agreement had "substantial [actual] anticompetitive effects"—an increase of more than $250,000 in the total price paid for the twelve restaurants built by union contractors. Finally, the jury could have found that the agreement between Silver's and the Councils had "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." For, on plaintiff's evidence, that agreement "indiscriminately excluded nonunion [contractors] from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods."

We therefore conclude that the grant of a directed verdict cannot be affirmed on the theory that any agreement which might be found is a matter of law within the nonstatutory labor exemption.

165. See G. Lilly, Evidence §§ 15-16 (1978). See generally F. James & G. Hazard, Civil Procedure, §§ 7.5, 7.8 (2d ed. 1977). While the term "burden of proof" refers to the dual burdens of producing evidence and then persuading the factfinder, we will use the term generically to refer to the minimum content of the plaintiff's prima facie case.


We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, 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.

This statement is crucial in the sense that the courts in Muko and Feather relied on this as being the state of the law as to the scope of the nonstatutory exemption.
ment to be non-exempt; therefore, a directed verdict for the defendant should be reversed. 167 Further on, the Muko court noted that:

While Connell was decided on the basis of a full trial record, we have not yet heard the defendant's evidence in this case. Our holding that the grant of a directed verdict cannot be sustained on the basis of the nonstatutory exemption therefore should not be misconstrued as a holding that the defendants cannot establish in the court below 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. 168

Taking these statements together along with the Feather formulation, it seems that in a Muko-Connell situation, where the alleged agreement is not in a collective bargaining agreement, a plaintiff will be required to adduce sufficient evidence to prove that:

1. There was an agreement between labor and non-labor parties; 169
2. That the agreement had a potential for restraining the business market; 170 and
3. That the restraint would not flow naturally from the elimination of competition over wages and working conditions. 171

Once this is done, the burden shifts to the claimant of the labor exemption, requiring him to go forward with evidence rebutting any of the above factors. If he can show there was no agreement, then there is no antitrust violation. 173 Additionally, if it can be shown that there is no restraint of the business market, then the antitrust policy will not apply under Apex Hosiery. 174 Finally, if it can be shown that the competitive advantage is derived solely from desperate ways or working conditions of wage competition, then the Jewel Tea "intimately related" language seems to preclude liability for the restraint. 175

167. See text accompanying note 106 supra.
168. 609 F.2d at 1375 (emphasis added).
175. 381 U.S. at 689.
If in fact the union can escape the antitrust proscription by negating any single Connell factor, the labor exemption seems rather broad, cutting against the Court's command in Group Life and Health Insurance v. Royal Drug Company\textsuperscript{176} that antitrust exemptions should receive a narrow reading.\textsuperscript{177} If Royal Drug, rather than Connell, is to be the polestar in defining antitrust exemptions, then conceivably the better course would be to allow the plaintiff to plead the basic elements of an antitrust case,\textsuperscript{178} and require the union to plead and prove a statutory or non-statutory exemption as an affirmative defense.\textsuperscript{179} Perhaps the courts view the formulation which places greater burdens on the antitrust plaintiff as being more desirable. It may be that if the plaintiff has the burden, then there is the potential of dismissal at an earlier point in the litigation process, which serves to diminish the possibility of using judicial proceedings to hamstring legitimate labor group activity.\textsuperscript{180}

In the final analysis it seems that the antitrust plaintiff will be required to carry the greater burden. One could view the cases since Hutcheson as an elaboration of Justice Stone's statement in Apex that the aims of the Sherman Act do not include restriction of certain labor activity. If that is the case, then it is the plaintiff who must show that any agreement forming the basis of the alleged antitrust claim comes within the purview of the antitrust laws.\textsuperscript{181} In all cases, however, the defendant will still be saddled with the burden of proof regarding the Conex monetary damage defense.

\textbf{E. Agreements Within the Collective Bargaining Process}

For collective bargaining agreements that are alleged to violate

\textsuperscript{177} \textit{Id.} at 221. The Court stated, "It is well settled that exemptions from the antitrust laws are to be narrowly construed."
\textsuperscript{178} In order to recover damages, the antitrust plaintiff must show both a statutory violation and "fact of damage" from that violation. \textit{See} Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).
\textsuperscript{179} \textit{See} 609 F.2d at 1375; 602 F.2d at 511.
\textsuperscript{181} 609 F.2d at 1381-82 (Aldisert, J., dissenting):

But having indicated how the line is to be drawn is not to say that judicial precedents fashion an easy test to determine exactly where the axe must fall. Any test used to make that decision must include a presumption that antitrust law will not normally apply to union activity and that the union is not to be saddled with the burden of proving its activity is exempt. Rather, the burden of proving non-applicability of the exemption should fall on the party alleging restraint.

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the antitrust laws, it seems that *Jewel Tea*, *Conex*, and *Feather*, along with *Connell* provide the method by which the burdens of proof are allocated.\textsuperscript{182} As a collective bargaining agreement necessarily involves a non-labor party, the statutory exemption is unavailable. The *Conex* court noted that the non-statutory exemption is a product of an interpretation of the antitrust laws which concludes that the policy of the Sherman and Clayton Acts do not embrace certain labor activities. If courts are to be true to *Apex* and *Hutcheson*, the plaintiff must be required to show evidence that will indicate that the exemption should not apply in a given case; that the union was acting outside the scope of its legitimate activities. The *Conex* court indicates, however, that if the effect of the agreement was to restrain market competition, thus removing the "wage uniformity" factor of *Apex* and *Hutcheson*, the proper reading of *Jewel Tea* and *Connell* was one that placed the burden on the defendant to prove that the restraint resulting from the collective agreement is no broader than necessary to achieve legitimate union ends.\textsuperscript{183} If overbroad, the interests are not properly the subject of union concern, and the market restraint is not one justified by the national policy favoring collective union action. Thus, the activity is within the scope of the antitrust laws.

\textbf{F. Agreements Violating Federal Labor Law}

*Conex* is probably most significant for its conclusion that the labor exemption is unavailable if the collective bargaining agreement is violative of section 8(e).\textsuperscript{184} Conceptually, this makes sense, as the entire aim of the non-statutory exemption is to protect legitimate labor agreements from antitrust scrutiny. An agreement which runs contrary to federal labor law is not one advancing legitimate interests.

The simplicity of this method for eliminating the labor exemp-


tion can be very appealing to trial courts, as *Feather* indicates. Once it is determined that the agreement in question violates section 8(e), antitrust immunity disappears. If this occurs in an injunction action, the district court need not continue to wade through the conceptually difficult labor exemption area, but can proceed as if in a "garden variety" antitrust suit.\(^\text{185}\) If the action is one for treble damages, the union will still be without the labor exemption as developed from *Apex* through *Connell*, but will have an opportunity to prove that it was not "foreseeable" that the agreement was illegal. Again, the "foreseeability" standard is a traditional concept in the law,\(^\text{186}\) one which trial courts are used to applying in other settings.

This shortcut to removing the labor exemption has been criticized as allowing the trial courts to decide an area beyond a court's legitimate domain. In *Connell*, Justice Powell indicated that a federal court could "decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws."\(^\text{187}\) The Court then proceeded to determine that the agreement entered into with Local 100 was outside section 8(e)'s construction industry proviso. In *Muko*, the court of appeals, without explicitly deciding, indicated that the agreement in question may have violated section 8(e). The court then declined to comment on the panel's *Conex* formulation, stating:

Nor do we decide the question whether a finding that an agreement made outside the collective bargaining context violates § 8(e) by itself removes labor's nonstatutory antitrust exemption. . . . The fact that in *Connell* Justice Powell considered the actual and potential anticompetitive effects of the agreement independently of the § 8(e) issue suggests that the presence of a § 8(e) violation may not itself decide the exemption issue. In this case, however, as in *Connell*, there is evidence tending to show both a market restraint unjustified by the congressional interest in the elimination of competition over wages and working conditions and a violation of § 8(e). We therefore need not and do not rule on the effect of a § 8(e) violation standing alone.\(^\text{188}\)

In a footnote to the *Muko* opinion,\(^\text{189}\) Chief Judge Seitz expressed

\(^{185}\) This is true only to the extent that any antitrust suit under federal law can be described as "garden variety." See Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840 (3d Cir. 1974). See also Utility Serv. Engr., Inc. v. Colorado Bldg. Trades Council, 549 F.2d 173 (10th Cir. 1977); Barabas v. Prudential Lines, 451 F. Supp. 765 (S.D.N.Y. 1978).

\(^{186}\) See generally *Restatement (Second) of Torts*, §§ 289, 435, 447 (1965).

\(^{187}\) 421 U.S. at 626.

\(^{188}\) 609 F.2d at 1375 (citations omitted).

\(^{189}\) 609 F.2d at 1375 n.1 provides:

1. Chief Judge Seitz is of the view that the question whether the defendant's agreement is violative of § 8(e) of the NLRA is not presented as a "collateral issue" in this antitrust action, and need not be decided . . . . He notes that the defendants here have not argued, as did the defendants in *Connell*, that their agreement was "explicitly allowed by the construction-industry proviso to § 8(e) and that antitrust policy therefore must de-
a concern that a district court would make the same decision as the court did in Feather and read Conex and Connell as granting carte blanche authority to the trial court to make section 8(e) determinations. Perhaps the Conex court interposed its "damage-action defense" in order to soften the impact of the preclusive effect of finding a section 8(e) violation. In any event, the Supreme Court vacated the Conex case; rather than deciding on the merits, the Supreme Court has delayed an explicit ruling on this significant change in traditional labor exemption analysis.

The varying formulations in Connell, Muko, and Conex serve to highlight the difficulties accompanying the role of the labor exemption in antitrust litigation and to alert the courts of the need for a clearer statement of the precise scope of that exemption.

G. Muko On Retrial

An unresolved question is how all of this will affect Muko on retrial. As noted earlier, if the labor exemption is really an exemption rather than an affirmative defense, it is the plaintiff contractor in Muko who will have to present enough evidence to allow a jury to find the agreement violates the Connell Court's requirement that such agreements must not be outside the union's legitimate interests. If Conex's automatic preclusion of the labor exemption for a section 8(e) violation is still viable doctrine after Chief Judge Seitz's footnote in Muko, the plaintiff could attempt to raise a claim that the agreement violates that section, pursuant to the narrow reading it was given in Connell. If a section 8(e) violation is not shown, the defendants can defeat antitrust liability by negativing any element of the Connell formulation. Should they be unable to do so, the defendants in a Clayton section 4 action will be permitted to attempt to bury themselves within the

fer to the NLRA." . . . Moreover, he believes that we should not convey the impression to the district courts that an appropriate short-hand method of deciding the applicability of the non-statutory exemption in cases such as this is to determine whether the challenged agreement constitutes an unfair labor practice; such a method would lead to the needless resolution by the federal courts of significant labor law questions that ought to be decided in the first instance by the NLRB.

190. 48 U.S.L.W. 3849 (1980).

191. Connell effectively limited § 8(e)'s construction industry proviso to collective bargaining agreements and common situs situations. 421 U.S. at 633. See Squillacote v. Racine Bldg. & Const. Trades Council, 483 F. Supp. 1218 (E.D. Wis. 1980), where, in a situation very similar to Muko and Connell, the court granted an injunction under § 10(1) of the National Labor Relations Act, 29 U.S.C. § 160(1), enjoining activity to enforce an agreement illegal under § 8(e).
multi-pronged defense enunciated in *Conex*.\(^{192}\)

**CONCLUSION**

While the opinions in *Conex* and *Muko* serve as examples of the *Connell* requirement that unions limit their activities to areas of legitimate interests, they each fail to fill gaps in antitrust doctrine which are vital to lawyers practicing in this area. While *Conex* purports to clearly categorize antitrust violations by unions as being *per se* in nature, the entire court bypassed an opportunity in *Muko* to definitively adopt that reasoning. Likewise, Chief Judge Seitz's footnote in *Muko* may well have been a warning to trial judges and practitioners alike that Judge Gibbons's wholehearted adoption of a theory that removes the labor exemption upon showing of a section 8(e) violation may have been premature. Finally, the "defense" available to labor unions when an antitrust suit is one for damages under section 4 of the Clayton Act is logically appealing, but might be little more than an attempt to buffer the sting of the court's denial of the labor exemption for section 8(e) violations. While at least one trial court has applied it to relieve a union of antitrust liability, review by the Supreme Court will be necessary before it can become part of the labor exemption's path of development since *Apex Hosiery*.

In the final analysis, *Muko* can best be viewed as the case in which the outer limits of labor's ability to impair market competition are reached. *Muko* could build restaurants inexpensively, not because of low wages and poor working conditions, but because of efficient operation. By refusing to allow labor restraint of competition based on business acumen, the court in *Muko* has taken the labor exemption full-circle, back to Justice Stone's warning in *Apex Hosiery* that unions will be beyond the scope of the antitrust statutes only so long as they affect wages and working conditions, and that infringement of commercial competition will just as surely subject unions to antitrust liability.

\(^{192}\) 602 F.2d at 519-21.