THE SCOPE OF THE LABOR EXEMPTION IN PROFESSIONAL SPORTS

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I. INTRODUCTION

The two most significant events in the professional sports industry in 1987 occurred off the field and beyond the focus of most sports fans. The media regarded these two events with only slightly less indifference than the fans.¹ The first event took place on June 14, 1987, at the conclusion of the National Basketball Association (NBA) playoffs, when the 1983 NBA Collective Bargaining Agreement and the eleven-year, court supervised *Oscar Robertson* Settlement Agreement simultaneously expired.² The second followed some two months later on August 31, 1987, when the 1982 National Football League (NFL) collective bargaining agreement expired.³

Both the leagues and players' associations anticipated long and difficult negotiations over a new collective bargaining agreement, along with

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"God damn, well I declare,
have you seen the like?
Their walls are built of cannon balls;
their motto is: "Don't tread on me."

Finally and most importantly, the author acknowledges Kaia Tate Lock, whose love and affection provided the inspiration for this article.

1. Perhaps because the expiration of the 1983 National Basketball Association (NBA) agreement coincided with the final game of the 1987 NBA Championship Series, neither the Los Angeles Times, the Washington Post, nor the Arizona Republic acknowledged the expiration of the 1983 agreement in their June 14, 1987 editions. On August 31, 1987, the Washington Post briefly noted on an inside page of its sports section that the 1982 National Football League (NFL) agreement expired at midnight and, in a few lines, mentioned the issues in the negotiations. Wash. Post, Aug. 31, 1987, § C, at 2, col. 1. The Arizona Republic's brief story on the expiration of the agreement appeared on page seven of its sports section. *NFL Players Association Expected to Announce Strike Deadline Today*, Ariz. Republic, Aug. 31, 1987, § D, at 7, col. 1. The Los Angeles Times failed to mention the expiration of the NFL agreement in its August 31, 1987 edition.

2. *Sec Bridgeman v. NBA*, 675 F. Supp. 960, 962 (D.N.J. 1987). The *Robertson* settlement agreement was a 1976 court approved settlement agreement of a class action suit filed by NBA players in 1970. *Id.*; see also *infra* note 15 (contains partial text of agreement).

3. 1982 Collective Bargaining Agreement Between the National Football League Management Council and the National Football League Players Association art. XXXVIII (Dec. 11, 1982) [hereinafter 1982 Collective Bargaining Agreement].

the use of economic weapons and legal action. The NBA and National Basketball Players Association (NBPA), while unsuccessfully attempting to reach a new agreement, executed a moratorium on legal action and the signing of players.⁴ In the NFL, the bitter history of labor relations suggested the possibility of unfair labor practice charges, the use of economic weapons, and even antitrust litigation.⁵ NFL owners prepared for a strike by making plans to continue the regular season with replacement players.⁶

Legal action did follow in both disputes. At the expiration of the NBA-NBPA moratorium agreement, and after negotiations had reached a standstill, the NBPA filed an antitrust suit against the League.⁷ Similarly, the National Football League Players Association (NFLPA) filed an antitrust action against the NFL on October 15, 1987, the final day of the union's fifth strike in its relatively brief history.⁸ In each antitrust suit, the players' association alleged that the league's continuation of various player restraints in the respective expired agreement violated section 1 of the Sherman Antitrust Act.⁹

Although faced with complex antitrust claims filed against the leagues, the initial issue before each court involved only the threshold question of the scope of the nonstatutory labor exemption.¹⁰ Does the nonstatutory labor exemption, an exemption that immunizes terms in a collective bargaining agreement from antitrust attack, expire simultane-

4. The parties executed the "moratorium agreement" on June 8, 1987. See *Bridgeman*, 675 F. Supp. at 963.

5. See *infra* notes 114-71 and accompanying text.

6. Power, *Football Games Are Cancelled*, Philadelphia Inquirer, Sept. 25, 1987, § A, at 1, col. 1.

7. The "moratorium" period expired on October 1, 1987. See *Bridgeman*, 675 F. Supp. at 963.

8. The NFLPA strike ended after 24 days. See *Powell v. NFL*, 678 F. Supp. 777, 780-81 (D. Minn. 1988).

9. *Id.* at 778. For a discussion of the Sherman Act and basic antitrust doctrine, see *infra* notes 20-32 and accompanying text.

10. The NFLPA moved for partial summary judgment, alleging that the NFL had willfully acquired or maintained monopoly power, and for a preliminary injunction to enjoin the League from continuing the right of first refusal/compensation system. The League filed a cross-motion for summary judgment, alleging that the challenged restraints were insulated from antitrust scrutiny by operation of the nonstatutory labor exemption. *Powell*, 678 F. Supp. at 781.

The NBPA filed a motion for summary judgment, alleging that the labor exemption to the antitrust laws was inapplicable to the restraints in its dispute with the NBA. In its cross motion for summary judgment, the NBA declared that the challenged restraints were immunized from antitrust attack by operation of the nonstatutory labor exemption. As the New Jersey district court noted, none of these motions addressed the underlying merits of the plaintiffs' antitrust claims. Rather, the motions involved the threshold question whether the challenged practices were insulated from antitrust attack by the nonstatutory labor exemption. *Bridgeman*, 675 F. Supp. at 961 & n.1.

ously with the collective bargaining agreement?¹¹ Defining the appropriate scope of the labor exemption will affect the relative bargaining power of the parties in future negotiations. It will, therefore, affect the future of collective bargaining in professional sports. Without the ability to protect their rights under the antitrust laws, the unions will undoubtedly approach the bargaining table in a significantly weaker position. In fact, a reading of the labor exemption that, in essence, removes the antitrust laws as a potential remedy for antitrust violations could jeopardize the existence of professional sports unions.¹²

Because of the particular significance of the bargaining history in the NFL,¹³ and the fact that the NBPA suit was recently settled when the NBPA and NBA reached a new agreement,¹⁴ this article limits its analysis of the labor exemption to the facts in the NFL dispute. Though the two disputes raise virtually identical legal issues, factual differences relevant to the application of the labor exemption distinguish the two cases.¹⁵ Nonetheless, the conclusion reached on the facts of the NFL

11. For a discussion of the labor exemption, see *infra* notes 56-76 and accompanying text. In each dispute, the collective bargaining agreement had expired before the union filed the antitrust suit. For the factual background of each dispute, see *Powell*, 678 F. Supp. at 779-81; *Bridgeman*, 675 F. Supp. at 961-63.

12. Professional sports is one of the few industries in which individual and collective bargaining exist side by side. Players' associations traditionally have waived their right to negotiate salaries above the league minimum, thereby permitting individual players to establish salaries through direct negotiations with their teams. See, e.g., 1982 NFL Collective Bargaining Agreement, *supra* note 3, art. XXII. The average annual salary in the NBA is approximately \$500,000, an amount the NBPA estimates equals approximately 90% of total player compensation. See Plaintiff's Reply Memorandum of Law in Support of Motion for Partial Summary Judgment and Declaratory Relief and Opposition Memorandum to Defendants' Cross Motion for Summary Judgment at 3, *Bridgeman*, 675 F. Supp. at 960-61. Although the percentage of total compensation NFL players receive from individual negotiations is undoubtedly less than 90%, see NFLPA Stat Sheet, Winter 1988-89 (average team salaries at \$15 million and other player benefits at approximately \$4 million per team), a significant portion of players in both the NBA and NFL could reasonably conclude that eliminating restrictions that impede individual negotiations is a higher priority than bargaining for other benefits. Thus, a judicial determination that the challenged restraints are exempt from the antitrust laws by virtue of the union's existence might induce the players to decertify the union. Not surprisingly, a majority of NBA players recently voted to decertify the NBPA in the event that the courts conclude that the labor exemption immunizes restrictions on free agency from antitrust attack. See Cosell, *Best Way to Preserve Unions Is to Destroy Them*, N.Y. Daily News, Jan. 6, 1988, at 60. At a meeting of the Board of Player Representatives at the NBA All-Star Game on February 1, 1988, the Board authorized the NBPA to circulate petitions among the players authorizing the union to decertify. Those petitions were subsequently signed by the players and returned to the NBPA.

13. See *infra* text accompanying notes 114-48.

14. The NBA and NBPA reached an agreement (covering right of first refusal, salary cap, and the draft) and settled the lawsuit on April 26, 1988. See 1988 Collective Bargaining Agreement Between National Basketball Association and National Basketball Players Association, (Apr. 26, 1988).

15. The factual distinction most directly related to the current dispute involved an interpretation of a particular provision of the *Robertson* settlement agreement. See *supra* note 2 (explanation of settlement agreement). The *Robertson* settlement agreement contained the following clause:

dispute applies fully to the NBA dispute. Moreover, many arguments raised in the NBA dispute clearly speak to the legal issues in the NFL dispute and, as a result, are addressed in this article.¹⁶

This article covers the legal background of the current NFL dispute in section II. A brief discussion of the Sherman Act and its application to player restraints similar to those currently challenged precedes a general discussion of the nonstatutory labor exemption. Section III summarizes the current NFL dispute.¹⁷ This section presents a discussion of the

(d) Neither the settlement of the Class Action, nor entry into this Stipulation and Settlement Agreement or any collective bargaining agreement or any Player Contract, nor the effectuation thereof, nor any practice or course of dealing thereunder shall be deemed to be a waiver or estoppel by any NBA player or players or the Players Association of their right to challenge in a court of competent jurisdiction any future unilateral imposition by the NBA or any NBA member of any rule, regulation, policy, practice or agreement, or to contend (subject to the right of the NBA to contend otherwise) that the same is not a mandatory subject of collective bargaining or a subject over which they are otherwise required to collectively bargain, nor do they concede that the same is a mandatory subject of collective bargaining or a subject over which they are otherwise required to collectively bargain.

Stipulation and Settlement Agreement ¶ b(d) at 47, *Robertson v. NBA*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

Other factual differences distinguish the bargaining relationship between the two leagues and players' associations. In contrast to the bargaining history between the NBA and NBPA, for example, which has been mostly placid, the bargaining history between the NFL and NFLPA has been marked by strikes, numerous unfair labor practices, and, most recently, replacement games. Moreover, the economic structures of the two leagues differ significantly on account of different approaches to revenue sharing. And although both leagues possess monopoly power, the NBA acquired its monopoly as part of the *Robertson* settlement agreement and in exchange for liberalizing rules concerning the intra-league movement of players, while the NFL acquired its monopoly through a congressional exemption prior to the League's recognition of the NFLPA as the players' bargaining agent. See 15 U.S.C. § 1291 (1981). The extent to which these differences have or should have an impact on the application of the labor exemption is discussed *infra* at notes 177-222 and accompanying text.

An additional distinction between the two suits involves the college player draft. Notwithstanding the Second Circuit's opinion in *Wood v. NBA*, 809 F.2d 954, 960 (2d Cir. 1977) (labor exemption immunizes the draft during life of collective bargaining agreement even as to rookie players who were not members of bargaining unit when agreement was negotiated), the NBPA also challenged the NBA's college draft in its suit. Although the NFLPA did not challenge the NFL draft, the NFL draft was challenged by Kelly Stouffer, a 1987 draft pick who failed to reach an agreement with the St. Louis Cardinals and sat out the entire 1987 season. Stouffer motioned to intervene in the NFL v. NFLPA case, but the action was settled immediately prior to the 1988 NFL college draft when Stouffer was traded to and signed a contract with the Seattle Seahawks.

Admittedly, *Wood* and other cases hold that, for purposes of collective bargaining, the bargaining unit includes potential as well as current employees. See, e.g., *Wood*, 809 F.2d at 960 (NBA draft choices). A union normally has authorization to negotiate conditions of entry into the bargaining unit on behalf of potential employees. Yet, the NFLPA's certification with the National Labor Relations Board (NLRB) excludes unsigned draft picks as members of the bargaining unit. Thus, whatever the ultimate ruling in the current NFL-NFLPA dispute, the question whether the labor exemption immunizes from attack by a potential employee a provision for the college draft contained in an unexpired agreement will remain unanswered.

16. See *infra* notes 177-93, 217-26 and accompanying text.

17. See *infra* text accompanying notes 81-222.

unique nature of the bargaining relationship in professional sports and a summary of the bargaining history between the National Football League Management Council (NFLMC) and NFLPA regarding the challenged restraints. Section III also reviews the recent Minnesota and New Jersey district court holdings concerning the scope of the labor exemption in the professional sports context.

Section IV considers the owners arguments in the current disputes.¹⁸ Section V proposes an alternative analysis of the labor exemption within the context of the current NFL-NFLPA dispute.¹⁹ This alternative analysis recognizes the significance of the bargaining history between the parties as well as the unique nature of the professional sports industry. Finally, this analysis concludes that, within the context of the current NFL-NFLPA dispute, the labor exemption did in fact expire on August 31, 1987, the day the 1982 NFLMC-NFLPA Collective Bargaining Agreement ended.

II. LEGAL BACKGROUND OF THE CURRENT DISPUTES

A. *Application of Antitrust Laws to the Challenged Restraints*

1. *Antitrust Background.* The purpose of federal antitrust law is to promote competition.²⁰ Most substantive antitrust law derives from sections 1 and 2 of the Sherman Antitrust Act of 1890, the original and most basic piece of antitrust legislation.²¹ Sections 1 and 2 of the Sherman Act are brief and very broad. Section 1 condemns every contract, combination, or conspiracy in restraint of trade in interstate commerce.²² Section 2 condemns monopolization, as well as attempts, combinations and conspiracies to monopolize any part of interstate trade or commerce.²³

Literally interpreted, section 1 of the Sherman Act would condemn many legitimate and necessary business activities.²⁴ In the years following the enactment of the Sherman Act, however, the Supreme Court interpreted the general language of section 1 to ban only unreasonable

18. See *infra* text accompanying notes 223-319.

19. See *infra* text accompanying notes 320-93.

20. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 635 (1985) ("Sherman Act is designed to promote national interest in a competitive economy"); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986) ("Supreme Court . . . has instead stressed that the antitrust laws seek to protect competition.").

21. 15 U.S.C. §§ 1, 2 (1982); see also L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 14 (1977).

22. 15 U.S.C. § 1 (1982).

23. *Id.* § 2.

24. L. SULLIVAN, *supra* note 21, at 165-66 (virtually any contract restrains trade to some extent).

restraints of trade.²⁵ The test of illegality under section 1, therefore, has become whether the particular restraint is unreasonable. The Court has adopted two standards under which to analyze the reasonableness of a particular restraint of trade: the rule of reason and the *per se* rule.²⁶

The rule of reason requires a court to evaluate the reasonableness of the challenged restraint. It grants protection from section 1 liability to arrangements that achieve pro-competitive objectives but have an incidental effect on competition. Among the factors considered by courts in evaluating the reasonableness of a restraint are the history, purpose and effect of the restraint;²⁷ the existence of less restrictive alternatives to realize legitimate, pro-competitive objectives;²⁸ and the balance of pro-competitive and anticompetitive effects.²⁹ The rule of reason is appropriately applied to situations in which courts have little experience with the type of restraint in question, the industry is unique, or the restraint produces pro-competitive benefits.³⁰

Under the *per se* rule, courts invalidate, without inquiry, certain restraints of trade which are deemed inherently unreasonable.³¹ The *per se* rule is appropriately applied to situations in which courts have had sufficient experience with the challenged practice to conclude that the practice has no redeeming competitive virtues.³²

2. *Antitrust and Professional Sports.* The focus of much of the early antitrust litigation in the professional sports industry was on player

25. See, e.g., *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238-39 (1918) ("true test of legality" is whether the restraint "merely requests and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition"); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 65-66 (1911) (anticompetitive acts are tested by "the rule of reason, in light of the principles of law and the public policy which the act embodies").

26. L. SULLIVAN, *supra* note 21, at 166.

27. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (competitive effect analyzed by evaluating business involved, history of restraint, and reasons for restraint); *Chicago Bd. of Trade*, 246 U.S. at 238 (same).

28. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1187-89 (D.C. Cir. 1978) (significantly less anticompetitive alternatives exist to challenged draft system).

29. See, e.g., *Chicago Bd. of Trade*, 246 U.S. at 238 (test of legality is whether restraint imposed promotes or suppresses competition); *Smith*, 593 F.2d at 1188-89 (pro-competitive benefits must offset anticompetitive effect).

30. See, e.g., *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (not enough known about effect of vertical territorial limitation to apply *per se* rule); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 65 (1911) (no *per se* rule with complex and varied business transactions); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 652-53 (5th Cir. 1977) (*per se* theory not utilized without minimal indicia of anticompetitive effect; rather, rule of reason appropriate). For a general discussion of the rule of reason, see L. SULLIVAN, *supra* note 20, at 186-92.

31. See, e.g., *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (under the *per se* rule certain agreements or practices are conclusively presumed to be unreasonable).

32. *Id.* For a general discussion of the *per se* rule, see *supra* L. SULLIVAN, note 21, at 192-94.

restraints similar to those currently challenged by the NFLPA.³³ In each of the early cases, the leagues argued both that the unique nature of professional sports precluded application of the *per se* standard, and that the restraints were reasonable under the rule of reason.³⁴ According to the leagues, their economic viability depended upon their controlling the movement of players from team to team.³⁵ Profitability in professional sports leagues turns on the unpredictable outcome of individual games and championship races.³⁶ Absent restrictions on player movement, players presumably would gravitate toward the most successful franchises or those franchises in the largest markets, in an effort to get the top dollar for their services. This movement would create an imbalance in team strengths and ultimately undermine fan interest and revenues.³⁷

Thus, the restrictions on player movement, according to the leagues, are designed, not to injure players, but rather to enable the leagues to function. Competition, desirable in other industries, is neither desirable nor feasible in the professional sports industry, so the argument goes. Teams within a league are not economic competitors like firms in other industries.³⁸ A free market would destroy professional sports leagues.

33. See, e.g., *Mackey v. NFL*, 543 F.2d 606, 610-11 (8th Cir. 1976) (Rozelle Rule), *cert. denied*, 434 U.S. 801 (1977); *Kapp v. NFL*, 390 F. Supp. 73, 78 (N.D. Cal. 1974) (Rozelle Rule; tampering rule), *vacated in part*, 1975-2 Trade Cas. (CCH) ¶ 60,543 (N.D. Cal. 1975), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); see also *Robertson v. NBA*, 389 F. Supp. 867, 873-75 (S.D.N.Y. 1975) (basketball draft; reserve clause; uniform player contract); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club Inc.*, 351 F. Supp. 462, 467 (E.D. Pa. 1972) (hockey reserve clause). For further discussion of the Rozelle Rule, see *infra* notes 55-57 and accompanying text.

34. See, e.g., *Mackey v. NFL*, 407 F. Supp. 1000, 1002 (D. Minn. 1976) (NFL defends Rozelle Rule as reasonable restraint on trade) *modified*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); see also J. WEISTART & C. LOWELL, *THE LAW OF PROFESSIONAL SPORTS* 594-95 (1979) (reviewing arguments for and against *per se* antitrust liability in sports industry).

35. J. WEISTART & C. LOWELL, *supra* note 34, at 596; see also Brown, *Because of a Clause, A Cause*, *SPORTS ILLUSTRATED*, May 1, 1972, at 62 (option clause necessary to league).

36. See, e.g., H. DEMMERT, *THE ECONOMICS OF PROFESSIONAL TEAM SPORTS* 10-11 (1973); see also Noll, *Alternatives in Sports Policy*, in *GOVERNMENT AND THE SPORTS BUSINESS* 411, 415-17 (R. Noll ed. 1974) (arguing that limits on competition for players do not affect balance of competition among teams); Quirk & El Hodiri, *The Economic Theory of a Professional Sports League*, in *GOVERNMENT AND THE SPORTS BUSINESS* 33, 34-37 (R. Noll ed. 1974) (noting multitude of factors impacting on competitive strength in model sports league).

37. J. WEISTART & C. LOWELL, *supra* note 34, at 596; see also Quirk & El Hodiri, *supra* note 36, at 41-45 (noting many implicit assumptions in this model); L. SOBEL, *PROFESSIONAL SPORTS AND THE LAW* 224-29 (1977) (discussing interview with NFL Commissioner, Pete Rozelle, appearing in *PLAYBOY*, Oct. 1973, at 78).

38. See, e.g., *United States v. NFL*, 116 F. Supp. 319, 323 (E.D. Pa. 1953) ("Professional teams in a league, however, must not compete too well with each other in a business way."); J. WEISTART & C. LOWELL, *supra* note 34, at 597 (same).

In a series of player restraint cases in the 1970s, courts reached differing conclusions on the application of the rule of reason or the *per se* rule within the context of professional sports. Several trial courts recognized that the challenged restraints had characteristics in common with group boycotts, horizontal market divisions, and price fixing arrangements, arrangements that normally warrant application of the *per se* rule.³⁹ Some courts equivocated, however, because of their lack of experience with sports industry restraints; these courts also examined the factual basis of the arrangements under the rule of reason.⁴⁰ In *Mackey v. NFL*, the most widely cited of the early player restraint cases, the Eighth Circuit rejected the district court's application of the *per se* rule, emphasizing the unique nature of the professional sports industry.⁴¹ Application of the rule of reason, however, failed to legitimize the challenged restraints in *Mackey* or in any of the other cases in which courts applied the rule of reason: the player restraints were uniformly condemned as unreasonable.⁴²

Currently, the NFLPA challenges the right of first refusal/compensation system contained in the 1982 collective bargaining agreement as well as the modified free agency system unilaterally implemented by the NFLMC on February 1, 1989. Under the right of first refusal/compensation system contained in the 1982 agreement, a team retained certain rights to a player after its contractual rights to that player expired.⁴³ When a player's contractual relationship with his team ended, the player was permitted to accept an offer from another team. The player's original team, however, had the right either to match the offer and retain the player or to receive draft choice compensation from the other team. The compensation, which was based on the new team's offer and the number of years the player had been in the League, raised the price to the new team of obtaining a particular player's services to a level that completely

39. See, e.g., *Smith v. Pro Football, Inc.*, 420 F. Supp. 738, 744 (D.D.C. 1976) (analogizing the draft to a "group boycott in its classic and most pernicious form"), *aff'd in part and rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 407 F. Supp. 1000, 1007 (D. Minn. 1975) (finding Rozelle Rule and related practices were a concerted refusal to deal and a group boycott), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); *Kapp v. NFL*, 390 F. Supp. 73, 81 (N.D. Cal. 1974) (noting that players who violate their contracts will be "boycotted by all members clubs").

40. E.g., *Smith*, 420 F. Supp. at 745-46 (finding activities would be barred even under rule of reason); *Kapp*, 390 F. Supp. at 81-82 (noting rule of reason may be more appropriate, given unique nature of sports league activities).

41. *Mackey*, 543 F.2d at 619-20.

42. See, e.g., *Smith*, 593 F.2d at 1188-89 (1968 NFL draft had "severe anti-competitive effects and no demonstrated pro-competitive virtues"); *Mackey*, 543 F.2d at 622 (Rozelle Rule is "significantly more restrictive than necessary to serve any legitimate purposes").

43. See 1982 Collective Bargaining Agreement, *supra* note 3, art. XV.

deterred the movement of players under this system.⁴⁴

The NFLPA's objective as it approached the bargaining table in 1987 was to eliminate the compensation restrictions contained in the 1982 agreement in order to provide veteran players, upon expiration of their individual player contracts, with a realistic opportunity to change teams.⁴⁵ Negotiations with the NFLMC for a new agreement were unsuccessful, however, and the League maintained the right of first refusal/compensation provisions contained in the 1982 agreement during the 1987 and 1988 seasons. Late in 1988, the NFLMC proposed and the NFLPA rejected a modified system of free agency.⁴⁶ On February 1, 1989, the NFLMC unilaterally implemented the new system, Plan B. Under that system, each team is permitted to protect thirty-seven players.⁴⁷ The new system subjects the thirty-seven protected players on each team to a right of first refusal/compensation system similar to the system contained in the 1982 agreement. The new system, however, changes the levels of compensation required under the 1982 agreement and, in addition, specifies three different compensation requirements depending upon the performance during the prior season of the team signing the free agent.⁴⁸ Thus, the nine weakest teams are subjected to somewhat lower compensation requirements than the middle nine teams and the top ten teams. Like the system contained in the 1982 agreement, teams are permitted to sign protected free agents between February 1 and April 1 of the year following the free agent's final season under contract with his team. Not a single player changed teams under this system between February 1, 1989 and April 1, 1989.⁴⁹

Under the new system, players unprotected by their teams become unrestricted free agents on February 1, regardless of whether the player is under contract for the upcoming season as of that date or is a free agent.⁵⁰ Unprotected players are also free to sign a contract with a new team between February 1 and April 1. The new team is not required to compensate the unprotected player's former team. The rights of unpro-

44. *Powell v. NFL*, 678 F. Supp. 777, 779-81 (D. Minn. 1988). In fact, the court noted that of the 1,415 players who became veteran free agents during the term of the 1982 agreement, apparently only one player even received an offer from another club. *Id.* at 781 & n.6. That player, Brent Boyd of Minnesota, received an offer from the San Diego Chargers in 1983. The offer, which Minnesota chose to match, was not high enough to trigger draft choice compensation.

45. *Id.* at 781.

46. See Letter from Gene Upshaw, Executive Director of NFLPA, to Jack Donlan, Executive Director of NFL Management Council (Dec. 12, 1988) (rejecting NFLMC proposals and presenting NFLPA's proposal on free agency).

47. See *Scorecard*, SPORTS ILLUSTRATED, Feb. 13, 1989, at 7.

48. See *Powell*, 678 F. Supp. at 779-81.

49. King, *Inside the NFL*, SPORTS ILLUSTRATED, Sept. 18, 1989, at 68.

50. See *id.*; see also *Powell*, 678 F. Supp. at 779-81.

tected players who do not sign a contract with a new team by April 1 revert back to the team that failed to protect the player.⁵¹

Two hundred and twenty-nine unprotected players changed teams between February 1, 1989 and April 1, 1989.⁵² A large majority of these players, however, were either aging veterans with large contracts, players recovering from serious injuries, or marginal players.⁵³ The top thirty-seven players on each team are still subjected to a right of first refusal/compensation system similar to the one contained in the 1982 agreement and, accordingly, the NFLPA has indicated it will challenge the new system.⁵⁴

The right of first refusal/compensation system contained in the 1982 collective bargaining agreement as well as the system unilaterally implemented by the owners on February 1, 1989, are similar to restraints condemned in prior actions. These systems are modified versions of the NFL's old "Rozelle Rule," which gave the commissioner discretionary power to award compensation to a team losing a free agent if the free agent's new and old teams could not agree on compensation.⁵⁵ The Rozelle Rule was abolished after *Mackey v. NFL*, when the Eighth Circuit held that under section 1 of the Sherman Act the rule constituted an unreasonable restraint of trade.⁵⁶ The 1982 version of the right of first refusal/compensation system eliminated the commissioner discretion element of the Rozelle Rule; otherwise, it is functionally identical to the Rozelle Rule. In practice, it proved even more restrictive as fewer players have moved under the 1982 system.⁵⁷

51. See *Scorecard*, *supra* note 47, at 7.

52. See *King*, *supra* note 49, at 68.

53. See generally *id.* ("Of the 229 players who switched clubs under the system, 105 (46%) made opening-day rosters. Of these, 33 (14% of the total) started in Week 1 . . ."). But see *id.* (Cleveland Browns official crediting Plan B system with enabling team to fill key positions).

54. *Id.* ("It wasn't lawful and wasn't adequate for all players in 1989, and it won't be lawful or adequate in 1990," says Doug Allen, the union's assistant executive director.").

55. The League unilaterally implemented the Rozelle Rule in 1963, five years before the NLRB recognized the NFLPA as the exclusive bargaining representative for NFL players. *Mackey v. NFL*, 543 F.2d 606, 610-11 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

56. *Id.* at 622.

57. In 1977, the NFL and the NFLPA executed a five-year collective bargaining agreement in which the right of first refusal/compensation system replaced the Rozelle Rule as the mechanism for limiting the movement of players. The new system included pre-determined, objective compensation criteria, thereby eliminating the commissioner's involvement in the process of compensating teams losing free agents. See 1977 Collective Bargaining Agreement Between the National Football League Players Association and the National Football League Management Council art. XV (Mar. 1, 1977) [hereinafter 1977 Collective Bargaining Agreement]. The 1977 collective bargaining agreement was incorporated in a judicially approved settlement of the class action. *Alexander v. NFL*, 1977-2 Trade Cas. (CCH) ¶ 61,730, at 72,985-86 (D. Minn. 1977), *aff'd sub nom. Reynolds v. NFL*, 584 F.2d 280 (8th Cir. 1978). NFL players brought suit in *Alexander* after the Eighth Circuit's holding in *Mackey* that the Rozelle Rule violated the Sherman Act. The settlement agreement pro-

Similarly, the League's new system, based on the results in 1989, appears to be as restrictive as the old system, at least with respect to the top thirty-seven players on each team's roster. Not a single protected player changed teams under the new system. Admittedly, a significant number of unprotected players moved. Yet the employee turnover rate in the NFL is approximately 25% and, consequently, many unprotected players are in jeopardy of losing their job to a rookie selected in the 1989 draft.

Based on previous judicial pronouncements condemning player restraints, the current suit is, on the merits, likely to be resolved in favor of the players' association. Prior courts, analyzing similar restraints under the rule of reason, have recognized the League's justifications for the restraints but concluded nevertheless that those justifications did not require the restraints to be completely insulated from the antitrust laws.⁵⁸ Moreover, the courts concluded that the League had implemented exces-

vided, *inter alia*, that the League would pay more than \$13 million over the period from 1977-1987 as damages to class members who played in the NFL from 1972-1976. *Id.* at 281-82.

During the five-year life of the 1977 agreement, only one player shifted teams in a transaction involving draft choice compensation. *Powell v. NFL*, 678 F. Supp. 777, 780 (D. Minn. 1988). Of approximately 600 players who became free agents between 1977 and 1982, fewer than 50 received offers from other teams pursuant to article XV of the 1977 Agreement. *Id.* Only two of those players received offers high enough to trigger compensation if their original club chose not to match the offer. The one player who did move was Norm Thompson, who moved in 1977 from St. Louis to Baltimore in return for a third round draft choice. The other player, Randey Crowder, received an offer from the Atlanta Falcons in 1977 which would have required a third round draft choice as compensation. The Miami Dolphins, Crowder's original team, chose to match the offer and Crowder remained with Miami. *See* Affidavit of Richard A. Berthelsen, NFLPA General Counsel, at 13-14, *Powell*, 678 F. Supp. 777 (D. Minn. 1988) (No. 4-87-917) [hereinafter *Berthelsen Affidavit*].

In 1982, the parties executed a new five-year collective bargaining agreement. The new agreement contained a modified right of first refusal/compensation system, which increased the salary levels triggering draft choice compensation. For example, the salary level triggering a third-round draft choice for a veteran free agent entering his fourth NFL season increased from \$55,000 in 1981 (1977 Collective Bargaining Agreement, *supra*, art. XV) to \$90,000 in 1983 (1982 Collective Bargaining Agreement, *supra* note 3, art. XV). *Powell*, 678 F. Supp. at 780-81. The liberalized system, however, failed to increase player movement. Upward pressure on salaries due to competition for players from the United States Football League negated the modifications in the 1982 agreement. Not a single player changed teams under this system until 1988, after the 1982 agreement had expired, when Chicago Bears linebacker Wilbur Marshall received an offer from the Washington Redskins which the Bears chose not to match. Marshall signed with the Redskins, and the Bears received Washington's first round draft choices in 1988 and 1989 as compensation. *See* *Berthelsen Affidavit*, *supra*, at 13-14; *see also supra* note 44 (discussing free agent movement under the 1982 agreement).

58. *See, e.g., Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1188-89 (D.C. Cir. 1978) ("[A] player draft can survive scrutiny under the Rule of reason only if it is demonstrated to have positive, economically *procompetitive* benefits that offset its anticompetitive effects, or . . . if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is *insubstantive*."); *Mackey*, 543 F.2d at 621-22 (Rozelle Rule found invalid under the rule of reason because it applied to every play regardless of status, was unlimited in duration, and lacked procedural safeguards).

sive restraints and that less restrictive alternatives would accomplish the same objectives.⁵⁹ The currently challenged restraints likely face this same conclusion.

One factor, however, distinguishes the current NFL dispute from the previous antitrust attacks on player restraints: the NFLPA is no longer in its infancy. In each of the earlier cases, the challenged restraints were unilaterally implemented by the League prior to the formation of the players' association.⁶⁰ The restraints were initially incorporated in a collective bargaining agreement while the union was in its infancy and too weak to resist management's demands.⁶¹

In the earlier cases, NFL management argued that because the challenged restraints were incorporated in an existing collective bargaining agreement, they were immunized from antitrust attack by virtue of the nonstatutory labor exemption.⁶² However, the courts uniformly rejected this argument. The courts found the challenged restraints, although contained in an agreement, reflected the weak position of the union and were not the product of meaningful, arm's-length negotiations.⁶³

In the current case, NFL Management is again arguing that the labor exemption immunizes the challenged restraints from antitrust attack.⁶⁴ Clearly, the union is no longer in its infancy and, therefore, a court is less likely to conclude that the restraints incorporated in the most recent agreement were not the product of arm's-length negotiations. Nonetheless, the labor exemption once again is the pivotal issue in the NFL dispute because the challenged restraints are contained in an *expired* collective bargaining agreement. Before addressing the merits of the players' antitrust claims, therefore, the court must determine the scope of the nonstatutory labor exemption. More specifically, the court must determine the extent to which the nonstatutory labor exemption

59. See, e.g., *Smith*, 593 F.2d at 1187-88 (draft rule's purpose of promoting athletic competitiveness among teams might be accomplished through restricting number of players any team allowed to sign, allowing draft prospect to negotiate with other teams should drafting team fail to make an acceptable offer, conducting second draft, or restricting draft to top players and allowing others to enter "free market").

60. For example, the NFL instituted the draft in 1935. *Smith*, 593 F.2d at 1174. The League unilaterally implemented the Rozelle Rule in 1963, five years before the NLRB recognized the NFLPA as the exclusive bargaining representative for NFL players. *Mackey*, 543 F.2d at 610-11.

61. *Mackey*, 543 F.2d at 615-16.

62. See, e.g., *id.* at 612 (defendants argued that Rozelle Rule was incorporated into agreement with players union and that the agreement should be insulated from antitrust liability to achieve "proper accommodation of federal labor and antitrust policies"); *Kapp v. NFL*, 390 F. Supp. 73, 84 (N.D. Cal. 1974).

63. See, e.g., *Mackey*, 543 F.2d at 616 (no arm's-length bargaining found with recent Rozelle Rule).

64. *Powell v. NFL*, 678 F. Supp. 777, 782-83 (D. Minn. 1988).

immunizes from antitrust attack restraints contained in a collective bargaining agreement that has expired.

B. *The Labor Exemption*

The Sherman Act, enacted in 1890, has as its primary purpose to regulate commercial activity.⁶⁵ Nonetheless, early courts interpreted the general language of the Act to apply not only to commercial activity, but also to combinations among employees that interrupted the free flow of commercial activity.⁶⁶

Unions by nature are combinations that attempt to restrain an employer's ability to deal with employees. In addition, most types of concerted union activity, such as strikes and boycotts, restrain the movement of an employer's goods. Thus, application of the Sherman Act to labor combinations impeded the development of unions. As a result, Congress included two provisions in the 1914 Clayton Act to reduce the impact of the antitrust laws on the labor movement.⁶⁷ Section 6 of the Clayton Act provides that labor unions are not combinations in restraint of trade.⁶⁸ Section 20 restricts the injunctive power of courts in labor disputes to certain enumerated types of union organizational activities.⁶⁹ However, the Supreme Court interpreted section 20 narrowly and many union activities were, after 1914, still subject to antitrust attack and the injunctive power of the courts.⁷⁰ The Norris-LaGuardia Act,⁷¹ approved in 1932, expanded the protection given to union activity by further restricting the use of injunctions in labor disputes.⁷² Together, the relevant Clayton Act and Norris-LaGuardia Act provisions constitute the statutory labor exemption. This exemption protects unions and certain types of union activity from antitrust liability.⁷³

The statutory labor exemption does not immunize from antitrust at-

65. *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 803-06 (1945).

66. R. GORMAN, *BASIC TEXT ON LABOR LAW* 3 (1976).

67. Ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12-27 (1982); 29 U.S.C. § 52 (1982)).

68. 15 U.S.C. § 17 (1982).

69. 29 U.S.C. § 52 (1982).

70. *See, e.g., Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 471-74 (1921) (secondary boycott not immunized from antitrust attack because defendant employees lack direct employment relationship with company which was ultimate object of boycott).

71. Ch. 90, 47 Stat. 70, 71-73 (1932) (codified at 29 U.S.C. §§ 104, 105 and 113 (1982)).

72. *See, e.g., Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-22 (1975) (statutory enactments exempt specific union activities from operation of antitrust laws).

73. *See, e.g., Apex Hosiery Co. v. Leader*, 310 U.S. 469, 501-03 (1940) (federal labor policy codified in statutory exemption immunizes inherently anticompetitive collective activities by employees).

tack agreements between labor and management.⁷⁴ The courts, though, have recognized that the application of antitrust laws to labor-management agreements would undermine the collective bargaining process mandated by Congress in the National Labor Relations Act (NLRA). Thus, courts have created a common law, nonstatutory exemption to immunize labor-management agreements.⁷⁵

The scope of this nonstatutory labor exemption is not precisely defined.⁷⁶ The Supreme Court decisions indicate that a collective bargaining agreement, to be eligible for antitrust immunity, must meet certain minimum prerequisites. For example, the agreement must not include outside parties.⁷⁷ Similarly, matters in the agreement that affect other employers or employment relationships are not immunized; the exemption is limited to matters that primarily affect the immediate employment relationship.⁷⁸ Beyond these threshold requirements, however, the Court has not articulated a general standard for applying the labor exemption to union-employer agreements.

More specifically, the Supreme Court has not addressed the issue of whether the labor exemption immunizes provisions in an expired agreement. Furthermore, the Court's prior decisions addressing the labor exemption do not provide any clear guidelines with which to resolve this question within the context of professional sports. In rendering its earlier decisions, the Court faced and responded to the question of whether the labor exemption would immunize certain union-proposed restraints. In those cases, the union asserted the labor exemption to escape antitrust liability. The plaintiff was either the employer or a third party challenging a union-proposed restraint embodied in an unexpired agreement.⁷⁹ In the current NFL dispute, as well as in each of the other player restraint cases in which the application of the labor exemption was at issue, the union is the plaintiff, and the League has raised the exemption to

74. See *Bridgeman v. NBA*, 675 F. Supp. 960, 964 (D.N.J. 1987) (citing *United States v. Hutcheson*, 312 U.S. 219 (1941)).

75. See, e.g., *Connell*, 421 U.S. at 621-22 ("The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions"); *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) ("exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws").

76. See J. WEISTART & C. LOWELL, *supra* note 34, at 525.

77. See, e.g., *Connell*, 421 U.S. at 622-23.

78. See, e.g., *Jewel Tea*, 381 U.S. at 664-66 (union forfeits exemption when it is "clearly shown" that it agreed with employer to impose certain wage scale on other bargaining units).

79. See J. WEISTART & C. LOWELL, *supra* note 34, at 526 (citing *Connell*, 421 U.S. 616 (1975)); see also *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Jewel Tea*, 381 U.S. 676 (1965).

immunize its own proposed restraints.⁸⁰

This distinction is significant in light of the original purpose of the labor exemption. Congress created the statutory labor exemption to protect unions and their legitimate organizing activities from antitrust attack.⁸¹ The purpose of the nonstatutory labor exemption, which is derived from the statutory exemption, is to effectuate Congress' limited objective as expressed in the statutory exemption.⁸² To protect the union's role in collective bargaining, both parties to the agreement must be protected from antitrust liability. As a result, the nonstatutory exemption affords employers derivative protection from the antitrust laws.⁸³ Nevertheless, the original purpose of the exemption—to benefit labor—endures and has undoubtedly influenced the Court's decisions.

The prior player restraint cases are also of limited precedential value in the current dispute. The willingness of courts to recognize the union's infancy as a factor in determining the scope of the labor exemption factually distinguishes the current dispute from the earliest player restraint cases. More important, no previous court has addressed the legal effect of an expired agreement.⁸⁴ In each of the earlier player restraint cases, of course, the court addressed the same general policy choice raised in the current dispute: whether federal labor policy encouraging collective bargaining overrides the federal antitrust policy prohibiting unreasonable restraints of trade. The focus of the current dispute, however, is more specific: whether the federal labor policy encouraging collective bargaining compels courts to exempt restraints contained in an expired agreement. This specific policy choice is not addressed in the prior cases.⁸⁵

80. See, e.g., *Mackey v. NFL*, 543 F.2d 606, 609 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); *Robertson v. NBA*, 389 F. Supp. 867, 884-86 (S.D.N.Y. 1975) (challenge by NBPA).

81. See *Jewel Tea*, 381 U.S. at 700-13; *Allen Bradley Co. v. Local 3, Intl. Bhd. of Elec. Workers*, 325 U.S. 797, 801-08 (1945); *United States v. Hutcheson*, 312 U.S. 219, 229-37 (1941).

82. *Connell*, 421 U.S. at 622.

83. *J. WEISTART & C. LOWELL*, *supra* note 34, at 527.

84. In *Mackey*, the only challenge to restraints in an expired agreement, the court withheld the exemption because of the absence of bona-fide, arm's-length negotiations. 543 F.2d at 615-16. The court specifically noted that its decision did not reach the question whether the exemption survived the expiration of the agreement. *Id.* at 616 n.18.

85. *Mackey*, however, does offer some guidance. The *Mackey* court held that the labor exemption immunizes player restraints provided those restraints are the product of bona-fide, arm's-length negotiations. See *supra* note 84. In other words, union approval seems to be a prerequisite to the application of the exemption; the mere potential for bargaining is not enough to immunize the restraints, and the exemption will not immunize restraints unilaterally implemented by management.

III. THE CURRENT NFL DISPUTE

A. *The Unique Nature of the Employment Relationship in the Professional Sports Industry*

The history of collective bargaining in the NFL is, to a large extent, a function of the unique nature of the employment relationship in the professional sports industry. Several factors distinguish the market for professional football from other markets, and professional athletes and team owners from industrial unions and more typical multi-employer bargaining units. These factors, discussed below, have created an inherently unequal bargaining relationship between players and owners quite unlike the relationship between industrial employees and employers.

The NFLPA is, as a bargaining unit, inherently weaker than industrial bargaining units. The players' association consists of a total of about 1500 players on twenty-eight teams located in twenty-six different cities. Unlike industrial employees, professional athletes do not possess homogeneous skills; a wide range of ability and expertise exists among players. Not surprisingly, different union demands affect superstars and marginal players differently. For example, marginal players would undoubtedly benefit from higher minimum salaries and greater job security, while star players would realize greater benefits from free agency. Because of the lack of commonality of interests among players, the NFLPA lacks the cohesiveness enjoyed by industrial unions.

Other factors distinguish the players' association from industrial unions. Because of the collective nature of athletic contests, players associations recognize that a player's value to any particular team depends not only on the player's skill level, but also on the nature of the player's skills and the player's attitude, conduct, age, and relationship with teammates. As a consequence, the employment relationship in professional sports presumes that teams retain the discretion to make necessary personnel changes in search of the right combination of talent, attitude, and leadership to produce a winning team.⁸⁶

As a result of this unique employment relationship, individual players, with the exception of a few superstars, have virtually no job security. The NFL standard player contract contains no injury protection beyond

86. See, e.g., NFL Player Contract ¶ 11 (rev. 1982):

SKILL, PERFORMANCE, AND CONDUCT. Player understands that he is competing with other players for a position on Club's roster within the applicable player limits. If at any time, in the sole judgment of Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, the Club may terminate this contract.

the season in which an injury occurs⁸⁷ and grants the team sole discretion to terminate the player's contract at any time for lack of skill.⁸⁸ Fewer than 5% of all NFL players are able to negotiate skill and/or injury guarantees into their standard contract.⁸⁹ The 1982 collective bargaining agreement contained only minimal protection against injury⁹⁰ and lack of skill⁹¹ beyond that contained in the standard contract. Career-ending injuries as well as injuries that reduce a player's skill are not uncommon. Teams constantly attempt to upgrade the quality of their rosters and, as a result, there is a continuous turnover of employees. Not surprisingly, the average career for an NFL player is less than 4 years.⁹²

The lack of job security and brief work-life of most players distinguishes the NFLPA from most industrial unions and creates problems for the association not encountered by other unions. Because of the brief work-life of its bargaining unit employees, the union has an extremely short institutional memory. The NFLPA experiences approximately twenty-five percent yearly turnover in its bargaining unit, a rate unheard of in industrial unions.⁹³ At any given time, many if not most players would not have been members of the NFLPA during the negotiations for the previous collective bargaining agreement. As the union approaches negotiations for a new agreement, it must educate a large number of employees who have absolutely no understanding of the nature of labor-management relations in the industry. Moreover, the brief work-life guarantees that few players will remain in the League long enough to

87. *Id.* ¶ 9.

INJURY. If Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and, in accordance with Club's practice, will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period, as Player is physically unable to perform the services required of him by this contract because of such injury. If Player's injury in the performance of his services under this contract results in his death the unpaid balance of his yearly salary for the season of injury will be paid to his stated beneficiary or, in the absence of a stated beneficiary, his estate.

88. *Id.* ¶ 11; *see also supra* note 86. The club's discretion to terminate is limited by a good faith requirement, "meaning that the decision to terminate must be made honestly and without pretense." J. WEISTART & C. LOWELL, *supra* note 34, at 232.

89. NFLPA, GAME PLAN '87, at 14 (1986).

90. 1982 Collective Bargaining Agreement, *supra* note 3, art. X (qualifying player receives 50% of salary up to maximum of \$65,000 for season following injury season, unless individual contract contains greater injury protection; only entitled to injury benefit once in career).

91. *Id.* art. XXXV (provides for termination pay for players with at least four years of NFL service in amount equal to unpaid balance of initial 50% of salary, exclusive of deferred compensation, but not less than equivalent of one week's salary).

92. The NFLPA research department reports that the average NFL career is less than 4 years. *See* NFLPA, GAME PLAN '87, at 23 (1986).

93. *See* Serrin, *Behind the Football Strike: New Questions for Labor*, N.Y. Times, Oct. 17, 1982, at 1, 34, col. 5 (football players' union has annual turnover rate of 25%).

benefit from the elimination of certain restraints. In effect, the union must ask players to strike, play without an agreement, or forgo immediate gains at the bargaining table for the benefit of future players.

The lack of job security creates even more significant problems as the NFLPA seeks to bargain for its highly vulnerable members. NFL players possess highly specialized skills that are rarely marketable in any other industry either during or after their NFL careers. The NFL is the only buyer of the skills possessed by its employees.⁹⁴ In the overwhelming majority of situations, a player who is cut will experience an enormous drop in yearly income. In the most extreme case, a player with a six figure income will be unable to find employment outside of professional football. As a result, individual players are extremely vulnerable to management pressure. Within the context of collective bargaining, player representatives and other players active in the union are particularly vulnerable.⁹⁵ Proving discriminatory discharge is extremely difficult in an industry where the employer retains sole discretion to make employment decisions.⁹⁶

NFL owners, in contrast to the weak position of the players vis-a-vis industrial unions, are inherently strong vis-a-vis other multi-employer bargaining units. Professional football is currently a one league industry. In 1966, Congress granted the NFL and the American Football League an antitrust exemption, permitting the two leagues to merge.⁹⁷ Since that merger, two leagues, the World Football League and more recently the United States Football League, were unable to compete with the NFL and were essentially driven from the market.⁹⁸ The NFL currently competes with no other professional football league for fan interest or employees.⁹⁹ Consequently, the NFL is the only buyer of the skills

94. See *infra* notes 97-99 and accompanying text.

95. See *infra* notes 116-17 and accompanying text (discussing charges of discriminatory discharge by NFL teams).

96. See *supra* note 86 (providing text of standard player's contract).

97. The merger authorization bill became law on November 8, 1966, as part of Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 1508, 1515 (1966). It is now codified as amended at 15 U.S.C. § 1291 (Supp. V 1987) and reads in pertinent part:

In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501 (c)(6) of the Internal Revenue Code of 1986 [26 U.S.C. 501 (c)(6)] combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

98. For a discussion of competing leagues, see R. BERRY, *LABOR RELATIONS IN PROFESSIONAL SPORTS* 92-96 (1986).

99. The Arena Football League, formed in 1987, played two seasons. However, that league was not really a competitor of the NFL. Its games were played indoors with eight men teams on a 50-yard field. All players received the same salary. The Arena Football League will not operate in 1989. See *Scorecard*, *SPORTS ILLUSTRATED*, Mar. 20, 1989, at 16.

possessed by its employees.

In addition, NFL football is sufficiently distinctive so that the League also does not compete with college football or professional leagues in other sports.¹⁰⁰ No real substitutes exist for the League's product.¹⁰¹ Moreover, demand for NFL football is high (the league has operated at about 90% attendance capacity over the past decade.¹⁰²) Demand is also inelastic (at least in response to changes in quality)—fans attended, and the networks televised the 1987 strike games between teams composed of players previously cut from NFL rosters.¹⁰³ The League thus possesses both monopoly and monopsony power in a market in which excess demand exists for its product.

In addition to operating in an environment in which there are no outside competitors for fan interest or employees, the NFL has, in the name of preserving competitive balance, successfully regulated intra-league competition for fan interest and players. Courts have accepted the League's competitive balance argument as justification for analyzing arguably *per se* violations of the Sherman Act under the rule of reason.¹⁰⁴ More significantly, the League, with the help of Congress, has adopted a system of revenue sharing to govern intra-league economic competition.

In 1961, the NFL, in an effort to maximize industry revenues, approached Congress and obtained an exemption from the antitrust laws permitting the League to sell broadcast rights to its games in a package.¹⁰⁵ Ancillary to this exemption, NFL teams share equally television revenues from the sale of League broadcast rights. Because gate receipts

Another league, the Canadian Football League (CFL), is currently in operation but similarly is not a realistic or serious competitor to the NFL. CFL teams are in none of the NFL markets, and league revenues and players' salaries are a fraction of NFL revenues and salaries. With the exception of a few CFL games that appear on ESPN during non-prime time hours, the NFL and the CFL do not compete in the market for television viewers. Finally, under league rules CFL teams are limited in the number of American players each team is permitted to carry on its roster.

100. *Cf.* NFL v. USFL, 644 F. Supp. 1040, 1057 (S.D.N.Y. 1986) (finding NFL had monopoly power in market defined as professional football), *aff'd*, 842 F.2d 1335 (2d Cir. 1987).

101. *Cf.* Board of Regents v. NCAA, 546 F. Supp. 1276, 1297-301 (W.D. Okla. 1982) (discussing the relevant market for college football), *aff'd in part and rev'd in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984). NFL football, like college football, is sufficiently distinctive to conclude that no real substitutes exist for its product.

102. In 1984, NFL attendance was 13,398,112, or 88.4% of capacity. THE NFL AND YOU 1985-1986, at 6 (1985). In 1985, NFL attendance was 88% of capacity, and in 1986 attendance equalled 89% of capacity. OFFICIAL 1987 NFL RECORD AND FACT BOOK (1987).

103. Demand is inelastic when it fails to respond to changes in price or quality of a product. For a discussion of the view of the players toward the replacement games, see Garvey, *Foreword to The Scope of the Labor Exemption in Professional Sports: A Perspective on Collective Bargaining in the NFL*, 1989 DUKE L.J. 325, 331, 335.

104. *See, e.g.*, Mackey v. NFL, 543 F.2d 606, 618-20 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

105. 15 U.S.C. § 1291 (Supp. V 1987) provides:

are divided 60%-40% between the home and visiting teams, approximately 90% of industry revenues are shared equally among the twenty-eight team owners.¹⁰⁶ Interestingly, playoff money, as well as revenues generated by the Super Bowl, are also shared equally among the twenty-eight teams.¹⁰⁷

As a result of this system of revenue sharing, a system not common to employers in other industries, the NFLMC is inherently stronger and more cohesive than other multi-employer bargaining units. At the bargaining table, every demand or position taken by the NFLMC affects each of the twenty-eight owners identically, at least from an economic standpoint. Moreover, revenue sharing removes the economic incentive to produce a winning franchise.¹⁰⁸ Regardless of the system regulating the movement of free agents which the parties agree upon at the bargaining table, no economic incentive exists for a given owner to bid on expensive free agents to improve the quality of his or her football team. Bidding for an expensive free agent may help a team win more games and most certainly will increase a team's payroll. It will not, however, necessarily increase a team's revenues.

In addition to removing the economic incentive to win, the League historically has penalized teams for signing other teams' free agents. The earliest mechanism for penalizing teams was the Rozelle Rule.¹⁰⁹ Following the Eighth Circuit's decision in *Mackey v. NFL*, the League employed a right of first refusal/compensation mechanism to restrict the movement of free agents. Recognizing the possibility that some owners may derive more utility from winning than from maximizing their prof-

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

106. See NFLPA, *GAME PLAN '87*, at 28 (1986).

107. Stoltz, *Who Really Makes Money in the NFL?*, *REGARDIE'S*, Oct. 1985, at 73-82; see also NFLPA, *WHY A PERCENTAGE OF GROSS? BECAUSE WE ARE THE GAME* 30 (1981) (detailing sharing of revenues) [hereinafter *WHY A PERCENTAGE OF GROSS?*].

108. Stoltz, *supra* note 107, at 73-82; see also Boyle, *The 55% Solution*, *SPORTS ILLUSTRATED*, Feb. 1, 1982, at 30, 32 (quoting NFLPA Executive Director Ed Garvey's reference to NFL's system of revenue sharing as "corporate socialism"). NFL teams divide network television revenues and playoff money equally, see *supra* text accompanying notes 106-07, and gate receipts are split 60%-40% between home and visiting teams, with most stadiums either sold out or near capacity. *WHY A PERCENTAGE OF GROSS?*, *supra* note 107, at 30-31. Consequently, the addition of a superstar may improve a team's win-loss record, but not generate significant additional revenue. From an economic standpoint, signing high-priced free agents simply increases a team's expenses. The NFLPA's Garvey insisted that this system of revenue sharing, under which a major portion of team revenues are essentially fixed, provided no incentive for teams to engage in bidding for expensive free agents. See Boyle, *supra*, at 32.

109. See *supra* notes 55-56 and accompanying text.

its, the NFLMC has, until recently, refused to compromise its position on the free agent system.¹¹⁰ Presumably, the League implemented its new "liberalized" system, which grants unrestricted free agency to only unprotected (second tier) players, to increase the likelihood that the district court would find the system reasonable under the rule of reason.¹¹¹

The bargaining history that led to the inclusion of the right of first refusal/compensation system in the 1982 collective bargaining agreement and the implementation of the League's current system is discussed below.¹¹² Despite the negative impact that this system has had on player salaries and player mobility,¹¹³ the inclusion of this system in the 1982 agreement was not surprising in light of the unique nature of the employment relationship in the professional sports industry and the inherently weak status of the union. Because of this employment relationship, management's domination over the union at the bargaining table is understandable and arguably inevitable.

B. *The Bargaining History and Evolution of the Challenged Restraints*

1. *The 1977 Agreement.* The NFLPA appeared to be in an extremely strong bargaining position immediately following the Eighth Circuit's 1976 decision in *Mackey*. During the three-year period between the expiration of the 1970 collective bargaining agreement in 1974 and the execution of the 1977 agreement, the players filed four antitrust suits challenging various player restraints employed by the owners. The union returned to the bargaining table in 1977 with judicial decisions that the labor exemption did not apply and that each of the challenged restraints violated the antitrust laws.¹¹⁴

The union, however, was in fact struggling to survive. The litigation during the previous four years had taken its toll both financially and organizationally. More debilitating was the ongoing labor dispute with the NFLMC. The players played the 1974, '75 and '76 seasons with no collective bargaining agreement, while the union and the owners engaged in

110. See *supra* notes 46-54 (discusses hybrid free agent system unilaterally implemented by owners in Feb., 1989).

111. See *Scorecard*, SPORTS ILLUSTRATED, Feb. 13, 1989, at 7-8.

112. See *infra* notes 114-48 and accompanying text.

113. E.g., J. WEISTART & C. LOWELL, *supra* note 34, at 608-09 (discussing findings in *Mackey* case).

114. See *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (invalidating professional football player draft); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (holding that Rozelle Rule violated the Sherman Act), *cert. denied*, 434 U.S. 801 (1977); *Bryant v. NFL*, No. 75-2543 (C.D. Cal. July 30, 1975) (temporary restraining order granted against Rozelle Rule); *Bryant*, (C.D. Cal. Aug. 7, 1975) (order dissolved after Commissioner changed compensation from active player (Bryant) to draft choices); *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974) (striking down option clause, standard player contract, Rozelle Rule, and no-tampering rule).

intermittent and bitter negotiations over the League's restrictions on free agency. An aborted League-wide strike during the 1974 pre-season was followed by a walk-out by isolated teams at the conclusion of pre-season play in 1975. The failure of other teams to join the walk-out left the union bitter and divided.¹¹⁵

Meanwhile, the union filed thirty-two unfair labor practice charges with the NLRB during this time. The Board issued a consolidated complaint and held a hearing on fifteen of the charges. The NFLPA alleged, *inter alia*, that management had refused to furnish bargaining information, had attempted to change terms of employment unilaterally, and had discharged players for union activity.¹¹⁶ In fact, virtually every union officer, as well as numerous player representatives and other players who actively and openly supported the union, was terminated or traded during the course of negotiations.¹¹⁷ These discharges, together with other management conduct, undoubtedly chilled union support.

By 1977, the NFLPA was experiencing serious financial problems and a significant erosion of support from its constituents. Management had stopped funding the players' pension, and a majority of players, convinced that the union was responsible for the inability of the parties to reach an agreement, refused to pay union dues.¹¹⁸ Under pressure from the players to reach an agreement and in the face of management's unwillingness to consider eliminating the condemned restraints,¹¹⁹ the NFLPA submitted to a five-year agreement containing a union security clause along with slightly modified versions of each of the judicially-condemned restraints.¹²⁰ These restraints, like their predecessors, limited players' mobility and depressed salaries.

The modifications of the Rozelle Rule in particular had virtually no impact on player mobility or salaries. Moreover, in one of the most significant setbacks in the history of the NFLPA, the NFLMC won the

115. For a brief history of events during this time period, see L. SOBEL, *supra* note 37, at 278-87; R. BERRY, *supra* note 98, at 126.

116. NFLMC and NFL Clubs and NFLPA, NLRB Case No. 2-CA-13379, June 30, 1976.

117. See *id.* at 55-64 (termination of NFLPA officers); L. SOBEL, *supra* note 37, at 285-86 (players active in union terminated during negotiations). It should be noted that other players may have been released during this period on account of their union activity. Because teams retain the unilateral right to make roster decisions, see *supra* note 86, discriminatory discharge is extremely difficult to establish within the context of professional sports. As a result, many other players, conceivably released for union activity during this time period, never filed unfair labor practice charges with the Board.

118. Garvey, *supra* note 103, at 334.

119. See generally L. SOBEL, *supra* note 37, at 278-87 (history of player actions during this time period).

120. 1977 Collective Bargaining Agreement between NFLMC and NFLPA, arts. IV, § 1, XII, XV (Mar. 1, 1977) (union security clause, NFL standard player contract, college draft, and right of first refusal/compensation, respectively) [hereinafter 1977 NFL Agreement].

infamous "section 17 dispute" at arbitration, giving individual teams perpetual rights to players under contract.¹²¹ As a result of the section 17 decision and the right of first refusal/compensation system contained in the 1977 collective bargaining agreement, only one player changed teams under the modified system between 1977 and 1982.¹²² When the players approached the bargaining table in 1982, they were, at least with respect to the restrictions on the movement of veteran free agents, in virtually the same position as they had been when preparing for negotiations in 1974.

2. *The Union's "Percentage of Gross" Plan.* The 1977 agreement expired on July 15, 1982.¹²³ Prior to negotiations for a new agreement, the NFLPA concluded that the system of individual salary negotiations, along with the right of first refusal/compensation provisions, had failed to provide adequate compensation for players.¹²⁴ Moreover, the union concluded that players would never obtain an equitable share of League revenues through individual salary negotiations, regardless of modifications of the right of first refusal/compensation provisions in the 1977 agreement. The League's system of revenue sharing simply eliminated any economic incentive for teams to bid on individual players.¹²⁵

121. Section 17 of article XV of the 1977 NFL Agreement provided that teams could retain the exclusive rights to a veteran free agent player who had not received an offer from another team merely by offering to re-sign that player at a salary equal to 110% of his previous year's salary. *Id.* art. XV, § 17. Arbitrator Dutton interpreted section 17 as granting teams the perpetual rights to re-sign veteran free agents at 110% of their prior salary. In effect, Dutton held that if teams failed to bid on each other's free agent players, teams could retain their own players indefinitely by paying them a 10% yearly salary increase. This interpretation created a perpetual reserve system.

122. *Powell v. NFL*, 678 F. Supp. 777, 780 (D. Minn. 1988). That player was Norm Thompson, who moved from the St. Louis Cardinals to the Baltimore Colts. *See supra* note 57.

123. 1977 NFL Agreement, *supra* note 120, art. XXXVI, § 2.

124. Affidavit of Richard A. Berthelsen at 19-20, submitted to the NLRB in support of Case No. 2-CCA-18923 (July 19, 1982) [hereinafter Berthelsen Affidavit II]. The reasons for the NFLPA's dissatisfaction with the system of individual salary negotiations are discussed in *WHY A PERCENTAGE OF GROSS?*, *supra* note 107. According to the NFLPA, League revenues in 1980 were approximately \$400,680,000. *Id.* at 8. League revenues in 1982 were predicted to increase significantly because of a new, five-year network television contract, which guaranteed each team approximately \$14,000,000 per year. *Id.* at 16. The previous network contract had guaranteed each team approximately \$6,000,000 per year. *Id.* at 11. The NFLPA predicted that the NFL would realize an even greater increase in revenues in the future from cable and pay television contracts. *Id.* at 16.

Despite this growth in League revenues, the percentage of gross revenues actually received by players had been declining steadily since 1967. In 1967, the NFLPA reported that the players received 67% of gross revenues. After the merger of the American Football League and the NFL, that percentage decreased to approximately 42% in 1972 and approximately 30% in 1980. *Id.* at 36. With the increase of League revenues from the 1982 network television contract, the union predicted that the players' percentage of gross would drop to approximately 20% in 1982 under the system of individual salary negotiations authorized by the 1977 Collective Bargaining Agreement. *Id.* at 47.

125. *See Boyle, supra* note 108, at 32 (owners have no economic incentive to sign free agents or pay established players more money); *see also supra* note 108.

In response to the NFLMC's position, the union adopted, as an alternative, a proposal guaranteeing the players a fixed percentage of League revenues.¹²⁶ NFLPA leaders proposed a wage scale under which revenues would be distributed to players on the basis of seniority and objective performance criteria.¹²⁷ The union adopted this "percentage of gross" proposal as its primary bargaining demand.¹²⁸ The owners, unalterably opposed to the percentage of gross plan, insisted upon a continuation of the system of individual player-team negotiations.¹²⁹

The negotiations between the NFLPA and the NFLMC were tense and unproductive, leading to a fifty-five day regular season strike.¹³⁰ The union filed eleven unfair labor practice charges during the negotiations. These charges generally involved management's bargaining tactics; in this respect, they were indistinguishable from the charges filed against employers in other industries or those filed against the NFLMC during the 1974-1977 negotiations.¹³¹ Two of the charges filed by the union, however, are particularly relevant to the owners' perpetuation of the right of first refusal/compensation restraints challenged in the current dispute.

3. *The NFLPA's Refusal to Bargain Charges.* On July 8, 1982, the NFLPA filed the first of two refusal-to-bargain charges against man-

126. Berthelsen Affidavit II, *supra* note 124, at 1-2; *see also* WHY A PERCENTAGE OF GROSS?, *supra* note 107, at 5. The NFLPA's initial demand was for 55% of League revenues. *Id.* at 35. The union did, however, indicate in another handout distributed to the players that the percentage figure was negotiable. NFLPA, PERCENTAGE OF GROSS: HOW IT WILL WORK 1 (1981) [hereinafter HOW IT WILL WORK].

127. WHY A PERCENTAGE OF GROSS?, *supra* note 107, at 48-50. Under the proposal, the NFL was to contribute a specific percentage of League revenues each month to a League-wide "NFL Players' Compensation Fund." The largest percentage of this fund was to be distributed to players through a wage scale based on seniority. Each player would receive a base salary calculated solely on his years of service in the League. HOW IT WILL WORK, *supra* note 126, at 2-3, 9.

128. Berthelsen Affidavit II, *supra* note 124, at 1-2. The players endorsed the proposal at the March 1982 NFLPA convention. HOW IT WILL WORK, *supra* note 126, at 2; *see also* WHY A PERCENTAGE OF GROSS?, *supra* note 107, at 3.

129. Berthelsen Affidavit II, *supra* note 124, at 15. For example, Jack Donlan, executive director for the NFL Management Council, referring to the percentage of gross demand, stated that "[the demand] is totally unacceptable to the owners, without regard to what the percentage is. You really equate a percentage with control, and when you get a percentage of anything you want to change things. The owners are not going to let the union run their business." Boyle, *supra* note 108, at 36.

130. For a detailed history of the 1982 negotiations between the NFLMC and NFLPA, *see* Lock, Section 10(j) of the National Labor Relations Act and the 1982 National Football League Players Strike, 1985 ARIZ. ST. L.J. 113 [hereinafter Section 10(j)], and Lock, Employer Unfair Labor Practices During the 1982 National Football League Strike: Help on the Way, 6 U. BRIDGEPORT L. REV. 189 (1985) [hereinafter Employer Unfair Labor Practices].

131. *See* Lock, Employer Unfair Labor Practices, *supra* note 130, at 226 Appendix A (listing unfair labor practice charges).

agement stemming from the 1982 negotiations.¹³² This charge contained eight allegations relating to management's conduct and was typical of most refusal-to-bargain charges. In connection with the charge, however, the union requested an injunction under section 10(j) of the NLRA to compel the owners to bargain in good faith and, in addition, hoped to obtain an order declaring the exclusive rights provisions in the individual player contracts voidable.¹³³ Paragraphs 2 and 3 of the standard NFL player contract, the exclusive rights provisions, prohibit players from participating in non-League sponsored football-related activities.¹³⁴ The enforceability of these provisions became the most critical issue during the 1982 negotiations.

Notwithstanding paragraphs 2 and 3 of the standard player contract, the NFLPA planned a series of non-League-sponsored all-star games to generate income for the players during the strike.¹³⁵ Prior to the first scheduled all-star game, individual teams sent letters to their players threatening legal action against those participating in any of the games.¹³⁶ While the NLRB was considering the July 9 refusal-to-bargain charge and the related requests for injunctive and declaratory relief, the union waged a little publicized, but highly significant, battle in the District of Columbia District Court and the Court of Appeals. This battle

132. NLRB Case No. 2-CA-18923.

133. See *Lock*, Section 10(j), *supra* note 130, at 121. Section 10(j) of the NLRA authorizes the NLRB to seek injunctive relief in situations in which it issues an unfair labor practice complaint. 29 U.S.C. § 160(j) (1982). The NFLPA repeatedly asked the NLRB General Counsel to seek section 10(j) relief. Telephone interview with Tim English, NFLPA staff attorney and former NLRB staff attorney (Sept. 10, 1983).

134. Paragraphs 2 and 3 of the NFL Player Contract (rev. 1982) provide:

2. **EMPLOYMENT AND SERVICES.** Club employs Player as a skilled football player. Player accepts such employment. He agrees to give his best efforts and loyalty to the Club, and to conduct himself on and off the field with appropriate recognition of fact that the success of professional football depends largely on public respect for and approval of those associated with the game. Player will report promptly for and participate fully in Club's official pre-season training camp, all Club meeting and practice sessions, and all pre-season, regular-season and post-season football games scheduled for and by Club. If invited, player will practice for and play in any all-star football game sponsored by the League. Player will not participate in any football game not sponsored by the League.

3. **OTHER ACTIVITIES.** Without prior written consent of Club, Player will not play football or engage in activities related to football otherwise than for Club or engage in any activity other than football which may involve significant risk of personal injury. Player represents that he has special, exceptional and unique knowledge, skill, ability, and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages. Player, therefore, agrees that Club will have the right, in addition to any other right which Club may possess, to enjoin Player by appropriate proceedings from playing football or engaging in football-related activities other than for Club or from engaging in any activity other than football which may involve a significant risk of personal injury.

135. See Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 8-9, *NFLPA v. NFL*, No. 82-2728 (D.D.C. Sept. 23, 1982).

136. Telephone interview with Tim English, NFLPA staff attorney and former NLRB staff attorney (Sept. 10, 1983).

concerned the players' right to participate in the all-star games and thus earn a living during the strike. As much as any other single factor, this legal battle determined the outcome of the 1982 negotiations and the substantive terms of the 1982 agreement.

The NFLPA petitioned the district court to declare the exclusive rights provisions of the standard player contract unenforceable during the period in which no collective bargaining agreement was in effect or during the pendency of the strike.¹³⁷ Anticipating a rash of lawsuits in state courts by individual teams, the NFLPA also asked the court to enjoin individual teams from proceeding in state courts to prevent NFLPA members from participating in the union-sponsored all-star games.¹³⁸ The union had neither the resources nor the time to litigate each potential challenge and realized that such a strategy by the owners would effectively prevent the all-star games from being played.¹³⁹

On October 6, 1982, the district court denied the NFLPA's motion for declaratory judgment on the enforceability of the exclusive rights provisions.¹⁴⁰ The court stated that outstanding issues of fact prevented a preliminary decision on the merits of the case. The court did, however, enjoin the owners from pursuing actions in other courts.¹⁴¹ The NFLPA would suffer irreparable harm if forced to defend multiple actions, the court reasoned, and the League would not, according to the court, be prejudiced by being required to present its arguments in one court.

The union, encouraged by the district court's order, proceeded with its plans for the games. Two all-star games were played, the first on October 17, in Washington D.C.,¹⁴² and the second in Los Angeles on October 18, 1982.¹⁴³ The games proved that the union could promote its own contests. For a brief period, the balance of power appeared to shift dramatically.

137. See Complaint for Declaratory and Injunctive Relief, *NFLPA v. NFL*, No. 82-2728 (D.D.C. Sept. 23, 1982).

138. See *NFLPA v. NFL*, No. 82-2728, slip op. at 4 (D.D.C. Oct. 6, 1982).

139. Telephone interview with Tim English, NFLPA staff attorney and former NLRB staff attorney (Sept. 10, 1983).

140. See *NFLPA v. NFL*, No. 82-2728, slip op. at 3-4 (D.D.C. Oct. 6, 1982).

141. *Id.* The order acknowledged that federal courts are ordinarily reluctant to enjoin future state proceedings where such action interferes with state sovereignty. Nonetheless, the court reasoned that state interests were minimally involved, because its decision was intended to protect the federally created right to strike. *Id.* The court added that the interests of efficiency, uniformity, and most importantly, equity supported an order requiring that the dispute be decided in one forum. *Id.*

142. Attner, *Close Friends, Few Others See Mosley Win Game in RFK*, Wash. Post, Oct. 18, 1982, § D, at 1, col. 2.

143. Greenberg, *Only the Lonely Were at Coliseum: Some 3,000 Gather to See AFC Beat the NFC*, 31-27, L.A. Times, Oct. 19, 1982, § III, at 2, col. 1.

The players' optimism, though, was short lived. The League immediately appealed and, prior to the third scheduled all-star game, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's order without issuing a written opinion.¹⁴⁴ No additional games were played.

The NFLPA's overtures to the NLRB also were unsuccessful. On October 29, 1982, five weeks into the strike, the NLRB finally issued a consolidated complaint joining four unfair labor practice charges filed by the union, including the July 9 refusal-to-bargain charge.¹⁴⁵ On November 11, during the eighth week of the strike, the General Counsel finally submitted to the Board a section 10(j) request. The Board, however, decided not to seek section 10(j) relief. The strike ended on November 16, the day after the Board rejected the General Counsel's request.¹⁴⁶ On December 11, 1982, the July 9 refusal-to-bargain charge, along with seven other charges, was withdrawn under the terms of a settlement agreement negotiated between the NFL and NFLPA in conjunction with the 1982 agreement.¹⁴⁷

The Board's decision, coupled with the earlier ruling by the D.C. Circuit, effectively prevented player participation in the all-star games and severely impaired the union's bargaining position during negotiations. The "percentage of gross" proposal was rejected by management. Moreover, the five-year agreement ultimately executed by the parties contained the same right of first refusal/compensation system, with minor modifications, that was contained in the 1977 agreement.¹⁴⁸

4. *Exclusive Representation and Individual Contract Negotiations.* One other unfair labor practice charge significantly affected the evolution and perpetuation of the restraints challenged in the current dispute. On September 20, 1982, the day the NFLPA executive committee voted to strike, the NFLPA filed the second of its two refusal-to-bargain charges against management during the 1982 negotiations.¹⁴⁹ This charge, unlike the other ten charges, involved the substance of the negotiations.

144. *NFL v. NFLPA*, No. 82-2200 (D.C. Cir. filed Oct. 8, 1982) (unreported).

145. See Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, NLRB Cases Nos. 2-CA-18923, 2-CA-18995, 2-CA-19104, 2-CA19104-2 (Oct. 29, 1982).

146. See Lock, *Section 10(j)*, *supra* note 130, at 138.

147. On December 11, 1982, the same day the 1982 NFL Collective Bargaining Agreement was executed, Jack Donlan and Ed Garvey signed, on behalf of the NFLMC and NFLPA, a document entitled Settlement Agreement for the Purposes of Resolving Nine Unfair Labor Practice Charges Filed by the NFLPA Against the NFLMC During the Negotiations.

148. 1982 Collective Bargaining Agreement, *supra* note 3, art. XV.

149. NLRB Case No. 2-CA-19104-2.

The primary dispute in 1982 concerned the method by which wages were going to be determined for a group of employees who had chosen to be represented by an exclusive bargaining representative.¹⁵⁰ The owners wanted to set wages through individual employer-employee negotiations. The union wanted to establish a wage scale patterned after the typical industrial model, based on seniority and objective merit criteria.¹⁵¹

During the negotiations for the 1982 agreement, the NFLPA informed the NFLMC that the union no longer waived its right to represent players in salary negotiations above the minimum.¹⁵² In other words, the union rejected the extraordinary system voluntarily agreed to in the past,¹⁵³ in favor of the type of system prescribed by the NLRA.¹⁵⁴ The right of first refusal/compensation system demanded by management incorporated individual player-team contract negotiations. In fact, the League's system could not operate in the absence of direct negotiations.¹⁵⁵ Thus, the owners were in effect demanding the continuation of such negotiations.

Individual employee-employer negotiations are not prescribed by the National Labor Relations Act. Rather, the Act mandates that every employer has an obligation to bargain with the exclusive representative of its employees over mandatory subjects of collective bargaining.¹⁵⁶ The very purpose of collective bargaining is to supersede the terms of separate agreements with individual employees in favor of terms that reflect the group's strength and bargaining power and serve its interests. The freedom to contract individually is sacrificed for the good of the group, even by employees who could secure better bargains for themselves than did the union.¹⁵⁷ The NFLPA alleged in the September 20 charge that the owners' insistence on a system of individual salary negotiations constituted a refusal to bargain collectively with the union over wages and, therefore, violated the principle of exclusive representation.¹⁵⁸

The Board included this charge in the consolidated complaint issued

150. Berthelsen Affidavit II, *supra* note 124, at 15.

151. *See supra* notes 123-31 and accompanying text.

152. Berthelsen Affidavit II, *supra* note 124, at 1.

153. *E.g.*, 1977 NFL Agreement, *supra* note 120, art. XXII, § 8.

154. 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .").

155. 1977 NFL Agreement, *supra* note 120, art. XV; *see also infra* notes 305-08 and accompanying text.

156. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944).

157. *Id.*

158. NLRB Case No. 2-CA-19104-2.

on October 29, 1982, but failed to set a hearing date.¹⁵⁹ Since the NFLPA was on strike, the Board apparently preferred that the parties devote their time and energy to resolving the underlying dispute rather than preparing for a hearing on an isolated unfair labor practice charge. On December 11, the charge, like the July 9 refusal-to-bargain charge, was withdrawn under the terms of the NFLMC-NFLPA settlement agreement.¹⁶⁰ The 1982 agreement authorized individual player-team salary negotiations.¹⁶¹

5. *Negotiations for the New Agreement.* As it approached negotiations for a new agreement in 1987, the NFLPA decided, as it had in 1974, to seek elimination of the restrictions on free agency.¹⁶² Management, however, refused to eliminate these restrictions. As in 1982, the NFLPA struck at the conclusion of the second week of league play.¹⁶³ Two weeks later, after cancelling just one week of regular season play, the owners scheduled—and the networks televised—games between NFL clubs composed mostly of players who had been released prior to the start of the 1987 season.¹⁶⁴ By the second week of the strike, players began to cross picket lines. Three “scab games” were played before the strike fell apart and the players voted to return to work.¹⁶⁵ The NFLPA subsequently commenced its current antitrust suit against the owners.

On December 30, 1987, a federal district court in Minnesota heard the players’ motion to preliminarily enjoin the owners from continuing to enforce the right of first refusal/compensation provisions in the expired 1982 collective bargaining agreement. The court also heard a request by the owners that those same provisions be declared immune from antitrust attack. In response, the court held that the provisions were immunized until they became an issue over which the parties bargained to impasse.¹⁶⁶ A pending refusal-to-bargain charge against the union, however, prevented the court from determining at that time the presence or

159. See Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, NLRB Cases Nos. 2-CA-18923, 2-CA-18995, 2-CA-19104, 2-CA-19104-2 (Oct. 29, 1982).

160. See *supra* note 147.

161. See 1982 Collective Bargaining Agreement, *supra* note 3, art. XXII, § 2.

162. See NFLPA, GAME PLAN ‘87, at 5 (1986) (NFLPA publication for its members outlining its 1987 bargaining demands).

163. Eskeraz, *Management Planning to Resume Play Using Substitutes*, N.Y. Times, Sept. 22, 1987, § 1, at 1, col. 3.

164. Janofsky, *Sparse Crowds, Heavy Picketing at NFL Games*, N.Y. Times, Oct. 5, 1987, § 1, at 1, col. 1.

165. Janofsky, *No Bargaining Accord—Antitrust Suit Filed Against Club Owners*, N.Y. Times, Oct. 16, 1987, § 1, at 1, col. 1.

166. *Powell v. NFL*, 678 F. Supp. 777, 789 (D. Minn. 1988); see also *infra* note 187 and accompanying text.

absence of impasse.¹⁶⁷

On April 28, 1988, the Board dismissed the refusal-to-bargain charge¹⁶⁸ and the players renewed their motion for preliminary relief pending resolution on the merits. On July 11, 1988, the court concluded that the parties had reached impasse but denied the players' motion for preliminary relief.¹⁶⁹ The district court, in response to a December 2, 1988 request by the NFLPA for a trial date, scheduled the trial on the merits for November 13, 1989. Meanwhile, the players completed the 1988 season under the terms of the 1982 agreement.

Although the League continued to enforce the expired 1982 agreement during the 1987 and 1988 seasons and, on February 1, 1989, unilaterally implemented a modified version of the 1982 agreement, management has revoked article IV of that agreement, the union security clause.¹⁷⁰ The ongoing dispute, as well as the Minnesota court's failure to grant preliminary relief, has undoubtedly dampened the players' support for the union and its demands. The 1987 strike, which lasted for four weeks, cost the players approximately 25% of their 1987 salaries. In addition, virtually all of those players who had become free agents after the 1987 season and had waited, on the union's advice, to sign 1988 contracts until after the court's ruling on the motion for preliminary relief, lost their leverage in individual negotiations on July 11, 1988, days before the start of training camp. Not surprisingly, a significant number of players are not paying union dues, and the union has been forced to secure a loan to survive the ultimate resolution of the present dispute.¹⁷¹

On January 6, 1989, the district court filed a memorandum and opinion granting a motion by the NFLMC for interlocutory appeal on the legal question of when the labor exemption expires.¹⁷² The district court amended its January 29, 1988 order to certify the question of whether, and to what extent, the labor exemption protects defendants from antitrust liability, for interlocutory appeal.¹⁷³ Under the statutory requirement, the party seeking the appeal must file a petition in the circuit court within ten days of the district court's order.¹⁷⁴ Although the NFLMC failed to file a petition within ten days of the district court's

167. *Id.*; see also NLRB Case No. 2-CB-12117.

168. NLRB Memorandum, Case No. 2-CB-12117.

169. *Powell v. NFL*, 690 F. Supp. 812, 818 (D. Minn. 1988).

170. See 1982 Collective Bargaining Agreement, *supra* note 3, art. IV (union security clause).

171. Telephone interview with Tom DePaso, NFLPA staff attorney and former NLRB staff attorney (Sept. 7, 1989).

172. *Powell v. NFL*, 711 F. Supp. 959 (D. Minn. 1989).

173. *Id.* at 964-65; see also *Powell*, 678 F. Supp. 777 (D. Minn. 1988) (contains Jan. 29, 1988 order).

174. 28 U.S.C. § 1292(b) (1982).

order, the court granted the NFLMC's motion for recertification on February 16, 1989.¹⁷⁵ The NFLMC then filed a petition to permit interlocutory appeal with the court of appeals. Without ruling on the NFLPA's motion to dismiss for lack of jurisdiction, the Eighth Circuit granted management's petition on February 24, 1989.¹⁷⁶ Accordingly, the Eighth Circuit heard arguments on the district court's ruling regarding the expiration of the labor exemption on May 12, 1989.

C. *Recent District Court Rulings on Application of the Labor Exemption*

1. *The NBPA Suit.* The recent NBA-NBPA dispute, like the NFL-NFLPA dispute, involved an antitrust challenge by the players' association to terms in an expired collective bargaining agreement. The 1983 NBA collective bargaining agreement expired on June 14, 1987.¹⁷⁷ After negotiations between the parties failed to produce a new agreement, the NBPA filed an antitrust suit challenging several of the NBA's restrictions on player mobility and salaries. Both parties filed motions seeking a preliminary ruling on the issue of whether the labor exemption continued to shield the restraints from antitrust attack after the expiration of the agreement.¹⁷⁸ Thus, the legal issue in the NBA case mirrors the legal issue in the NFL dispute.

The federal district court in New Jersey recognized that the purpose of the nonstatutory labor exemption is to balance competing antitrust and labor policies. In other words, the court determined that application of the exemption turned on whether labor policy encouraging collective bargaining deserved preeminence over antitrust policies promoting free competition under the circumstances of a particular case.¹⁷⁹ The court concluded that the balance tipped in favor of the labor laws, and thus the application of the exemption was appropriate, in cases where the exemption fostered rather than impeded collective bargaining.¹⁸⁰

175. Motion of Defendants for Recertification, *Powell*, 711 F. Supp. 959 (D. Minn. Feb. 3, 1989), (No. 4-87-917), *granted id.* (unpublished opinion).

176. Petition for Permission to Appeal and Memorandum in Support of Petition, *Powell* (No. 89-5091), *granted* (8th Cir. Feb. 24, 1989).

177. *See supra* notes 1-2 and accompanying text.

178. *See* Plaintiffs' Memorandum of Law In Support of Motion For Partial Summary Judgment and Declaratory Relief, *Bridgeman v. NBA*, 675 F. Supp. 960 (D.N.J. Oct. 1, 1987) (No. 87-4189); Defendants' Memorandum In Opposition to Plaintiffs' Motion For Partial Summary Judgment and in Support of Defendants' Cross-Motions For Summary Judgment Dismissing the Complaint And For Joinder of the NBA As a Party, *id.* (Nov. 23, 1987).

179. *Bridgeman*, 675 F. Supp. at 964-65.

180. *Id.* at 965-66. The court indicated that the exemption encouraged collective bargaining by immunizing "only those practices that were included in a collective bargaining agreement after being subject to arm's-length bargaining[.]" *Id.*

After analyzing each of the labor exemption tests proposed by the League and the union, the district court concluded that none of the proposed tests fostered collective bargaining. The court rejected the owners' arguments that federal labor law automatically overrides federal antitrust law, or that the antitrust laws do not reach labor market restraints.¹⁸¹ The court also rejected the players' argument that the exemption expired the moment the agreement expired,¹⁸² as well as the players' alternate argument that the exemption expired upon impasse.¹⁸³

After rejecting the parties' proposed tests, the court determined that the end point of the labor exemption occurred the moment the exemption no longer fostered collective bargaining.¹⁸⁴ Accordingly, the court concluded that the exemption survives only as long as the employer continues to impose the restriction unchanged¹⁸⁵ and reasonably believes that the practice or some variant will be incorporated in the next agreement. When the employer no longer reasonably believes the restraint will continue, the restraint is no longer the product of arm's-length bargaining and is subject to antitrust challenge.¹⁸⁶ This point may occur before, during, or after impasse. Some facts may be relevant both to questions

181. *Id.* at 964-65. Immunization of the challenged restraints for an indefinite time would, according to the court, discourage collective bargaining; unions would be reluctant to enter into an agreement if doing so would preclude them from invoking their rights under the antitrust laws. *Id.* at 966.

182. This proposition, according to the court, was unrealistic in light of an employer's obligation to maintain the status quo after an agreement's expiration. *Id.* at 965. The proposition was also inconsistent with the bargaining history between the parties. During interim periods between collective bargaining agreements, the NBA had historically maintained the status quo with respect to provisions contained in an expired agreement. Ultimately, these provisions were reincorporated in a new agreement. The court reasoned that it would be anomalous to immunize the restraints during the agreement, remove the exemption during the interim period between agreements, and re-immunize the restraints under the new agreement. *Id.* at 966. Moreover, the simultaneous expiration of the agreement and exemption also would inhibit the bargaining process. Employers would be reluctant to agree on certain provisions under any circumstances for fear that they would be subsequently exposed to antitrust liability. *Id.*

183. *Id.* at 966-67.

184. *Id.* at 967.

185. The test imposed by the New Jersey district court requires that the employer, in order to perpetuate the exemption, maintain the status quo. Under this test, then, the NFLMC presumably would have lost the exemption, if the exemption had not already expired, when it implemented its new free agency system on February 1, 1989. *See supra* notes 46-54 and accompanying text.

186. *Id.* at 967. Although the court acknowledged that no prior cases addressed the issue in a case involving an expired agreement, it noted that previous courts had typically applied the nonstatutory exemption to immunize restraints to which the parties had agreed. *Id.* at 965 (citing *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197 n.7 (6th Cir. 1979); *Mackey v. NFL*, 543 F.2d 606, 616-18 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); *Smith v. Pro Football, Inc.*, 420 F. Supp. 738, 742 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); *Robertson v. NBA*, 389 F. Supp. 867, 886-89 (S.D.N.Y. 1975)). The court reconciled this observation with the underlying purpose of the labor laws, to foster collective bargaining, and consequently with the appropriate application of the labor exemption. Immunizing only those practices included in an

involving impasse and questions involving application of the labor exemption. Nonetheless, the court posited that the presence of impasse and the scope of the labor exemption were distinct issues.¹⁸⁷ More specifically, the court recognized that impasse is a labor law concept, one not developed to deal with the unique intersection of labor and antitrust law.¹⁸⁸

The court's test poses several problems. First, the abstract nature of the test makes it difficult and impractical to apply. A court will have trouble accurately determining the point when an employer no longer reasonably believes that the restraint will be reincorporated into a new agreement. To identify this moment, a court must rely, at least in part, upon an employer's assertions, even though that employer has an interest in maintaining that she had a reasonable belief that the provision would be incorporated after that belief actually ceased.

Admittedly, this problem is a familiar one for courts who routinely administer reasonable-person tests. More significant is the second criticism of the court's test. Assuming the relevant moment could be identified, it is unclear why the employer's belief or impressions concerning the likelihood of the continuation of the restraint should be controlling. Why should the court tie its test to the employer's perceptions of the negotiations? Why should the matter not be settled by the union's belief? The employer's perceptions are derivative; they depend upon the union's position and perception. Under the court's test, the exemption expires not at the point in time when the union decides that the restraint will no longer be continued, but rather when the union convinces the employer that the restraint will no longer be continued. The court offers no explanation why this point is more appropriate than the actual point when the union concludes that the restraint will no longer be continued.

Third, the court's test no more serves to promote collective bargaining than the tests proposed by the parties. The union has no more incentive to bargain in good faith under the court's test than under its own proposed test of immediate expiration. Whatever test or endpoint is adopted, the players arguably will have the same incentive to do whatever is necessary, including adopting an intractable position at the bargaining table, to reach that point.

agreement after arm's-length negotiations prevented unilateral imposition of unagreed upon terms and thus encouraged good faith bargaining. *Bridgeman* at 965.

187. The court noted that impasse occurs when the entire bargaining process stops. Thus, particular provisions in the expired agreement might have been rejected prior to impasse. At the same time, impasse is not equivalent to cessation of negotiations. Impasses may be resolved, and challenged provisions may ultimately be included in a new agreement. *Bridgeman* at 966-67.

188. *Id.*

Fourth, the court's test fails to consider the nature of the parties' bargaining relationship. As a result, this test is a potential weapon for the stronger party. The outcome of prior bargaining in the NFL illustrates this point.

As the NFLPA approached the bargaining table in 1977, it had played three seasons with no agreement, struck twice and won a series of four antitrust suits. All of these actions concerned free agency—the very issue at stake in the current dispute.¹⁸⁹ Despite the union's unequivocal rejection of the owners' restrictions on free agency, the NFLMC undoubtedly approached the bargaining table in 1977 with a reasonable belief that the restrictions on free agency would be incorporated into a new agreement. The owners' reasonable belief proved accurate. Because of the mismatch in bargaining power, the owners simply outlasted the union.¹⁹⁰ A similar result is likely to occur in the current dispute. The NFL undoubtedly believes it will eventually prevail upon the NFLPA to include the challenged restraints in a new agreement, despite the union's resistance. The court's test, then, could effectively result in the indefinite immunization of the challenged restraints.

Fifth, the test ignores the distinction between the labor exemption and the status quo doctrine, a doctrine under federal labor law that requires an employer to maintain provisions in an expired collective bargaining agreement.¹⁹¹ Ironically, the court recognized a similar distinction between the labor exemption and impasse. The court concluded that impasse is a labor concept, rather than a concept intended to accommodate the intersection of antitrust and labor law.¹⁹² Inconsistently, however, the court rejected the argument for simultaneous expiration of the agreement and the exemption, concluding that simultaneous expiration was inconsistent with the status quo doctrine.¹⁹³

In concluding that the status quo doctrine eliminated the possibility of immediate expiration of the exemption, the court failed to recognize that the policies under the NLRA were only one of two factors to be considered in disputes involving the scope of the labor exemption. Thus,

189. The collective bargaining agreement executed in 1977 contained significant restrictions on free agency. See 1977 Collective Bargaining Agreement art. XV.

190. In the past, management always has been able to outlast the union until enough players have become both impatient and dissatisfied with the union. Convinced that the union's demands are unrealistic, undesirable, or simply unattainable because management will never agree to them under any circumstances, the players have yielded in past confrontations. See *supra* notes 115, 162-65 and accompanying text.

191. *E.g.*, *NLRB v. Cauthrone*, 691 F.2d 1023, 1025 (D.C. Cir. 1982).

192. *Bridgeman v. NBA*, 675 F. Supp. 960, 965-67 (D.N.J. 1987); see also *supra* notes 186-88 and accompanying text.

193. 675 F. Supp. at 965-67.

the court failed to accommodate competing antitrust and labor policies. Further, the status quo doctrine is a labor law doctrine; it has nothing to do with the antitrust laws. Like impasse, it is not determinative of the scope of the labor exemption. The court simply failed to distinguish between a labor doctrine involving the continuation of provisions in an expired agreement and the scope of a waiver, adopted in the underlying agreement, of a party's rights under the antitrust laws once the agreement has expired.

2. *The NFLPA Suit.* Like its counterpart in New Jersey, the district court in Minnesota rejected each of the tests proposed by the parties. The court rejected the owners' arguments that the challenged restraints were automatically immunized from antitrust attack¹⁹⁴ or that the status quo doctrine justified indefinite immunization of terms in an expired agreement.¹⁹⁵ The court also rejected the players' argument that the exemption expires when the union makes unequivocally clear that it will no longer consent to a continuation of the challenged provision.¹⁹⁶ Finally, the court rejected the test adopted by the New Jersey district court.¹⁹⁷

194. *Powell v. NFL*, 678 F. Supp. 777, 788 (D. Minn. 1988). The court found no basis for absolute and indefinite immunity merely because the challenged restraints involved mandatory subjects of bargaining or because of the existence of the collective bargaining relationship. The court recognized that the purpose of the labor exemption was to accommodate competing antitrust and labor policies. *Id.* at 782 (citing *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-22 (1975); *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965)). Absolute immunity would subvert completely federal antitrust law rather than strike the proper balance between competing federal labor and antitrust policies. *Powell*, 678 F. Supp. at 783.

195. The court concluded that the exemption must survive the agreement in order to foster collective bargaining. *Id.* at 785 (quoting *Laborers Health & Welfare Trust Fund v. Advance Light Weight Concrete Co.*, 779 F.2d 497, 500 (9th Cir. 1985), *aff'd*, 108 S. Ct. 830 (1988)). However, it rejected the argument that prior approval immunized the restraint indefinitely. Indefinite immunity would accord greater longevity to illegal provisions than to lawful ones, which expire upon impasse. 678 F. Supp. at 788. The court therefore declined to extend "indefinite, blanket protection" to union-employer agreements. *Id.* at 783.

196. *Id.* at 786. Such a test, reasoned the court, would invite the union to make it "unequivocally clear" at the earliest possible moment that it no longer consents to a particular provision. The employer then would be subject to potential antitrust liability the moment the agreement expired, a result the court felt would impede, rather than foster, the collective bargaining process. *Id.* at 787. The court also indicated that the union's test disregarded, and was inconsistent with, an employer's obligation to maintain the status quo until impasse. The court could not endorse a test under which an employer could be charged with committing an unfair labor practice if the employer unilaterally liberalized player restraints to avoid antitrust liability following the expiration of the agreement. *Id.*

197. The court rejected the New Jersey court's test for the same reason it rejected the union's proposed test. The players would have the same incentive to "furnish the requisite indicia of disaffection and unwillingness to bargain" in order to establish either that the employer could no longer reasonably believe the restraint would continue, or that it had unequivocally indicated that it no longer consented to the restraint. *Id.*

Instead, the court held that the labor exemption survives the agreement until the parties reach an impasse concerning the challenged restraint. Thereafter, the restraint no longer warrants immunity from antitrust attack. According to the court, this test promotes good faith bargaining after the expiration of the agreement and, therefore, strikes an appropriate balance between competing antitrust and labor policies.¹⁹⁸

The court's use of impasse stands out as a convenient compromise of the parties' positions on the moment at which the labor exemption appropriately expires. Despite the Minnesota district court's assertions to the contrary,¹⁹⁹ however, its test does not promote collective bargaining any more than the other proposed tests. Nothing in the court's opinion suggests that the union, under the impasse test, has any incentive not to attempt to cause impasse at the earliest moment in the negotiations. To maximize its leverage, the union presumably would want to reach the moment when the exemption expires whether that moment was at impasse or upon the unequivocal withdrawal of consent.

Ironically, the Minnesota district court, preoccupied with the status quo doctrine, flatly rejected one test that would likely foster collective bargaining.²⁰⁰ If the exemption expires with the agreement and the employer must negotiate union consent for continued immunization, the employer must decide either to bargain over or to eliminate the restraint. Although a restraint may be illegal, the employer can immunize it through negotiations. It follows that an employer who believes that the restraint is desirable has a true incentive to bargain.

Moreover, the Minnesota district court's test raises the possibility that the NLRB will be drawn into disputes through an ancillary unfair labor practice charge.²⁰¹ Because of the NLRB's procedures, the Board's involvement in any dispute will likely delay the resolution of that dispute.²⁰² This is precisely what happened in the current NFLPA-NFL antitrust suit.

By the end of December 1987, when the Minnesota district court heard oral arguments on various motions in the NFLPA-NFL dispute, the NFL already had filed a refusal-to-bargain charge with the Board

198. *Id.* at 788-89.

199. *Id.* at 789.

200. *See id.* at 784-85 (rejecting test that labor exemption expires with the agreement).

201. *See Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 641 F.2d 90, 94-95 (3d Cir.) (when labor law issue before district court is also pending before NLRB, court should defer to the Board for resolution of such questions), *petition for writ of mandamus and prohibition denied*, 451 U.S. 905 (1981).

202. *See Lock, Employer Unfair Labor Practices*, *supra* note 130, at 190-98 (discussing the complexity of NLRB proceedings and the likelihood of substantial delays).

against the NFLPA.²⁰³ The charge, if meritorious, would have precluded a finding that the parties had reached impasse, since impasse requires that the parties through good faith bargaining have reached a deadlock in negotiations.²⁰⁴ Since the refusal-to-bargain charge was still pending, the resolution of the antitrust dispute was delayed.

Within the context of professional sports, the type of delay caused by a pending refusal-to-bargain charge produces a situation that will be difficult to remedy should the union ultimately prevail in its lawsuit. The standard NFL player contract expires annually on February 1.²⁰⁵ Approximately 450 NFL players were not under contract for the 1988 season and consequently were free agents as of February 1, 1988.²⁰⁶ Absent a pre-season strike, NFL players report to training camp in July to prepare for the upcoming season. Signing a standard NFL player contract is a prerequisite to participating in pre-season practice. Accordingly, as training camp approached in 1988, more and more of those 450 veteran free agents signed new contracts under the right of first refusal/compensation system contained in the expired 1982 agreement. Should the Minnesota district court subsequently conclude that the labor exemption had expired on or about February 1, 1988, it will have a difficult task trying to determine what salaries those players would have received in an open market. Thus, the Board's involvement and attendant delay remains critical to the equitable resolution of the current antitrust dispute.

3. *Analysis of Both Tests.* Although the Minnesota district court's test is functionally distinguishable from the test adopted by the New Jersey district court, the two tests are based in part on the same legal premise. Both courts concluded that the status quo doctrine was relevant to the scope of the labor exemption. Moreover, both courts failed to distinguish between a labor law principle which mandates the survival of terms in an expired agreement and an exemption which is designed to accommodate competing antitrust and labor policies. As a result, each court concluded that the simultaneous expiration of the agreement and exemption was inconsistent with the employer's obligation to maintain the status quo.²⁰⁷

203. NLRB Case No. 2-CB-12117.

204. *Powell v. NFL*, 678 F. Supp. 777, 784 (D. Minn. 1988) (nonstatutory labor exemption continues until parties reach impasse after good faith bargaining); *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967) (where genuine impasse existed, employer could unilaterally institute his proposed changes), *enforced sub nom.* *American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). *See also* *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 65 (1964) (after impasse and strike an employer may unilaterally implement proposed benefits as new employment terms).

205. *See* NFL Player Contract ¶ 1 (rev. 1982).

206. *Powell*, 678 F. Supp. at 781.

207. *Id.* at 784-85; *Bridgeham v. NBA*, 675 F. Supp. 960, 965 (D.N.J. 1987).

In reaching its conclusion, the Minnesota district court expressly refused to adopt a rule that it believed would expose an employer to immediate antitrust liability for maintaining the status quo.²⁰⁸ This concern is not valid. An employer should be exposed to antitrust liability for continuing to enforce a provision that violates the Sherman Act if the union has ceased to consent to that provision. Such a provision is immunized *only* by the union's consent.²⁰⁹ Once that consent is withdrawn, the employer should not be able to hide behind a labor law principle requiring it to maintain the status quo. The underlying purpose of the status quo doctrine is to foster collective bargaining.²¹⁰ If the union no longer desires the challenged provision, elimination of that provision should not violate the status quo doctrine.

Both courts suggested that subjecting an employer to "instant" or "immediate" antitrust liability for maintaining a provision that the employer is obligated to maintain under the status quo doctrine would be inequitable.²¹¹ This concern, though, ignores the practical aspects of professional sports. The professional sports industry is one of the few industries in which individual and collective bargaining exist side by side.²¹² Because expiration of individual player contracts is not likely to coincide with expiration of the collective agreement, withdrawal of the labor exemption will not generally result in immediate antitrust liability for employers.

Individual NFL contracts expire on February 1 of each year,²¹³ while the 1977 collective bargaining agreement expired on July 15, 1982,²¹⁴ and the 1982 agreement expired on August 31, 1987.²¹⁵ In each instance, virtually every NFL player remained under contract at the time the collective bargaining agreement expired. Clearly, NFL owners were not exposed to significant antitrust liability between July 15, 1982 and

208. *Powell*, 678 F. Supp. at 785.

209. *See, e.g., Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); *see also California State Council of Carpenters v. Associated General Contractors*, 648 F.2d 527, 536 (9th Cir. 1980) ("the nonstatutory exemption may be invoked only in cases involving agreements between unions and employers on wages or working conditions"), *rev'd on other grounds*, 459 U.S. 519 (1983).

210. R. GORMAN, *supra* note 66, at 450-51, 463-64.

211. *Powell*, 678 F. Supp. at 786; *Bridgeman*, 675 F. Supp. at 965.

212. Players' associations historically have waived their rights to negotiate salaries above minimums established through collective bargaining, thereby permitting individual player-team salary negotiations. *See, e.g., 1982 Collective Bargaining Agreement, supra* note 3, art. XXII.

213. NFL Player Contract ¶ 1.

214. 1977 NFL Agreement, *supra* note 120, art. XXXVI.

215. 1982 Collective Bargaining Agreement, *supra* note 3, art. XXXVIII.

February 1, 1983, or between August 31, 1987 and February 1, 1988.²¹⁶ Although each year a number of NFL players become free agents on February 1, few players sign new contracts prior to, on, or even soon after that date. Consequently, the owners' potential risk of antitrust liability would begin after February 1 and increase as training camp approaches and more players sign contracts under the challenged system.

In the current dispute, the time period preceding the expiration of the agreement through sometime after the following February 1 offered the parties an opportunity to reach an agreement without raising antitrust concerns. Their inability to reach an agreement during that period suggests that the labor exemption, under either of the district courts' tests, expired prior to termination of the individual player contracts on February 1. Although the negotiations had completely stalled long before the following February 1, the owners faced no significant antitrust liability until after that date.²¹⁷

The Minnesota district court also alluded to the "catch 22" implications for an employer who decided to ignore the significance of the status quo doctrine. The employer could liberalize a rule in an effort to avoid antitrust liability and conceivably violate the unfair labor practice provisions of the NLRA for doing so.²¹⁸ This concern also has no merit.

An employer should be charged with committing an unfair labor practice for unilaterally liberalizing challenged restraints following the expiration of the agreement. The issue of liability for unilateral changes in working conditions, however, has nothing to do with the simultaneous expiration of the agreement and the exemption. Unilateral liberalization of a challenged restraint is the exact type of unilateral change in working conditions precluded by the status quo doctrine. Such a change would notify employees that the employer will not deal with the union, that the employees do not need the union, or that the employees can do better without the union. Clearly, such a change would undermine the union's

216. NFL Player Contract ¶ 5 (rev. 1982) states in relevant part, "For purposes of this contract, a collective bargaining agreement will be deemed to be 'in existence' during its stated term or during any period for which the parties to that agreement agree to extend it."

217. The NBA and NBPA agreed to avoid the possibility of immediate antitrust liability for the owners where the collective bargaining agreement and individual player contracts expired simultaneously. The 1983 NBA agreement expired on June 14, 1987. *See supra* note 2 and accompanying text. The standard NBA player contract also expired at the conclusion of the 1987 season. *See* Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment and Declaratory Relief at 8, *Bridgeman v. NBA*, 675 F. Supp. 960 (D.N.J. Oct 1, 1987) (No. 87-4189). To avoid the immediate risk of antitrust liability, the parties declared a five-month moratorium on legal action and the signing of veteran contracts while they continued collective negotiations.

218. *Powell v. NFL*, 678 F. Supp. 777, 785-87 (D.Minn. 1988).

authority.²¹⁹

If, however, the union demands the total or partial elimination of the challenged restraint and management acquiesces, the elimination is not unilateral and does not violate the status quo doctrine.²²⁰ The union's demand implies consent. Otherwise, the union could demand the elimination of a particular restraint and then file a refusal-to-bargain charge against an employer for acquiescing to the union's demand. Although unilateral changes in working conditions alone can violate NLRA section 8(a)(5),²²¹ resolution of most refusal-to-bargain charges depends upon the totality of circumstances.²²² Consequently, the Board would not issue an 8(a)(5) complaint involving a unilateral change that the union demands and over which the union has filed an antitrust suit.

IV. THE NFL OWNERS' ARGUMENTS

In each of the prior player restraint cases, management claimed that the nonstatutory labor exemption immunized the challenged restraints from antitrust attack.²²³ As discussed above, these cases are factually distinguishable from the current dispute between the NFL and the NFLPA. In the earlier disputes, a fledgling union challenged restraints that had been unilaterally imposed by the League prior to the union's existence.²²⁴ Moreover, no court determined whether the policies of the NLRA control the outcome of a dispute involving terms in an expired agreement.²²⁵

Despite these differences, however, the owners cite two prior cases, *Mackey v. NFL*,²²⁶ and *Wood v. NBA*,²²⁷ more frequently than any other

219. See, e.g., *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 223-25 (1949). See generally R. GORMAN, *supra* note 66, at 439-43 (collecting cases where employers' unilateral action was found to be unfair labor practice).

When it issued its opinion that collective bargaining provisions were immunized from antitrust attack until impasse, the district court declined to determine the presence or absence of impasse in the NFLPA-NFL dispute because of a pending refusal-to-bargain charge filed by management against the union. 678 F. Supp. at 789. Whether the NFLPA believed that the parties had bargained to impasse over the new system or were concerned that the district court would once again defer to the Board and further delay a hearing on the merits, the NFLPA declined to file an unfair labor practice charge with the Board when the League implemented its new system on February 1, 1989.

220. R. GORMAN, *supra* note 66, at 445.

221. 29 U.S.C. § 158(a)(5) (1982).

222. See, e.g., *Pittsburgh-Des Moines Co. v. NLRB*, 663 F.2d 956, 959 (9th Cir. 1981).

223. See, e.g., *Mackey v. NFL*, 543 F.2d 606, 611 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

224. See *supra* notes 60-63 and accompanying text.

225. See *supra* notes 84-85 and accompanying text.

226. 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

227. 809 F.2d 954 (2d Cir. 1987).

authority in their briefs. *Wood* involved a challenge to restraints in an *unexpired* collective bargaining agreement by a prospective player and, consequently, is not particularly pertinent to the current dispute.²²⁸ *Mackey*, however, has been cited by every court that has considered the legality of player restraints since the Eighth Circuit's decision in that case in 1976.²²⁹

A. *Mackey v. NFL*

Mackey involved a challenge to the Rozelle Rule.²³⁰ Plaintiffs contended that the rule impeded the movement and suppressed the salaries of free agents.²³¹ The district court agreed. In an opinion issued after the expiration of the 1970 agreement, the district court rejected the League's argument that the Rule was immune from antitrust attack, holding that it violated section 1 of the Sherman Act.²³² On appeal, the Eighth Circuit affirmed.²³³ The Eighth Circuit's analysis of the labor exemption is particularly significant since the test it articulated has been used by every court since that has analyzed the antitrust implications of player restraints.²³⁴

In analyzing *Mackey*, the Eighth Circuit recognized that Supreme Court precedents were factually dissimilar from the case before it. Nonetheless, the court concluded that the principles articulated in those prior cases reflected the proper accommodation of competing federal labor and antitrust policy.²³⁵ After extracting various principles from these cases, the court fashioned a three-pronged test to determine whether the labor

228. Defendants' Memorandum in Opposition to Plaintiff's Motions for Partial Summary Judgment and in Support of Defendants' Cross-Motions for Summary Judgment Dismissing the Complaint and for Joinder of the National Basketball Players Association as a Party at 13-21, *Bridgeman v. NBA*, 675 F. Supp. 960 (D.N.J. Nov. 23, 1987) (No. 87-4189) [hereinafter *NBA Memorandum*]. See also Memorandum in Support of Motion for Summary Judgment on Defendants' Counterclaim for Declaratory Judgment at 10-16, *Powell v. NFL*, 678 F. Supp. 777 (D. Minn. Dec. 14, 1987) (No. 4-87-917) [hereinafter *NFL Memorandum*].

229. The NBA owners advanced arguments in *Bridgeman* similar to those raised by the NFL owners in *Powell*. Citations to the NBA owners' arguments *infra* demonstrate this similarity, and indicate variations the NFL owners may adopt.

230. See *supra* notes 55-56 and accompanying text (discussing Rozelle Rule).

231. *Mackey v. NFL*, 407 F. Supp. 1000, 1007 (D. Minn. 1975), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

232. 407 F. Supp. at 1007.

233. *Mackey*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977). The Eighth Circuit rejected the district court's finding that the Rozelle Rule was a *per se* violation of the Sherman Act, but concluded nonetheless that the Rozelle Rule was unreasonable under the rule of reason. *Id.* at 618-22.

234. See *Wood v. NBA*, 809 F.2d 954, 962 n.6 (2d Cir. 1987); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-98 (6th Cir. 1979); *Zimmerman v. NFL*, 632 F. Supp. 398, 403-04 (D.D.C. 1986).

235. *Mackey*, 543 F.2d at 614.

exemption immunized the Rozelle Rule from antitrust attack. Under this test, federal labor policy appropriately overrides federal antitrust policy and the labor exemption applies if: 1) the restraint primarily affects only the parties to the collective bargaining relationship; 2) the agreement concerns a mandatory subject of collective bargaining; and 3) the agreement is the product of bona-fide arm's-length bargaining.²³⁶

Applying its test to the facts before it, the court found that the Rozelle Rule primarily affected the parties to the collective bargaining relationship and concerned a mandatory subject of bargaining.²³⁷ After reviewing the bargaining history between the NFL and NFLPA, however, the court concluded that the Rozelle Rule was not the product of arm's-length negotiations. It found that the union, from the point of its formal recognition as the players' exclusive bargaining representative until the Rozelle Rule was included in the 1970 agreement, "stood in a relatively weak bargaining position vis-a-vis the clubs" and was not strong enough to negotiate any modifications of the previously adopted Rule.²³⁸ For that reason the court withheld the exemption.²³⁹

Both the League and the players' association cite *Mackey* to support their respective positions. They disagree, though, over the significance an agreement has in the Eighth Circuit's three-pronged test. The union argues that the existence of an agreement is indispensable to the court's test and accordingly to the application of the exemption.²⁴⁰ The NFL owners, on the other hand, argue that the existence of an agreement is irrelevant, provided the challenged restraint satisfies each prong of the test. In other words, the owners argue that the labor exemption applies absent an agreement if the challenged restraint concerns a mandatory bargaining subject, primarily affects the parties, and results from arm's-length bargaining.²⁴¹

Although the *Mackey* court specifically declined to address the sig-

236. *Id.*

237. *Id.* at 615.

238. *Id.*

239. The *Mackey* court expressly declined to consider whether the labor exemption expires upon expiration of the collective bargaining agreement. 543 F.2d at 616 n.18. But because the Rozelle Rule was not the product of arm's-length negotiations, it was subject to antitrust attack *prior* to the expiration of the 1970 agreement. Thus, the court was not forced to determine whether the Rule would have been subject to antitrust attack after the 1970 agreement expired.

240. Plaintiff's Memorandum In Opposition to Defendants' Motion For Summary Judgment at 14-19, *Powell v. NFL*, 678 F. Supp. 777, 781-82 (D. Minn. Dec. 28, 1987) (No. 4-87-917); *see also* Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment and Declaratory Relief at 29, 32-34, *Bridgeman v. NBA*, 675 F. Supp. 960, 964 (D.N.J. 1987) (No. 87-4189) (NBPA argument).

241. NFL Memorandum, *supra* note 228, at 13-16, 28, 33; *see also* NBA Memorandum, *supra* note 228, at 22-28, 50-55.

nificance of the expiration of the agreement,²⁴² the court's opinion suggests that the existence of an agreement is relevant to the applicability of the exemption, provided the agreement is the product of arm's-length negotiations. First, the court recognized the significance of an agreement in two of the three prongs of its test. Provided that the challenged restraint primarily affects the bargaining parties, the Eighth Circuit concluded that the exemption applies where the "agreement sought to be exempted" concerns a mandatory subject of collective bargaining and is the product of arm's-length negotiations.²⁴³

Second, the court also recognized the significance of an agreement in its exemption analysis when it rejected the players' assertion that only employees are entitled to the benefits of the exemption. The purpose of the nonstatutory labor exemption is to further the national policy favoring collective bargaining. In the court's words, the exemption extends to agreements and, as a consequence, the benefits of the exemption logically extend to both parties to the agreement.²⁴⁴ Nothing in the court's opinion suggests that the use of the word "agreement" was inadvertent or accidental.

The NFL owners' interpretation of *Mackey* is inconsistent with the Eighth Circuit's analysis. According to the League, the labor exemption immunizes anticompetitive restraints for an indefinite period even though they are contained in an agreement for a specific term.²⁴⁵ Yet, the Eighth Circuit's failure to determine whether the exemption and agreement expire simultaneously indicates neither that the agreement is irrelevant to the application of the exemption nor that the exemption continues indefinitely after the agreement expires. The court's repeated reference to an "agreement" or union approval suggests that the exemption must expire at some point. Thus, regardless of whether it expires simultaneously with the agreement, the exemption becomes more tenuous the more removed union approval or a bona-fide agreement is from the imposition of the restraint.

B. *Judicial Non-intervention*

1. *The NLRA and Intrusion into the Bargaining Process.* The NFL owners also advance two policy arguments in the current dispute to support their position that the labor exemption survives the expiration of

242. See *supra* note 239.

243. *Mackey*, 543 F.2d at 614 (emphasis added).

244. *Id.* at 612.

245. Memorandum in Support of Motion for Summary Judgment of Defendant's Counterclaim for Declaratory Judgment at 28-33, *Powell*, 678 F. Supp. 777 (D. Minn. Dec. 14, 1987) (No. 4-87-917).

the agreement. First, they argue that the comprehensive framework of collective bargaining established by Congress prohibits judicial involvement in fashioning the substantive terms of collective bargaining agreements. Under this view the purpose of the NLRA is to promote industrial peace through collective bargaining.²⁴⁶ When a majority of employees designate a union to represent them, an employer must cease negotiating with individual employees and bargain in good faith with the employees' representative concerning wages, hours, and other terms and conditions of employment.²⁴⁷ These subjects are known as mandatory subjects of collective bargaining.²⁴⁸

Congress designed the procedural framework of the NLRA to ensure that employers and employee representatives will make an honest effort to resolve their differences at the bargaining table. Congress clearly intended the parties involved in a collective bargaining relationship to resolve their own disputes.²⁴⁹ The federal labor laws, however, do not require the parties to reach an agreement.²⁵⁰ The Act mandates the collective bargaining *process*; it does not mandate an agreement or dictate the substantive terms of any bargain between the parties.

A fundamental corollary to the collective bargaining framework mandated by the NLRA is that the courts ordinarily may not review the substantive terms of the parties' agreement.²⁵¹ Moreover, absent an agreement, courts may not intervene in labor disputes and impose their own views of a desirable settlement.²⁵² Congress designated the bargaining process as the primary method for resolving labor disputes involving mandatory subjects of collective bargaining. The results of the collective bargaining process are to be determined not by the courts but by the

246. 29 U.S.C. §§ 151-69 (1982 & Supp. V 1987). Section 151 reads in pertinent part: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining."

247. *See id.* § 159(a) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .").

248. *See, e.g., First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 667, 674 (1981).

249. *See, e.g., Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 150 n.11 (1976), *overruled*, *Brown v. Hotel & Restaurant Employees Int'l Union Local 54*, 468 U.S. 491 (1984); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488-89 (1960).

250. *See* 29 U.S.C. § 158(d) (1982) (to bargain collectively creates an obligation to meet and confer in good faith but "does not compel either party to agree to a proposal or require the making of a concession").

251. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985) (Congress not concerned with substance of agreement); *Insurance Agents' Int'l Union*, 361 U.S. at 483-87 (same).

252. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-04 (1970) (government does not attempt to control results of collective bargaining).

parties on the basis of their respective bargaining power.²⁵³ Accordingly, the Act authorizes employees to resist at the bargaining table undesirable terms or conditions of employment and, if necessary, to use economic weapons to achieve their goal.²⁵⁴

The NFL owners maintain that judicial determination of the parties' respective rights under the antitrust laws constitutes judicial intrusion in the bargaining process.²⁵⁵ According to the owners, the current litigation involves a dispute between employees, represented by a labor union, and a multi-employer bargaining unit.²⁵⁶ Because the challenged practices are mandatory subjects of bargaining,²⁵⁷ the parties must resolve this dispute *exclusively* through the collective bargaining framework established by Congress and not in an action brought under the Sherman Act; under this analysis, antitrust review is simply inconsistent with the labor policy favoring collective bargaining.²⁵⁸

The owners also argue that the practical effects of judicial intervention are inconsistent with the purposes of the NLRA. The use of the antitrust laws as a weapon in the union's arsenal effectively permits the union to dictate terms of employment, thereby creating a strong disincentive for the union to bargain in good faith.²⁵⁹ Faced with possible Sherman Act sanctions, management would be forced to capitulate to the union or risk immediate liability for treble damages. Thus, according to the owners, an actual or threatened antitrust attack distorts the bargaining process by artificially inflating the union's bargaining leverage.

The owners' argument against judicial involvement in labor disputes fails because it lacks consistency with the resolution of previous antitrust actions in the professional sports industry. This argument, that judicial determination of the parties' rights under the antitrust laws undermines the collective bargaining framework mandated by the NLRA, cannot be reconciled with the district courts' role in the judicially-supervised *Oscar Robertson* Settlement Agreement in 1976 between the NBA and NBPA,²⁶⁰ and the 1978 *Alexander* Settlement between the NFL and

253. See, e.g., *Lodge 76*, 427 U.S. at 150 n.11; *Insurance Agents' Int'l Union*, 361 U.S. at 488-89.

254. See 29 U.S.C. § 163 (1982) (nothing in NLRA "diminishes in any way the right to strike").

255. NBA Memorandum, *supra* note 228, at 19; NFL Memorandum, *supra* note 228, at 11, 16-17.

256. NBA Memorandum, *supra* note 228, at 21; NFL Memorandum, *supra* note 228, at 10-16.

257. Cf. *Mackey v. NFL*, 543 F.2d 606, 615 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977) (Rozelle Rule is mandatory bargaining subject).

258. NBA Memorandum, *supra* note 228, at 20-21, 45-46; NFL Memorandum, *supra* note 228, at 11-12, 16, 25-28.

259. NBA Memorandum, *supra* note 228, at 42-46; NFL Memorandum, *supra* note 228, at 11.

260. Stipulation Settlement Agreement at 47, *Robertson v. NBA*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

NFLPA.²⁶¹ Both district courts clearly recognized the union's right to seek redress for antitrust violations, and both were willing to oversee the ultimate settlement agreement between the parties.²⁶²

The owners' argument for judicial non-intervention is also inconsistent with management's own conduct during previous disputes with the union. Individual teams did not hesitate to seek injunctive relief in 1982 to prevent players from participating in non-League-sponsored all-star games during the 1982 strike.²⁶³ Filing unfair labor practice charges with the Board, a remedy the owners now argue is the exclusive remedy in a labor dispute,²⁶⁴ would not have precluded the players from participating in the all-star games.²⁶⁵

Moreover, the argument for judicial non-intervention is based on an alleged desire to comply with the collective bargaining framework established by Congress.²⁶⁶ Yet, the League's concern over proper deference to the NLRA is not convincing in light of the fact that it appears to have incorporated violations of the Act as a routine part of its bargaining strategy. If one theme permeates the NLRA, it is the parties' obligation to act in good faith.²⁶⁷ The owners' conduct during previous collective bargaining, however, has been inconsistent with this obligation. The number of unfair labor practice charges filed, the complaints issued against the NFL, and the League's apparent disregard for NLRB procedures illustrate the owners' unwillingness to comply with either the letter or the spirit of the NLRA.²⁶⁸ In response to a recent Board decision to issue a complaint against the NFL, for example, NFLMC member Tex Schramm stated, "I'm never surprised when the NLRB rules in favor of

261. The 1977 collective bargaining agreement was incorporated in a class action settlement, approved by the district court in *Alexander v. NFL*, 1977-2 Trade Cas. (CCH) ¶1,61,730, at 72,999-73,004 (D. Minn. 1977), *aff'd sub nom. Reynolds v. NFL*, 584 F.2d 280 (8th Cir. 1978).

262. Stipulation Settlement Agreement at 47, *Robertson*, 72 F.R.D. 64.

263. See *supra* notes 135-44 and accompanying text.

264. The NBA owners have been explicit in adopting this position:

Any objection the Players Association may have to the NBA's adherence to the terms of the prior collective bargaining agreement while the parties negotiate toward a new agreement can and must be redressed through the substantive coercive remedies provided by the NLRA, such as the filing of an unfair labor practice charge or by engaging in the ultimate economic sanction of a strike.

NBA Memorandum, *supra* note 228, at 20.

265. See *supra* notes 135-44 and accompanying text.

266. NFL Memorandum, *supra* note 228, at 13-16; see also NBA Memorandum, *supra* note 228, at 20-21.

267. See, e.g., 29 U.S.C. § 158(a)(5) (1982) (employer cannot refuse to bargain collectively with his employee's representatives); *id.* § 158(b)(3) (a labor organization or its agents cannot refuse to bargain collectively with an employer); *id.* § 158(d) (to "bargain collectively" defined as mutual obligation of employer and representative of employees to meet at reasonable times and "confer in good faith").

268. See, e.g., *supra* notes 149-61.

the union. You know what the penalty is, don't you? They tell you not to do it again."²⁶⁹

The owners' argument for judicial non-intervention is further undermined by the lack of any evidence to support their dire predictions concerning the effects of withholding the labor exemption. Past judicial involvement has neither forced management to capitulate to the union's demands nor permitted the union to dictate the terms of an agreement. NFL owners did not capitulate to the union in 1977 in the face of adverse antitrust decisions: to the contrary, the union was unable to impose its demands upon management in the 1977 agreement²⁷⁰ despite its antitrust victories in *Kapp v. NFL*,²⁷¹ *Mackey*,²⁷² and *Smith v. Pro Football Inc.*²⁷³ Given the unique nature of the collective bargaining relationship in professional sports,²⁷⁴ it is unlikely that a judicial victory would enable the union to do so in 1989.

2. *The Bargaining Relationship in Professional Sports.* The unique nature of the bargaining relationship in professional sports also undermines the owners' argument that the resolution of the parties' respective rights under the antitrust laws will create an incentive for the union not to bargain in good faith. The lack of job security and the length of most players' careers ensures that the players will pressure the union to bargain in good faith to reach an agreement. If it refuses to reach an agreement, the union can either strike or play without an agreement. Since the NFL player's average career spans approximately four years and few players possess skills as marketable or remunerative as their skills as professional athletes,²⁷⁵ playing without an agreement or striking jeopardizes a significant portion of the career and earning potential of many players. Thus, neither strategy is likely to receive wholehearted support from the players, regardless of management's position at the bargaining table or the outcome of the current antitrust dispute.

Moreover, judicial resolution of the underlying antitrust issues will not permit the court to either intrude into the bargaining process or

269. *NLRB Tackles the Cowboys*, USA Today, Mar. 16, 1988, at C3, col. 5.

270. See *supra* notes 118-20 and accompanying text.

271. 390 F. Supp. 73 (N.D. Cal. 1974) (holding that several NFL rules, including Rozelle Rule, were unreasonable restraints on trade), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

272. *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977) (Rozelle Rule overly restrictive, deterred free agency, decreased players' bargaining power, and violates § 1 of Sherman Act); see also *supra* notes 230-45.

273. 593 F.2d 1173 (D.C. Cir. 1978) (NFL draft undeniably anticompetitive, violates § 1 of Sherman Act).

274. See *infra* notes 275-84 and accompanying text.

275. See *supra* notes 94-95 and accompanying text.

shape the substantive terms of the ultimate agreement in a manner contrary to congressional intent. When it enacted the federal labor statutes, Congress clearly intended to limit judicial involvement in labor disputes. The relevant provisions of the Clayton Act and the Norris-LaGuardia Act preclude courts from enjoining various types of concerted activity in labor disputes.²⁷⁶ The NLRA compels parties in a collective bargaining relationship to seek redress for unfair labor practices from the NLRB rather than the courts.²⁷⁷ Asking a court to enjoin protected concerted activity or redress an unfair labor practice, however, is certainly distinguishable from seeking a declaration of the parties' respective rights under the antitrust laws regarding provisions in an expired collective bargaining agreement.

Although Congress intended the NLRA to prohibit judicial involvement in labor disputes, no authority exists to support the owners' argument that determination of the parties' rights under the antitrust laws is the type of judicial involvement in the bargaining process with which Congress had concern. This interpretation of the labor exemption ignores *Mackey*, which other courts have relied on in refusing to immunize challenged restraints from antitrust attack. The owners cite *Mackey* to support their position but fail to explain how the court's involvement in *Mackey*, as well as in *Smith* and *Kapp*, differs from judicial involvement in the current dispute. According to the owners' interpretation of the labor exemption, those cases should have emerged, if at all, as refusal-to-bargain charges under section 8(a)(5) of the NLRA.²⁷⁸

Resolution of the underlying antitrust dispute can coexist with judicial reluctance to shape the terms of the ultimate agreement.²⁷⁹ The purpose of limiting judicial intervention is to preserve the parties' right to arrive at their own agreement. Certainly, judicial condemnation of the challenged restraints may benefit the union at the bargaining table; it has the potential to shape the terms of the agreement in the same manner that a declaration of the parties' respective rights under the labor laws or any other federal statute will shape the agreement. As the owners admit, however, the challenged restraints involve mandatory subjects of bargaining.²⁸⁰ The parties thus have an obligation to bargain over the re-

276. See *supra* notes 67-73 and accompanying text.

277. See, e.g., *Wood v. NBA*, 809 F.2d 954, 962 n.5 (2d Cir. 1987). ("Any claim of unreasonable bargaining behavior must be pursued in unfair labor practice proceeding charging a refusal to bargain in good faith, . . . not in action under Sherman Act.")

278. See *supra* notes 260-74 and accompanying text.

279. *Wood*, 809 F.2d at 962 n.6 (declining offer to find other avenues of compromise due to potential for a strike).

280. NFL Memorandum, *supra* note 228, at 2. In *Mackey*, the Eighth Circuit concluded that the Rozelle Rule was a mandatory subject of bargaining. *Mackey v. NFL*, 543 F.2d 606, 615 (8th

straints, regardless of the outcome in the current litigation.²⁸¹ In 1977, for example, the parties executed an agreement that contained restraints similar to those condemned in *Kapp*, *Mackey*, and *Smith*.²⁸² Whether the Minnesota district court similarly condemns the challenged restraints or instead concludes that they are immunized from antitrust attack, the parties will ultimately determine in what form, if any, the restraints will continue to exist.

More importantly, the owners' interpretation implies that the exemption immunizes restraints involving mandatory bargaining subjects by virtue of the union's existence. Under this analysis, the exemption would apply from the moment of union certification. In essence, this interpretation equates the right to form a union and engage in various concerted activities, protected under the Clayton and Norris-LaGuardia Acts,²⁸³ with the mere potential to bargain over mandatory subjects. Such an interpretation completely eliminates the distinction that courts consistently have recognized between the statutory and nonstatutory labor exemptions. It completely ignores the fact that the nonstatutory labor exemption evolved after Congress enacted the federal labor statutes because the courts recognized that those statutes authorized collective bargaining without immunizing restraints in collective bargaining agreements.²⁸⁴

In fact, absolute judicial refusal to determine the parties' antitrust rights is inconsistent with the existence of the labor exemption. If judicial reluctance to shape the terms of an agreement precludes courts from resolving antitrust disputes, the labor exemption would be unnecessary. Courts would not have created the nonstatutory labor exemption to immunize provisions from antitrust attack if the policy of judicial non-intervention already accomplished the same purpose.

C. *Status Quo Doctrine*

1. *The Owners' Policy Arguments.* The owners argue in the alternative that contemporaneous expiration of the exemption and the collective bargaining agreement is inconsistent with the status quo doctrine. This argument, unlike the argument for judicial non-intervention, can be reconciled with judicial involvement in the *Robertson* and *Alexander* set-

Cir. 1976), *cert. denied*, 434 U.S. 801 (1977). The right of first refusal/compensation system has the same impact on player mobility and salaries.

281. See 29 U.S.C. § 158(a)(5), (b)(3), (d) (1982).

282. 1977 Collective Bargaining Agreement, *supra* note 120, art. XII (on player contracts); *id.* art. XIII (on college draft); *id.* art. XIV (on option clause); *id.* art. XV (on first refusal and compensation).

283. See *supra* notes 67-69, 71-73 and accompanying text.

284. See *supra* notes 74-75 and accompanying text.

tlement agreements, as well as with the decisions in *Smith* and *Mackey*. Nonetheless, the owners' attempt to equate the policies which justify obligating an employer to maintain the status quo with those underlying the labor exemption is a distortion of federal labor law.

The status quo doctrine limits employers' ability to change working conditions unilaterally while no agreement is in effect. The status quo obligation requires employers to continue in effect provisions of an expired agreement,²⁸⁵ regardless of whether the parties intended the provision to survive the expiration of the agreement.²⁸⁶ Failure to maintain the terms of an expired agreement during negotiations for a new agreement constitutes bad faith.²⁸⁷

To support their position that the labor exemption extends beyond the expiration of the agreement, the owners raise two policy arguments that incorporate the status quo rationale. First, they contend that the underlying policy of the labor exemption, like the policy underlying the status quo doctrine, is to promote collective bargaining. Thus, the same policy that justifies requiring an employer to maintain the status quo after an agreement expires also justifies application of the labor exemption after expiration of the agreement.²⁸⁸ Second, the owners contend that it would be inconsistent with federal labor policy to expose management to antitrust liability for practices the owners are required to maintain under the NLRA.²⁸⁹ Neither of these policy arguments is persuasive.

The League's argument that the policy underlying the labor exemption is somehow synonymous with that of the status quo doctrine is misleading. The general policy underlying the status quo doctrine, like the policy underlying all principles of federal labor law, is to promote collective bargaining.²⁹⁰ To the extent that the labor exemption immunizes

285. See NFL Memorandum, *supra* note 228, at 29-31 (citing *Hinson v. NLRB*, 428 F.2d 133, 137-38 (8th Cir. 1970); *NLRB v. Cone Mills Corp.*, 373 F.2d 595, 598 (4th Cir. 1967)); see also NBA Memorandum, *supra* note 228, at 28-29 (citing *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982) (quoting *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981)); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986)).

286. See *Southwestern Steel & Supply*, 806 F.2d at 1114.

287. NFL Memorandum, *supra* note 228, at 31 (citing *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 779 F.2d 497, 500 (9th Cir. 1985), *aff'd*, 484 U.S. 1043 (1987)).

288. See NFL Memorandum, *supra* note 228, at 31-34; see also NBA Memorandum, *supra* note 228, at 22, 28, 38, 50-55.

289. See NFL Memorandum, *supra* note 228, at 31-34; see also NBA Memorandum, *supra* note 228, at 30.

290. See, e.g., *Laborers Health & Welfare Trust Fund*, 779 F.2d at 500 ("Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract."). The NBA owners cite this case to support their argument that it would be inconsistent with national labor policy to impose antitrust liability for practices an employer is required to maintain. NBA Memorandum, *supra* note

restraints contained in a bona-fide arm's-length agreement, the labor exemption also fosters collective bargaining. Obviously, neither party would want to bargain away any benefit in exchange for a provision that could subsequently be challenged on antitrust grounds. To suggest, however, that this common purpose requires that the exemption outlive the agreement obscures the policy distinction between the exemption and status quo doctrine.

The NLRA was designed to eliminate "obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining."²⁹¹ This policy is enforced under the unfair labor practice provisions of the Act.²⁹² An employer commits an unfair labor practice under section 8(a)(5) by refusing to bargain collectively in good faith with the employees' exclusive bargaining representative.²⁹³ Although many violations of section 8(a)(5) are established by an employer's overall bargaining conduct,²⁹⁴ certain specific conduct alone violates the obli-

228, at 29-30. An alternative interpretation of this case is that the status quo doctrine fosters the collective bargaining process by protecting the authority of the union.

291. 29 U.S.C. § 151 (1982).

292. 29 U.S.C. § 158(a) (1982) (enumerating employer unfair labor practices); § 158(b) (enumerating employee unfair labor practices).

293. *Id.* § 158(a)(5). See *Powell v. NFL*, 678 F. Supp. 777, 783-84 (D. Minn. 1988) (agreement sought to be exempted must be product of bona-fide arm's-length negotiations for collective bargaining policy to override antitrust laws) (quoting *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977)).

294. See, e.g., *NLRB v. Cauthorne*, 691 F.2d 1023, 1026 n.5 (D.C. Cir. 1982) (whether employer has bargained in good faith should be assessed under totality of circumstances); *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 48 (2d Cir. 1974) (conduct of negotiations as charade or sham, intending to avoid reaching an agreement, amount to bad-faith bargaining and constitute unfair labor practice of employer). In this context, a determination of failure to bargain in good faith requires an inquiry into the state of mind or motives of the charged party and, thus, is often difficult to make. See *Continental Ins.*, 495 F.2d at 84; R. GORMAN, *supra* note 66, at 399-401 discussing problems of proving failure to bargain in good faith). For example, surface bargaining has been defined as "going through the motions of negotiating, without any real intent to reach an agreement." *K-Mart Corp. v. NLRB*, 626 F.2d 704, 706 (9th Cir. 1980) (quoting Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1413 (1958)). If established, surface bargaining violates the NLRA's requirement to negotiate in good faith. *Id.* This type of behavior is often difficult to distinguish from firm good faith bargaining and is therefore difficult to prove. See *id.*; see also, *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 407 (9th Cir. 1977) (distinguishing from charade bargaining requires drawing difficult inferences from conduct to motivation). Thus, many courts have applied a totality of circumstances test. See *Continental Ins.*, 495 F.2d at 48 (determination must be founded upon overall conduct and totality of circumstances). No single factor is essential to the application of this concept; rather, surface bargaining is usually detected by a careful review of the employer's overall bargaining conduct. *Id.*

Courts also apply a totality of circumstances test to determine whether a party has bargained with a predetermined course not to reach an agreement. *Id.* Factors courts consider in the determination of good faith include an employer's failure to make counter proposals, see, e.g., *NLRB v. Arkansas Rice Growers Coop. Ass'n*, 400 F.2d 565, 568-71 (8th Cir. 1968); *Adrian Daily Telegram*, 214 N.L.R.B. 1103, 1111 (1974), and delays or other evasive tactics, see, e.g., *NLRB v. Milgo Indus., Inc.*, 567 F.2d 540, 544-45 (2d Cir. 1977); *NLRB v. B.F. Diamond Constr. Co.*, 410 F.2d 462, 462

gation to bargain in good faith.²⁹⁵ For example, an employer may violate section 8(a)(5) by unilaterally changing mandatory subjects of bargaining without first fulfilling the obligation to bargain with the union over those subjects.²⁹⁶

The prohibition against unilateral employer action fosters collective bargaining both by preserving mandatory items for the bargaining table and by protecting the union's status as exclusive bargaining representative.²⁹⁷ Similarly, the specific purpose of the status quo doctrine is to prevent management from undermining the union's bargaining authority.²⁹⁸ The status quo doctrine is thus a logical extension of the prohibition against unilateral action regarding mandatory subjects of collective bargaining.

The foundational policy of the labor exemption, to reconcile competing antitrust and labor policies, is clearly distinguishable from the policy designed to protect the status of the exclusive bargaining representative. Limiting the scope of the labor exemption to the life of the collective bargaining agreement is not inconsistent with the status quo doctrine. More specifically, enabling the union to enjoin enforcement of unreasonable restraints after an agreement expires is not inconsistent with a doctrine designed to prevent management from undermining the status of the bargaining representative. If the union has indicated unambiguously that it no longer is interested in continuing the challenged restraints, neither maintaining the status quo nor continuing the labor exemption will foster collective bargaining or protect the union's bargaining status.

(5th Cir.), *cert. denied*, 396 U.S. 835 (1969). See generally R. GORMAN, *supra* note 66, at 401-07 (on the placing of conditions as prerequisites to bargaining).

295. For example, information concerning mandatory subjects of bargaining is recognized as necessary and relevant to the collective bargaining process, see *General Elec. Co. v. NLRB*, 466 F.2d 1177, 1183-84 (6th Cir. 1972), and an employer's obligation to furnish information of this nature is well established. *NLRB v. Acme Indus.*, 385 U.S. 432, 435-36 (1967); *K-Mart Corp. v. NLRB*, 626 F.2d 704, 707 (9th Cir. 1980); *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1165 (5th Cir. 1976); *General Elec. Co.*, 466 F.2d at 1183. Generally, an employer who refuses to provide a union with such information, when requested in the course of bargaining, violates section 8(a)(5). See, e.g., *Southwestern Bell Tel. Co. v. NLRB*, 667 F.2d 470, 474 (5th Cir. 1982); *Detroit Newspaper Printing & Graphic Communications Union, Local 13 v. NLRB*, 598 F.2d 267, 270-71 (D.C. Cir. 1979).

296. *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).

297. See, e.g., *Katz*, 369 U.S. at 747; *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 225 (1949).

298. See, e.g., *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960) (employer's unilateral change "tends to subvert the union's position as the representative of the employees"); *Leeds & Northrop Co. v. NLRB*, 391 F.2d 874, 877 (3d Cir. 1968) (employer's unilateral action "would undermine the union's authority by disregarding its status as the representative of the employees").

In light of the underlying purpose of the status quo doctrine, the owners' other argument supporting the continuation of the exemption, that it would be inconsistent with federal labor policy to expose management to antitrust liability for maintaining the status quo, is also unpersuasive. An employer should not be permitted to use the status quo doctrine to shield otherwise illegal provisions that the union no longer desires. The fact that the restraint was previously subject to good faith negotiations is relevant to an employer's obligation to maintain the status quo; previous good-faith negotiations are not relevant to the application or nonapplication of the labor exemption once the agreement has expired. Upon expiration of the agreement, an employer either should be forced to comply with the antitrust laws or willing to negotiate away benefits in return for the unreasonable restraint. The owners' argument that such a result creates an unjustifiable shift in bargaining leverage is difficult to accept. The union *should* have leverage to modify or eliminate an illegal restraint it determines is no longer in its best interest.

2. *Exception to the Status Quo Doctrine.* Even if one accepts the owners' argument that the labor exemption is tied to the status quo doctrine, two exceptions to that doctrine undermine the owners' position in the current dispute. If the challenged provisions fall within either of these exceptions, they are beyond the scope of the status quo doctrine. Obviously, the owners' argument that it would be inconsistent to impose antitrust liability for provisions the owners are required to maintain is irrelevant to provisions that the owners need not maintain.

First, an employer may, without violating the status quo doctrine, abolish provisions in an expired agreement that involve preeminent rights guaranteed by the NLRA, such as the right to engage or refrain from engaging in concerted activities and the right to strike.²⁹⁹ Under this exception, an employer can, upon expiration of the agreement, unilaterally change union security and dues check-off provisions,³⁰⁰ as well as no strike and arbitration provisions.³⁰¹ To support their position that the restrictions on free agency do not fall within this exception to the status quo doctrine, the owners cite authority that an employer must maintain

299. See, *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (waiver of union's statutory right to strike during the life of the collective-bargaining agreement is not waiver "of the right to strike beyond the contract term").

300. *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1502 (1962), *petition for enforcement denied and cause remanded sub nom. Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

301. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Graphic Communications Union, Local No. 2 v. Chicago Tribune Co.*, 794 F.2d 1222, 1225 (7th Cir. 1986).

wage provisions after an agreement expires.³⁰²

The restrictions on free agency do have a direct impact on wages.³⁰³ Unlike typical wage scales, however, these restrictions implicate preeminent rights guaranteed under the NLRA. The free agent system effectively requires a waiver of the union's right as exclusive bargaining representative to negotiate wages collectively.³⁰⁴

Individual contract negotiations are an integral part of the NFL's restrictions on free agency. Under article 15 of the 1982 agreement, a free agent is entitled to negotiate an offer with a different team. The team that owns the free agent's rights can either match the offer or receive draft choice compensation, which depends upon the amount of the offer negotiated with the new team.³⁰⁵ Although the primary purpose of the NLRA is to promote collective bargaining,³⁰⁶ the League's free agent system could not operate absent contract negotiations between individual players and teams. Thus, whether the dispute involves eliminating (as in 1982)³⁰⁷ or altering the League's free-agent system (as in the current negotiations),³⁰⁸ a system that authorizes individual contract negotiations appears to fall within the preeminent rights exception to the status quo doctrine.

Second, an employer's obligation to maintain the status quo does not continue indefinitely. The status quo doctrine only requires an employer to continue prior conditions of employment until the parties reach

302. See, e.g., *NLRB v. Katz*, 369 U.S. 736, 744-46 (1962); *NLRB v. General Time Corp.* 650 F.2d 872, 875 (7th Cir. 1981).

303. The right of first refusal/compensation system requires the team signing a free agent to compensate the player's previous team. In *Mackey v. NFL*, 543 F.2d 606, 615 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977), the Eighth Circuit concluded that compensation under the Rozelle Rule had an impact on salaries.

304. 29 U.S.C. § 159(a) (1982) provides: "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" Under § 8(a), it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" *Id.* § 158(a)(5). In effect, an employer is not entitled to bargain with any person other than the majority representative concerning wages, hours, or terms and conditions of employment. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944).

305. 1982 Collective Bargaining Agreement, *supra* note 3 art. 15, § 12.

306. See 29 U.S.C. § 151 (1982) ("[i]t is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining").

307. See *supra* notes 149-61 and accompanying text.

308. In the current dispute, the union wants to retain the system of individual player-team negotiations and eliminate the compensation requirements for veteran free agents. See *supra* notes 43-45 and accompanying text.

impasse.³⁰⁹ After bargaining in good faith to impasse, an employer is free to implement unilateral changes as long as those changes are consistent with the latest proposals offered to the union prior to impasse.³¹⁰

Recognizing the possibility that the parties had already reached or would reach impasse, the NFL owners argue that the labor exemption extends beyond the scope of the status quo doctrine and beyond impasse, and runs as long as management chooses to maintain the status quo.³¹¹ The owners' argue that the underlying policy of the status quo doctrine, like the policy underlying the labor exemption, is to promote the collective bargaining process by fostering a non-coercive atmosphere conducive to serious negotiations.³¹² Continuing the terms of an expired agreement beyond impasse is conducive to a stable bargaining environment. Although an employer at impasse may unilaterally change working conditions, impasse does not alter the policy considerations underlying the status quo doctrine. Under the owners' interpretation, a union that has agreed to a restraint may not challenge that restraint on antitrust grounds as long as the owners decide to maintain the status quo. Thus, an agreement to a particular *unreasonable* restraint for a finite period operates to waive, indefinitely or permanently, a party's rights under the antitrust laws. In short, the players' rights under the antitrust laws lie, after the agreement has expired, in the hands of the owners.

This interpretation is inconsistent with the requirements of bona-fide, arm's-length negotiations which are a prerequisite to the labor exemption.³¹³ The requirement of arm's-length negotiations suggests that there must be some *quid pro quo* between the parties. In other words, the union must be strong enough to extract some benefits from management in return for the concessions that it makes. In the absence of arm's-length bargaining, it has been held that the labor exemption does not shield player restraints from antitrust attack.³¹⁴ Hence, if courts refuse to immunize restraints contained in agreements over which the parties failed to bargain in good faith, it seems unlikely that courts will protect restraints which the union no longer desires, once the collective bargaining agreement has expired. Judicial reluctance to enforce restraints that were in essence thrust upon a union suggests that an expired collective bargaining agreement should not protect unwanted restraints that violate antitrust laws.

309. *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 64-65 (1964).

310. *Id.* at 65.

311. See *supra* notes 285-98 and accompanying text; see also NBA Memorandum, *supra* note 228, at 37-39.

312. See *supra* note 288 and accompanying text.

313. See *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976), cert. denied, 434 U.S. 801 (1977).

314. *Mackey*, 543 F.2d at 615-16.

Additionally, the owners' interpretation infringes upon one of the most fundamental rights established under the NLRA: the parties' right to establish through good faith negotiations the terms of their own agreement.³¹⁵ This right necessarily incorporates the freedom to contract.³¹⁶ In fact, the freedom to contract is so fundamental that the parties may agree in certain instances on unreasonable restraints of trade.³¹⁷ The freedom to contract also enables the parties to determine the length of their agreement.

Arguably, the application of the exemption after the agreement expires both undermines the bona-fide arm's-length negotiation prerequisite and impairs the ability of the parties to determine the length of their agreement. For example, union leaders might think that the cost to players of the right of first refusal/compensation system equals \$x. The union, then, might be willing to agree to such a system for five years, as it did in 1977, in return for \$5x or the equivalent thereof in other benefits.³¹⁸ Immunizing this system from antitrust attack in year six, after the expiration of the collective bargaining agreement, gives management a benefit for which there was no bargained-for exchange. Had the union anticipated this result, it would have demanded \$5x + (\$x)(P), where P is the probability that no new collective bargaining agreement would be reached by year six.³¹⁹

Finally, the owners' argument that the labor exemption survives the agreement by virtue of their obligation to maintain the status quo is clearly undermined, at least in this case, by the owners' recent unilateral implementation of their latest free agency proposal. Regardless of whether the owners had bargained to impasse over their new proposal,

315. See *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 150 n.11 (1976), *overruled*, *Brown v. Hotel & Restaurant Employees Int'l Union Local 54*, 468 U.S. 491 (1984); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488-89 (1960).

316. *Wood v. NBA*, 809 F.2d 954, 961 (2d Cir. 1987) (citing 95 WELLINGTON, LABOR AND THE LEGAL PROCESS 49-90 (1968)) (antitrust challenge to collective bargaining agreement would require abrogating NLRA's commitment to freedom of contract).

317. See, e.g., *Wood*, 809 F.2d at 961; *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1198 (6th Cir. 1979); *Zimmerman v. NFL*, 632 F. Supp. 398, 406 (D.D.C. 1986).

318. See *supra* notes 118-20 and accompanying text (discussing union's concessions in 1977 negotiations).

319. Even if management continued in year six the benefits that it agreed to provide in the expired agreement, this hypothetical suggests that continuation of the right of first refusal/compensation system in year six was not necessarily the product of good faith negotiations. The costs to players of this system in year six might be greater than (\$1x)(P), perhaps because the League enters into a new television agreement, expands, or undergoes other changes that affect the marginal revenue product of or utility an owner realizes from potential free agents. The union, at the time it valued the costs of this system in each of the five years at \$x, and decided to execute a five-year agreement, may have contemplated a much greater value for the system in year six.

and, therefore, had a right under the NLRA to implement that proposal, it is unlikely that a court would conclude that the labor exemption continues even after the status quo has been altered. Such a conclusion presumably would permit management to unilaterally implement, with immunity from the antitrust laws, an even more restrictive system.

V. PROPER ACCOMMODATION OF COMPETING ANTITRUST AND LABOR POLICIES

A. *Scope of the Labor Exemption in the Current Dispute*

The purpose of the labor exemption is to accommodate conflicting policies under federal antitrust and labor laws.³²⁰ To foster collective bargaining, the courts have willingly subordinated antitrust policies and immunized otherwise unlawful restraints contained in bona-fide arm's-length agreements. Thus, the parties are free to resolve their differences over mandatory subjects through the bargaining process. Either party may determine that agreeing to a restraint or bargaining away rights under the antitrust laws, in return for certain benefits, is in its best interest. As long as the restraint primarily affects the parties to the agreement, their consent justifies immunization from the antitrust laws.³²¹ In this context, the proper accommodation of the antitrust and labor laws requires that the labor laws control.

The Eighth Circuit in *Mackey* applied this general policy of accommodation to the fact situation before it and determined that federal labor policy was subordinate to the Sherman Act in situations where the challenged restraint was the product not of consent or arm's-length negotiations but resulted from a significant mismatch in relative bargaining position.³²² *Mackey*, then, is relevant to the current dispute to the extent that it reflects a proper accommodation of competing antitrust and labor policies.

The New Jersey and Minnesota district courts failed to apply this general policy of accommodation and, as a result, resolved the union-League disputes on the basis of rules that are inconsistent with the purpose of the labor exemption.³²³ The courts mistakenly attempted to formulate a test that could be explained in terms of isolated, specific labor policies. By focusing on specific policies, (such as the status quo doc-

320. See, e.g., *Mackey v. NFL*, 543 F.2d 606, 613-14 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977) (availability of exemption "turns upon whether the relevant federal policy is deserving of preeminence over Federal antitrust policy").

321. *Id.* at 614.

322. *Id.* at 616.

323. Ironically, both courts articulated this policy of accommodation. See *Powell v. NFL*, 690 F. Supp. 812, 817 (D. Minn. 1988); *Bridgeman v. NBA*, 675 F. Supp. 960, 965 (D.N.J. 1987).

trine), that contribute to the overall objective of the NLRA to foster collective bargaining, both courts failed to accommodate properly the conflicting purposes of the federal antitrust and labor laws.

Application of the labor exemption is not appropriate just because its application is consistent with a specific labor law policy. The *Mackey* court, for example, withheld the exemption even though its application was found to be consistent with two of the three prongs of its own test.³²⁴ The labor exemption represents an accommodation between labor and antitrust policies, rather than a reconciliation of the immunization of a particular restraint with a single, specific federal labor law policy.

This is not to say that the NLRA's policy fostering collective bargaining should not be given preeminence over the antitrust laws. In some situations, however, withholding the exemption will not impede the bargaining process, or will not do so to the extent necessary to justify application of the exemption. The current NFL-NFLPA dispute is an example of such a situation.

During the negotiations following the expiration of the 1970, 1977 and 1982 agreements, the NFLPA used virtually every economic and legal weapon at its disposal to eliminate League restrictions on free agency. The players' economic weapons were not effective in the union's negotiations with the owners. None of the strikes forced management to capitulate to the union.³²⁵ Instead, each strike crumbled after players crossed picket lines, leaving the union bitter and divided.³²⁶

The players' legal weapons also proved ineffective. Management refused to yield to the union's demands despite adverse antitrust decisions, and NLRB proceedings had virtually no impact on management's positions at the bargaining table. The outcome of the disputes over the interpretation of section 17 of the 1977 collective bargaining agreement and the exclusive rights provisions in the standard player contract exacerbated the effect of the NLRB's inability to vindicate the union's rights under the NLRA.³²⁷

More recently, the union's leverage suffered further damage by the owners' willingness and ability to continue the 1987 season with replacement players during the players' strike.³²⁸ The free agency system implemented by the NFLMC on February 1, 1989, presumably undertaken to improve the League's chances of prevailing at trial on the merits of the

324. *Mackey*, 543 F.2d at 614-16.

325. In the negotiations for the 1982 agreement, the union was able to exact some concessions from the owners. See *supra* notes 90-91 and accompanying text.

326. See *supra* notes 115-18, 130-48 and accompanying text.

327. See *supra* notes 121-22, 149-61 and accompanying text.

328. See *supra* notes 101-04 and accompanying text.

NFLPA's antitrust action, does provide unrestricted freedom for those not among their team's top thirty-seven players; yet, the benefits of this system almost exclusively fall on marginal players and aging veterans with large contracts.³²⁹ With a League-wide employer turnover rate approximating twenty-five percent per year, a significant number of players who did in fact change teams under the new system will likely be waived out of the League by opening day, albeit by a different team. In short, the union's use of economic and legal weapons has failed to produce any significant change in the League's provisions restricting free agency. The current provisions, at least for the top thirty-seven players on each team, are every bit as restrictive as those condemned in earlier antitrust actions.

One way to view this one-sided course of events, of course, is to cite the NLRA's policy of self-determination. The collective bargaining framework mandated by Congress is designed to permit the parties to negotiate their own agreement based on their respective bargaining strengths. Thus, neither the Board nor the courts should be concerned with the terms of the ultimate agreement.³³⁰ The parties' relative bargaining positions are irrelevant to the application of the labor exemption, to the extent that provisions in an *unexpired* agreement are the product of arm's-length negotiations. A union, for example, should not be permitted to invalidate undesirable restraints contained in an unexpired agreement simply because it has second thoughts concerning those restraints or makes a mistake in judgment or strategy during the negotiations. To permit a union to attack such restraints would undermine the federal labor policy favoring collective bargaining by giving employers "no assurances that they could enter into an agreement without exposing themselves to an action for treble damages."³³¹ In effect, this approach would subvert completely federal labor law in favor of antitrust policies, a result clearly not intended by Congress or the courts.³³²

The purpose of the NLRA, however, will not be realized where the agreement reached is based not on consent, but on a significant mismatch in relative bargaining positions. The requirement of good faith, arm's-length negotiations suggests that the union must be strong enough to extract some concessions from management. At some point the parties' relative bargaining positions are so unequal that the agreement is not the product of arm's-length negotiations. In those cases such an agreement

329. See *Supra* Notes 47-54 and accompanying text (discusses League's new free agent system, the alleged basis for the League's actions, and provides data indicating that players who changed teams under new system did not survive long with their new team).

330. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 2, 20 (1987) ("[T]he NLRA's concerned with engineering an equitable bargaining process, not with the substantive terms of the agreement.").

331. *Wood v. NBA*, 809 F.2d 954, 961 (2d Cir. 1987).

332. *Id.*

clearly fails to properly accommodate competing antitrust and labor policies.³³³

In *Mackey*, the Eighth Circuit determined that the challenged provisions were included in the 1970 agreement neither as a result of a mistake in judgment or strategy by the union, nor as a result of an acceptable imbalance in bargaining leverage. Rather, the court found that the restraints resulted from an imbalance in bargaining strength so significant that these restraints furthered neither antitrust nor labor law.³³⁴ *Mackey*, then, suggests that the requirement of good faith, arm's-length negotiations limits the extent to which a party with superior leverage can impose conditions of employment on a weaker party.

The Eighth Circuit, of course, expressly declined to consider the significance of bargaining history to terms contained in an expired agreement.³³⁵ Because the Rozelle Rule was not the product of arm's-length negotiations, it was subject to antitrust attack prior to the expiration of the 1970 agreement. Thus, the court was not forced to determine whether the Rule would have been subject to antitrust attack after the 1970 agreement expired. Where the bargaining history between two parties reflects a significant mismatch in bargaining power, however, that history is just as relevant to the prospective application of the exemption to terms in an expired agreement as it is to terms in an unexpired (albeit one-sided) agreement. Where a dominant party has historically dictated conditions of employment, conditions which are neither in the other party's best interest nor in accordance with the underlying policies of the antitrust laws, and it appears that the same party will continue to dictate similar conditions in the future, application of the exemption beyond the term of an agreement fails to accommodate competing antitrust and labor policies. To the extent that bargaining history reflects the type of imbalance recognized in *Mackey*, application of the exemption beyond the agreement's term perpetuates the imbalance and invites recurrence of the exact situation that the *Mackey* court condemned.

In the current dispute, no valid justification exists for applying the labor exemption beyond the term of the collective bargaining agreement. The imbalance in relative bargaining strengths during the early negotiations between the NFL and NFLPA recognized by the Eighth Circuit in *Mackey* continues to characterize the union's bargaining relationship with the League. The unique nature of the employment relationship in professional sports has created an inherent mismatch in bargaining be-

333. See *Mackey v. NFL*, 543 F.2d 606, 615-16 (8th Cir. 1976), cert. denied, 434 U.S. 801 (1977) (NFLPA was too weak to engage in bona-fide bargaining).

334. *Id.* at 616.

335. See *id.*

tween the NFL and NFLPA.³³⁶ The entire bargaining history between the parties reflects this mismatch. Application of the exemption beyond the agreement will perpetuate this mismatch.

Similarly, withholding the exemption will not effectuate the purposes of the antitrust laws.³³⁷ Two legislative exemptions have immunized certain anticompetitive conduct. Because of the inherently cooperative nature of professional sports and the fact that the League's product is jointly produced,³³⁸ the courts have reviewed otherwise *per se* violations of the antitrust laws under the more flexible rule of reason standard.³³⁹ The inherent mismatch in the parties' relative bargaining strengths has enabled management to perpetuate anticompetitive player restraints that were originally implemented unilaterally by the League prior to the union's existence. Thus, the antitrust laws, partially applied, have failed to preserve the level of competition among employers in professional sports that normally exists among employers in other unionized industries.

Permitting the labor exemption to shield additional anticompetitive conduct after the expiration of a collective bargaining agreement will further permit the League to circumvent the antitrust laws. In effect, it will completely eliminate application of the antitrust laws to player restraints. Moreover, it will eliminate the one remaining weapon that the NFLPA has at its disposal to counteract the League's ability to dictate and employ anticompetitive restraints, thereby further emasculating the union's leverage at the bargaining table.

In the current dispute, any decision to continue immunizing otherwise illegal restraints beyond the term agreed to will neither advance the purposes of federal antitrust and labor law nor accommodate competing antitrust and labor policies. Rather, continuing to immunize the challenged restraints will only further reduce competition in the industry, a result inconsistent with federal antitrust laws, without promoting the policies of the NLRA. In fact, a judicial decision to continue immunizing these restraints is likely to undermine the policies of the Act.

The owners fail to explain why granting the exemption will not benefit them, by inflating their leverage or inducing them not to bargain, more than withholding the exemption is likely to benefit the union. Yet, absent the risk of antitrust liability, the owners will have no incentive to bargain with the union over the restrictions on free agency. Because of the lack of meaningful penalties under the NLRA, the NFL will incur no

336. See *supra* notes 86-113 and accompanying text.

337. See *supra* notes 20-32 and accompanying text.

338. See *supra* notes 97-107 and accompanying text.

339. See *supra* notes 33-42 and accompanying text.

costs by simply continuing to impose the current system on the players.³⁴⁰

Within the context of the current NFL-NFLPA dispute, the proper accommodation of federal antitrust and labor law requires that the labor exemption expire simultaneously with the collective bargaining agreement. In this dispute, immediate application of the antitrust laws upon expiration of the agreement will not undermine federal labor law. As noted above,³⁴¹ the parties in this dispute were free to negotiate in good faith from the conclusion of the 1986 season until sometime after February 1, 1988 before potential free agents would accrue any damages under the antitrust laws. Thus, the parties had over a year to resolve this dispute through the collective bargaining process without the risk of antitrust liability. The parties were unable to reach an agreement during that time frame; the collective bargaining process had reached a standstill. Perpetuating the exemption in this case completely negates the antitrust laws without fostering collective bargaining. Thus no valid justification exists for not furthering the purposes of the antitrust laws.

B. *Additional Measures*

1. *Need for Other Measures.* In the current NFL dispute, simultaneous expiration of the agreement and the labor exemption undoubtedly would have had an impact on the parties' relative leverage in collective bargaining. At a minimum, such a result would have forced the parties to engage in meaningful negotiations at an earlier time and, in the absence of an agreement, precipitated a quicker resolution of the merits of the pending lawsuit. Thus, given the current structure of the professional sports industry, the simultaneous expiration of the exemption and the agreement was the best accommodation of competing antitrust and labor policies.

In a more general sense, however, the simultaneous expiration of the exemption and the agreement would not necessarily have produced an appropriate or desirable reconciliation of conflicting antitrust and labor policies. Immediate expiration of the exemption would not necessarily have eliminated the mismatch in relative bargaining strengths or produced an outcome that truly reflected good faith, arm's-length negotiations between the parties. Regardless of when the labor exemption expires, the ultimate solution to the inherent mismatch in bargaining strengths between the NFL and NFLPA is beyond the scope of the current dispute.

340. See Lock, *Employer Unfair Labor Practices*, *supra* note 130, at 216.

341. See *supra* notes 214-17 and accompanying text.

The following scenario illustrates this point. Assume that the Minnesota district court held that the exemption expired on August 31, 1987, the day the 1982 agreement expired. Further assume either that the anti-trust suit was resolved quickly on the merits in favor of the NFLPA, or that management, in anticipation of an adverse decision on the merits, negotiated a new agreement with the union containing few, if any, restrictions on free agency. The possibility still exists that the NFLPA's victory would be a hollow one.

First, complete judicial victory would not guarantee an elimination of the restrictions on free agency. A critical factor in the negotiations, of course, would be the extent to which the costs associated with the labor dispute between the NFL and NFLPA eroded player support for the union,³⁴² especially if management continued to insist upon restrictions on free agency after the lawsuit as it did following the *Mackey* decision. As the sequence of events following *Mackey* indicates, judicial victory will not necessarily shift the balance of bargaining power to the union.³⁴³

Second, given the economic structure and the employment relationships in the NFL, a new agreement providing for free agency might not benefit the players. Arguably, the system of revenue sharing might naturally limit the bidding for free agents. As a group, the owners realize a collective benefit from keeping salaries down. Good business judgment would, in the absence of any economic reward for winning, discourage bidding for expensive free agents. To the extent that natural economic forces failed to restrict free agent bidding, the owners would have the same economic incentive to artificially minimize free agent movement through collusion, conduct that would be difficult to prove in an antitrust suit or arbitration proceeding since the owners naturally lack incentive to bid for free agents under the League's system of revenue sharing.³⁴⁴

342. For a discussion of the impact of unfair labor practices within the context of professional sports, see Lock, *Employer Unfair Labor Practices*, *supra* note 130.

343. See *supra* note 335 and accompanying text.

344. Free agency has existed in Major League Baseball (MLB) since the Messersmith-McNally arbitration decision in December, 1975. *In re Arbitration Between the Twelve Clubs Comprising the National League of Professional Baseball Clubs and the Twelve Clubs Comprising the American League of Professional Baseball Clubs and the Major League Baseball Players Association*, Decision No. 29, Grievance Nos. 75-27 and 75-28 (Dec. 23, 1975) (Seitz, Arb.). In two recent arbitration cases the arbitrator found that MLB owners colluded to eliminate intra-league bidding for free agents: In the Matter of the Arbitration between MLBPA and the Twenty-Six Major League Baseball Clubs, Grievance No. 86-2, Sept. 21, 1987; In the Matter of the Arbitration between MLBPA of the Twenty-Six Major League Baseball Clubs, Grievance No. 87-3, Aug. 31, 1988. However, collusion would arguably be easier to establish in MLB than in the NFL. MLB teams do not share a significant portion of team revenues: gate receipts are split on an 80%-20% basis, Major League Baseball Constitution, art. 13. Each team with the exception of the "superstation" teams (Atlanta Braves, Chicago Cubs, and New York Mets), keeps 100% of its non-network television revenues. Telephone conversation with Don Gibson, MLB Broadcasting Dep't (Sept. 9, 1989) (unlike NFL,

Perhaps most significantly, an antitrust victory would not necessarily alter the inherent mismatch in leverage at the bargaining table. The players still would possess the same short careers, lack of job security, and limited alternative job opportunities that currently undermine the union's bargaining leverage. Thus, regardless of how little bidding for free agents actually occurred, the owners might be willing to accept free agency only in exchange for the elimination of other benefits such as severance pay, injury protection, or a pension and a minimum wage based on seniority. In other words, because management still would possess its inherently stronger position at the bargaining table, it would retain the ability to dictate the terms of a new agreement.

Free agency, in fact, could result in a less equitable allocation of industry revenues between management and the players or a less equitable allocation of revenues among players. As a class, NFL players do not possess homogeneous skills. As noted above,³⁴⁵ different bargaining demands affect different players differently: superstars would benefit from competitive bidding, while marginal players would probably benefit from higher minimum salaries, greater job protection and greater pension benefits. Even if the superstars benefit from free agency, the majority of players might fare less well than under the old system because of the "give backs" management would demand at the bargaining table in exchange for free agency.

The above scenario suggests that immediate expiration of the exemption may reduce, but would not eliminate, the inherent mismatch in bargaining power between the owners and NFLPA. Within the context of the NFL, the proper accommodation of competing antitrust and labor policies requires more than just the simultaneous expiration of the agreement and the labor exemption. Possible additional measures designed to achieve the proper accommodation of labor and antitrust policies are suggested below. These measures give a different perspective to the labor exemption issue in the current dispute and illustrate that the scope of the labor exemption is just one factor that has helped to shape the overall bargaining relationship between the owners and NFLPA.

baseball owners do not give league exclusive rights, but retain right to negotiate non-network contracts). Teams are rewarded economically for winning their division and participating in play-off and World Series competition, Major League Baseball Rules, Rule 45. In addition, MLB teams play before less than capacity crowds. To the extent that winning increases fan interest, MLB owners have an economic incentive to bid on high-priced free agents to improve their teams. NFL owners do not have the same economic incentive to win, and they could explain their failure to bid on free agents as individual economic decisionmaking, rather than collusion.

345. See *supra* note 86 and accompanying text.

2. *Elimination of Antitrust Exemptions.* Aside from the fact that the NLRA was designed for industrial employers and employees, the Act is typically more effective outside of professional sports at least in part because of the presence of competition in other industries. Competition does not exist in the NFL. The pronounced imbalance in bargaining strengths in the NFL is due partly to the lack of inter- and intra-league competition for players. The lack of external competition for employees deprives individual players of the opportunity to defect, or threaten to defect, to another employer (league) in the event that the union is unable to negotiate an acceptable collective bargaining agreement or the player is unable to reach an agreement with his team. This lack of external competition, coupled with the NFL's internal restrictions on competition for players, frequently places individual players in a "take it or leave it" situation in individual negotiations.³⁴⁶

The union's leverage in collective bargaining is, of course, a function of the leverage of individual players. Thus the union's leverage is inherently limited by the nature of the skills possessed by its bargaining unit employees. Strikes and holdouts jeopardize a disproportionate percentage of career earning potential for players with short careers and, in many cases, few alternative career opportunities. The lack of competition further limits the players' ability to withstand a strike and, consequently, the union's leverage at the bargaining table. With no competing league, most players have no legitimate alternative job opportunity and thus, are unlikely to outlast management in a labor dispute.

Moreover, because of the lack of competition, the strike, as a weapon to force management to concede to the union's demands, does not carry the same consequences for employers in professional sports as it does for employers in other industries. The 1987 NFL strike illustrates this point. With no competing league, the networks televised the replacement games, and the owners could offset at least part of the shortfall in gate receipts with the dramatic decrease in payroll expense associated with fielding replacement rather than regular players.³⁴⁷

Admittedly, management suffered significant losses during past players' strikes, and a future work stoppage may disrupt the owners' short-term revenue flow. Regardless of any short-term losses, however, the owners appear immune from the permanent or long term losses associated with the loss of market share. The absence of a competing league prevents the loss of market share to a competitor and, although the League has concerns over the negative impact of strikes on fan interest,

346. See, e.g., *North Dallas Forty* (Paramount 1979) (story of "washed up" player forced to take drugs in order to stay on team).

347. See *supra* notes 162-65 and accompanying text.

history shows that NFL fans, with no substitute product, are willing to tolerate labor disputes and even an inferior product. The attendance in 1983, after the players' strike, was eighty-seven percent of capacity.³⁴⁸ In 1987, many fans attended the replacement games and, when the walkout ended, fans seemed to forget the strike ever took place. Few employers in other industries could respond to a work stoppage by hiring inferior employees and producing an inferior product without the fear of losing market share and employees to a competitor. Few other employers or multi-employer bargaining units enjoy the type of monopoly and monopsony power enjoyed by the NFL owners. Not surprisingly, few unions face the same disadvantages at the bargaining table as the NFLPA.

Two antitrust exemptions granted by Congress have contributed to the elimination of inter- and intra-league competition: the exemption authorizing the package sale of the NFL's television rights to its games,³⁴⁹ and the exemption authorizing the NFL-AFL merger.³⁵⁰ In anticipation of new sources of revenue not covered by current league-wide revenue sharing arrangements, the NFL recently proposed additional legislation to prevent any future cracks in its monolith. The proposed legislation would exempt from the antitrust laws League rules controlling the movement of franchises, as well as League-wide revenue sharing arrangements for sky boxes and future non-network television revenue.³⁵¹

One way to reduce the imbalance in bargaining leverage in the NFL would be to force the League to operate, at least partially, in a competitive environment. Repealing either or both of the existing antitrust exemptions and denying the legislation currently proposed by the League would ensure a more competitive environment. The scope of the labor exemption is a more significant issue in the NFL than in other industries because of the cumulative impact of other exemptions on the industry. The purpose of the labor exemption is to foster collective bargaining, not to destroy the union's leverage at the bargaining table. Eliminating one or both of the existing exemptions and denying any additional exemptions would foster intra- and inter-league competition for players.³⁵² It would create more of a free market so that the labor exemption would have roughly the same impact on collective bargaining in the NFL as it

348. OFFICIAL 1987 NFL RECORD AND FACT BOOK (1987).

349. 15 U.S.C. § 1291 (1982).

350. *Id.*

351. See, e.g., S. 298, 99th Cong., 1st Sess., introduced at 131 CONG. REC. S633 (1985) (Sen. Deconcini introduces bill to clarify application of federal antitrust laws to professional sports industry); see also S. 259, 99th Cong., 1st Sess., 131 CONG. REC. S467-71 (1985) (Sen. Eagleton introduces bill to stabilize relationship of professional sports teams and host communities).

352. While eliminating the exemptions that allowed the NFL-AFL merger to take place could conceivably reestablish inter-league competition, such a proposal is simply not feasible today.

does in other industries.³⁵³

a. The television exemption. The 1961 legislation permitting the League to sell its television rights in a package effectively sanctioned the pro rata allocation of network television revenue.³⁵⁴ Whatever the impact this arrangement had on the overall allocation of industry revenues in 1961, before television became a major force in the industry, its impact in 1989 cannot be overstated. Television revenues now constitute a larger source of revenue than gate receipts. Under the League's current, three-year television agreement, each NFL team will receive approximately \$17 million per year, regardless of its record or the number of times it appears on television.³⁵⁵ Coupled with the division of gate receipts, which are shared between the home and visiting team on a 60%-40% basis, the pro rata division of television revenues undoubtedly dampens the enthusiasm for bidding on expensive free agents, even if the League agreed to such an intra-league system at the bargaining table.

Repealing the exemption authorizing package arrangements and the sharing of television revenues clearly would increase a team's incentive to win and to bid on expensive free agents. Although the NBA and Major League Baseball (MLB) share network television revenues, those leagues do not negotiate away the exclusive rights to their games to network television. As a result, individual franchises are free to contract with non-network and local or regional cable stations.³⁵⁶ The revenue generated from these sources is generally not shared.³⁵⁷ Winning undoubtedly increases viewers, cable subscribers, and ultimately advertising revenues, which in turn increases the winning team's non-network television revenue. Thus, NBA and MLB teams have an economic incentive to win, due in part to the fact that a larger percentage of league revenues are

353. In other industries, arrangements involving employers and other employers or sellers of products are subject to the antitrust laws. In other words, horizontal and vertical arrangements, i.e., arrangements not between employers and employees, are not normally exempt or immune from antitrust attack.

354. 15 U.S.C. § 1291 (1961). By selling its games in a package, the League would receive a lump sum payment from the networks and distributing this by any formula other than a pro rata allocation would be problematic (since the Kansas City Chiefs could argue, for example, that if there was no team for the New York Jets to play then there would be no television contract).

355. See Zimmerman, *Time to Light a Fire*, SPORTS ILLUSTRATED, Sept. 11, 1989, at 28, 30.

356. Unlike the NFL, MLB clubs do not give the Commissioner exclusive rights to negotiate contracts over their games, but only grant authority with respect to network contracts. Telephone conversation with Don Gibson, MLB Broadcasting Dep't (Sept. 9, 1989). Thus, individual franchises are free to negotiate for non-network broadcasting.

357. The one exception to the practice of not sharing non-network revenues exists in MLB where the "superstation" teams (the Atlanta Braves, Chicago Cubs, and New York Mets) make larger than pro rata contributions to the players' pension fund. *Id.*

unshared. Presumably, NFL teams also would have a greater incentive to win if television revenues were not shared on a pro rata basis.

Is it feasible to repeal the television antitrust exemption? In the absence of other measures to ensure the League's stability, repeal of the legislation authorizing the package sale of the League's television rights is probably not a realistic solution. Undoubtedly, the NFL would argue that the elimination of a pro rata distribution of network television revenues would place teams in small markets at a tremendous economic disadvantage and ultimately lead to the type of imbalance in team strengths that could jeopardize the viability of the League.³⁵⁸ However, the imbalance in team strengths, which the NFL fears is an inevitable product of free agency or any other system providing an incentive to win, has not materialized in the NBA or MLB. With the single exception of the NBA's Los Angeles Lakers, teams in large markets have not consistently dominated divisional races or championship series. Nonetheless, NFL management could make a plausible argument that the elimination of the pro rata distribution of network television revenues in conjunction with an intra-league system providing for the movement of free agents would make it impossible for teams in small markets such as Green Bay and Kansas City to compete with teams in large markets.

Even assuming that large market franchises would dominate the NFL in the event that television revenues were not distributed pro rata, various measures could be adopted to prevent this type of imbalance from occurring. For example, the League could adopt a salary cap to control the amount of money each team could spend on salaries, or limit the number of free agents any single team could sign per year. The NBA, which operates franchises in Portland, San Antonio, Sacramento, and Salt Lake City, adopted this measure.³⁵⁹ Alternatively, the League could require teams in large markets to subsidize teams in small markets. MLB has, to a limited extent, followed this strategy. For instance, "Superstation" teams are required to contribute a larger than pro rata share to the players' pension fund.³⁶⁰

Finally, the League could eliminate the restrictions on the movement of franchises. Presumably, teams in small markets that were unable to compete for players would gravitate to larger markets to maximize their revenues, unless they were subsidized by their large-city sister clubs. Theoretically, the marginal revenue products of all

358. See *supra* text and notes accompanying notes 33-38.

359. See Memorandum of Understanding between NBA and NBPA, which amended the 1976 Robertson Settlement Agreement (Apr. 18, 1983).

360. See *supra* note 356.

franchises would ultimately be equal.³⁶¹ Of course, the result might be a league with three franchises in Los Angeles, New York and Chicago, and none in Kansas City, Cincinnati, or Green Bay—a result inconsistent with the NFL's apparent desire for geographical dispersion.

A more moderate solution would be to amend the current exemption to permit the League to package its television rights only if the arrangement was non-exclusive. In other words, Congress could force the League to negotiate a network contract, like the NBA and MLB network arrangements, that would permit individual teams to negotiate individual, non-network television arrangements. Perhaps the most feasible solution would permit the package sale of exclusive television rights, but require the League to designate a portion of the revenue generated by network television as a playoff pool to be distributed to those teams that are eligible for post-season play.³⁶² Any system that rewarded teams for winning could potentially increase intra-league competition for players. The predicted advantage to teams in large markets could be offset or minimized by those measures suggested above: a salary cap, a limit on the number of free agents a team could sign, or elimination of restrictions on teams movement.

b. The merger exemption. In 1966, Congress enacted legislation sanctioning the merger between the NFL and AFL. The merger was great for the NFL and AFL. The two leagues had become involved in a bidding war for players which had driven salaries up to 67% of gross revenues. From an economic standpoint, the merger was disastrous for players. The merger completely eliminated the competition for players, and by 1980 salaries had declined to approximately 30% of league revenues.³⁶³

Although two additional competitors, the WFL and USFL, have since attempted to enter the market,³⁶⁴ neither league was capable of overcoming the enormous capital investment required to compete with the NFL. In the 1960s, the NFL had franchises in 12 cities and received a relatively small amount of money from its television arrangement with one network. Numerous markets capable of supporting professional

361. See generally P. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS 190 (1970) (discussing marginal revenue).

362. As it approached the negotiations in 1987, the NFLPA proposed that a League-wide playoff pool of money be established to reward the owner who wins. See NFLPA, GAME PLAN '87, BLUEPRINT OF PRIORITIES IN COLLECTIVE BARGAINING IN 1987, at 11 (1986).

363. After the AFL-NFL merger, the percentage decreased to 42% in 1972 and 30% in 1980. WHY A PERCENTAGE OF GROSS, *supra* note 107, at 36.

364. The WFL played two seasons (1974-75). The USFL played three seasons (1983-85) before it ceased play.

football and two networks were available to the AFL. While AFL owners undoubtedly lost money in the league's early years, they certainly did not face the same market power of the NFL in the 1960s which the WFL and USFL faced in the 1970s and 1980s. The NFL is currently in 26 markets and has a contractual arrangement with the three networks as well as ESPN, the national cable all-sports network. As the USFL discovered in the 1980s, the capital required to enter the market for professional football and legitimately compete with the NFL had become a barrier to entry. The NFL, partly because of the NFL-AFL merger and the League's three network television arrangement, has acquired an insurmountable degree of market power.

The tremendous mismatch in bargaining strengths between the NFL and NFLPA is due to the cumulative effect of the lack of intra- and inter-league competition for player service. Certainly the right of first refusal/compensation system demanded by management at the bargaining table would be less onerous if inter-league competition for players existed. The dramatic increase in NFL salaries between 1982 and 1985 illustrates this point.³⁶⁵ The rise in salaries was a function of the competition for players between the NFL and USFL that existed during that period.

Prior to the NFL-AFL merger, each league conducted its own draft and they had no inter-league arrangement preventing a team in one league from approaching a player from a team in another league upon the expiration of the player's contract. In other words, rookies and veterans were able to negotiate with one team in each league. Thus, repealing the AFL-NFL merger in effect would create partial free agency, giving players an opportunity to negotiate with at least two teams.³⁶⁶

365. In 1982, the year before the USFL began operations, the average NFL salary was approximately \$100,000. By 1985, the average NFL salary was approximately \$200,000. Telephone conversation with NFLPA Research Dep't (Sept. 5, 1989).

366. Admittedly, repealing the AFL-NFL merger exemption would not necessarily result in competition for player services similar to that which followed the formation of the AFL, WFL, and USFL. The teams in those leagues played before less-than-capacity crowds and had low television ratings and, therefore, had an economic incentive to sign free agents. The competition created by teams in those leagues was a function of their attempt to increase gate receipts and build market share. Attempts to sign highly visible, high-priced stars were presumably based on a belief that the marginal revenue product of high-priced stars would exceed the marginal costs of signing those players.

At the same time, the NFL had an economic incentive to engage in a bidding war for players with the new leagues. The more quality players the new leagues acquired, the longer they could survive and the more likely that they could produce a quality product. Theoretically, for example, the USFL ultimately could produce a product that equalled or exceeded the NFL's product. Competition for players then would have become an industry constant and, in the absence of another merger, placed permanent upward pressure on player salaries. By competing for players, the NFL maintained its superiority over the USFL in the short run and, in the long run, made the cost of competing with the NFL prohibitive. In other words, the NFL had an economic incentive to absorb

3. *Amendment to NLRA.* Another way to reduce the imbalance in bargaining strengths would be to amend the National Labor Relations Act as it applies to the professional sports industry. The Act's current procedures simply cannot accommodate the needs of employees in an industry such as professional sports where careers are short and employment is seasonal. Although the NLRB has issued complaints on numerous unfair labor practice charges filed by the NFLPA, few of those charges were resolved in a timely manner. Within the context of collective bargaining, delays in Board procedures frequently undermine the union's bargaining position and thereby affect the terms of the ultimate agreement. New procedures to expedite the resolution of unfair labor practice charges, especially those committed during a strike or negotiations for a new collective bargaining agreement, would minimize the erosion of union support which is likely to accompany continuous and unremedied misconduct by the owners.³⁶⁷

Section 10(j) of the Act,³⁶⁸ a provision designed to provide injunctive relief for victims of unfair labor practices pending resolution by the Board of the associated charges, should be applied more liberally within the context of professional sports. Section 10(j) was enacted because Congress was aware that the delay in Board procedures sometimes rendered the Board unable to correct unfair labor practices until after the victim had suffered irreparable harm.³⁶⁹ Thus, section 10(j) is critical to employees in industries such as professional sports where careers are short or employment is seasonal, as well as in any other circumstances in

the short-run costs associated with the competition for players in order to avoid the long-term costs of a permanent competitor in the marketplace or an involuntary merger.

That same economic incentive to compete would not necessarily exist if Congress separated the AFL and NFC. The two leagues would have little economic incentive to compete if each league maintained an intra-league system of revenue sharing and continued to enjoy capacity crowds and stable television ratings. In such an environment, the marginal cost of signing high quality free agents would exceed the marginal revenue product of such players. Nonetheless, the possibility would exist that some owners would realize more utility from winning than maximizing their profits and, thus, would bid for players on teams in the other league to improve their own team.

367. See Lock, *Employer Unfair Labor Practices*, *supra* note 130, at 224-25 (advocating accelerated procedures for processing NLRB complaints filed by unions)

368. 29 U.S.C. § 160(j) (1982).

369. See Lock, *Employer Unfair Labor Practices*, *supra* note 130, at 190 n.6.

The Senate Report on Section 10(j) alluded to the potential problem created by the Board's slow procedures. S. REP. NO. 105, 80TH CONG., 1ST SESS. 8, 27 (1947), *reprinted in* NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407-14, 433 (1947). Acknowledging that the Board was often unable to correct unfair labor practices until the innocent party had already suffered substantial injury, the report explained: "It has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation." *Id.* at 27, *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, at 433.

which resort to normal Board procedures would reduce significantly the ability of the Board to remedy in a meaningful way an unfair labor practice. Although section 10(j) is viewed by the Board and courts as an extraordinary remedy,³⁷⁰ it was enacted to address the type of extraordinary situation that is an inevitable by-product of the unique bargaining relationship in professional sports.³⁷¹

Substantive changes in the NLRA to reflect the unique nature of the professional sports industry also would further the underlying purposes of the Act. For example, the same standard or test for discriminatory discharge applied in an industrial setting, where employees can be evaluated on an objective basis, realistically cannot be applied to employees who because of the unique nature of their employment relationship, are employed by employers who retain sole discretion to terminate employees for lack of skill.³⁷²

Similarly, the widespread exposure of professional sports should affect the scope of the owners' obligation to disclose profit and loss information.³⁷³ "Inability to pay" statements³⁷⁴ made away from the bargain-

370. Section 10(j) has been used sparingly by the Board and the courts. The Board has historically restricted its use of section 10(j), exercising its discretion under that provision "not as a broad sword, but as a scalpel, ever mindful of the dangers inherent in conducting labor management relations by way of injunction." Lock, *supra* note 130, at 190 n.6 (quoting address by Board Chairman Frank W. McCulloch before the Eighth Annual Joint Industrial Relations Conference, Michigan State University (April 19, 1962), reprinted in 49 L.R.R.M. (BNA) 74, 83 (1962)).

Although the Board has, since 1962, expanded its use of section 10(j), it has continued to limit its requests for section 10(j) relief to extraordinary situations. See, e.g., Note, *Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look at a Potentially Effective (But Seldom Used) Remedy*, 18 SANTA CLARA L. REV. 1021, 1026 n.5 (1978). The courts also consider section 10(j) an extraordinary remedy. See, e.g., *Minnesota Mining & Mfg. Co. v. Meter ex rel. NLRB*, 385 F.2d 265, 272 (8th Cir. 1967) (section 10(j) reserved for serious and extraordinary set of circumstances).

371. See Lock, *Employee Unfair Labor Practices*, *supra* note 130, at 190 n.6.

372. *NLRB v. Wright Line*, 251 N.L.R.B. 1083, 1089 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

373. An employer normally will not have to disclose information regarding such matters as executive salaries, company profits, and detailed breakdowns of company expenses. The union must show a specific need, evaluated on a case-by-case basis. See, e.g., *United Furniture Workers of America v. NLRB*, 388 F.2d 880, 882-83 (4th Cir. 1967) (employer not required to turn over profit data, even though the employee's Christmas bonus was calculated as a percentage of profits, because nondisclosure would not impede bargaining); see also R. GORMAN, *supra* note 66, at 413 (company's financial data need not be disclosed because it is presumptively irrelevant, absent a company claim of poverty).

374. Although employers normally need not disclose profit and loss information, an employer will be required to disclose, upon request, information to substantiate claims of financial inability to meet the union's bargaining demands. "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims," including claims of inability to pay an increase in wages. "If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956). During the 1981 negotiation between the Major League Baseball Players Associ-

ing table are more likely to reach employees in an industry such as the NFL, where statements by team owners are reported on a regular basis, than in other industries that are not the daily focus of national media attention. Statements by the owner of the Dallas Cowboys, for example, that the union's demands, if accepted by management, will jeopardize the financial stability of the League are certain to reach players in Dallas as well as other NFL cities, regardless of whether the owner is a member of the management council or the statements are made to a local reporter in Dallas. In this context, the owners should be required to provide substantiating financial information to support such assertions.

The unique nature of employee skills in professional sports also requires a broader scope of mandatory bargaining than is required in the normal industrial setting. Employers in all industries have an obligation to bargain over matters involving "wages, hours and other terms and conditions of employment."³⁷⁵ Excluded from the scope of mandatory bargaining are various matters presumed to be within an employer's entrepreneurial prerogative. Thus, employers normally have the right to unilaterally implement decisions concerning the commitment of investment capital, the basic scope and direction of the enterprise, and advertising expenditures.³⁷⁶ Similarly, product design decisions normally have too remote and speculative an impact on conditions of employment to fall within the scope of mandatory bargaining.³⁷⁷

Despite the merit of excluding product design decisions from the scope of mandatory bargaining in the normal industrial setting, this limitation conflicts with the purpose of the NLRA when the employees' performance is the marketed product.³⁷⁸ For example, NFL owners have argued consistently that decisions involving rule changes³⁷⁹ and playing

ation (MLBPA) and the Major League Baseball Player Relations Committee (MLBPRC) over the issue of free agent compensation, several owners made away-from-the-table statements picked up by the press indicating that the existing system of free agency and the associated escalation of player salaries was threatening the financial viability of professional baseball. The MLBPA requested financial information to substantiate the claim. When the MLBPRC refused to disclose the requested information, the union filed an unfair labor practice charge and asked the Board to seek section 10(j) relief. *Silvermann ex rel. NLRB v. Major League Baseball Player Relations Comm.*, 516 F. Supp. 588, 593-94 (S.D.N.Y. 1981).

375. 29 U.S.C. § 158(d) (1982).

376. *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 224 (1964) (Stewart, J., concurring); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981) ("[I]n establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business . . .").

377. *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring).

378. *See Lock, The Legality Under the NLRA of Attempts by NFL Owners to Unilaterally Implement Drug Testing Programs*, 39 U. FLA. L. REV. 1, 37 (1987).

379. *See, e.g., NFLMC and Constituent Member Clubs of the NFL and NFLPA (NFLMC II)*, at 27-32, NLRB Case No. 13379 (June 30, 1976) (overtime and punt rules).

surfaces³⁸⁰ are essentially product design decisions. Yet, in professional sports rule changes and playing surfaces invariably affect the safety of players.³⁸¹ The NLRB and courts have held that safety concerns are conditions of employment within the meaning of the NLRA and, accordingly, are mandatory subjects of collective bargaining.³⁸² Until now, the Board and courts have addressed this inherent conflict on an ad hoc basis.

Finally, the most effective way to effectuate the purposes of the NLRA is to adopt a system of fines or penalties for violations of the Act's unfair labor practice provisions. The Act currently exerts little influence on the parties' conduct during collective bargaining. Even when the Board scheduled hearings and acted swiftly to resolve a particular unfair labor practice charge, it was incapable of vindicating the NFLPA's rights. Board sanctions are not punitive; they are simply designed to remedy violations of the Act.³⁸³ Although the Board ultimately may be able to eliminate the unlawful conduct, the Act contains no provisions either to undo the benefit that a violator may have derived from the unlawful conduct or to penalize the wrongdoer.³⁸⁴ Indeed, most of the NFLPA's unfair labor practice charges resolved by the Board resulted in a simple cease and desist order.³⁸⁵ Not surprisingly, in many situations NFL owners frequently have an economic incentive to commit unfair labor practices.³⁸⁶

The incentive for management to violate the unfair labor practice provisions of the Act is particularly high in the professional sports industry. Because professional athletes have short careers, minimal job security and seasonal opportunities for employment, athletes are extremely vulnerable to violations of the Act committed by their employers.³⁸⁷ During negotiations for a new agreement and especially during a work

380. National Football League Mgmt. Council and Constituent Member Clubs of the National Football League and National Football League Player's Ass'n (NFLMC I), 203 N.L.R.B. 958, 958 (1973) (installation of artificial turf).

381. See *id.* at 962.

382. See, e.g., *Miller Brewing Co.*, 166 N.L.R.B. 831, 832 (1967), *enforced* 408 F.2d 12 (9th Cir. 1969); see also *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring) ("what safety practices are observed" included among conditions of employment).

383. See 29 U.S.C. § 160(c) (1982).

384. The remedy for most unfair labor practices is a cease and desist order. *Id.* The Act does, however, provide for reinstatement and back pay for employees wrongfully discharged because of their union activities. *Id.*

385. See *supra* notes 268-69 and accompanying text.

386. See generally Skelton, *Economic Analysis of the Costs and Benefits of Employer Unfair Labor Practices*, 59 N.C.L. REV. 167 (1980) (cost-benefit analysis frequently makes employer unfair labor practices attractive).

387. The impact of unfair labor practices on professional athletes is discussed in Lock, *Employer Unfair Labor Practices*, *supra* note 130.

stoppage, employer misconduct, if uncorrected,³⁸⁸ in all likelihood will gradually erode player support for the union and ultimately affect the terms of the agreement between the parties.³⁸⁹ In this respect, a violation of the Act becomes a weapon of abuse for management.

Amending the substantive provisions of the Act undoubtedly would result in a more predictable and consistent application of the Act within the context of professional sports and, depending on the amendments, could bring a wider range of management conduct within the scope of the Act's unfair labor practice provisions. Yet, unless Congress also amended the remedies under the Act, these amendments would have little impact on management's conduct. Management would have more occasion but no less incentive to violate the Act.

One way to eliminate management's incentive to commit unfair labor practices is to fine violators of the Act. The fine should be large

388. Presumably, the injurious effects of employer misconduct will increase the longer the misconduct is allowed to continue. See Note, *The Propriety of Section 10(j) Bargaining Orders in Gissel Situations*, 82 MICH. L. REV. 112, 129-31 (1983).

389. An employer's refusal to bargain or other misconduct, if allowed to continue, may gradually erode employee support for the union. See Note, *supra* note 387, at 119. During a union organizational drive, an employer's unlawful conduct may reduce the chance of unionization. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-11 & n.31 (1969) (noting that employer's unfair labor practices tended to preclude a fair union election). In situations where a union has already been certified, an erosion of employee support can impair that union's bargaining leverage. The erosion might prevent a union from using the threat of a strike as leverage during negotiations. See Note, *supra* note 387, at 133. Gradual erosion may further weaken the union's position as collective bargaining proceeds and ultimately affect the concessions it can obtain from management. As the court in *International Union of Elec. Workers v. NLRB*, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970), stated:

Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. Thus, the employer may reap a . . . benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively.

426 F.2d at 1249. (citations omitted). See also *Frank Bros. v. NLRB*, 321 U.S. 702, 704 (1944) (employer's refusal to bargain can eventually cause irreparable harm by deflating morale of the employees and discouraging union membership).

Professional athletes are especially vulnerable to employer unfair labor practices because they have short careers and little job security. See H.R. REP. NO. 1786, 94TH CONG., 2D SESS. 535 (1977) (NFLPA's proposed amendments to section 10(j)). Ed Garvey, executive director of the NFLPA, proposed that section 10(j) be amended as follows:

that whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Section 8(a)(1)-(5) of the Act and the unfair labor practice affects employees (1) in an occupation in which the average career length is short or employment opportunities are seasonal, or (2) in other circumstances in which recourse to normal Board processes would significantly reduce the ability of the Board to meaningfully remedy the unfair labor practice, the preliminary investigation of such charge shall be given priority over all other cases except cases of like character and cases arising under Section 10(j) of the Act

Id.

enough, depending on the severity and frequency of the misconduct, to deter unlawful behavior. In other words, the fine should be large enough so that management is at least indifferent between violating and complying with the Act.³⁹⁰

4. *Recommended Solution.* The application of federal antitrust and labor law within the context of professional sports has failed to advance the underlying objectives of either antitrust or labor law. In the NFL, for example, two legislative exemptions, enacted prior to the formation of the NFLPA, permitted the package sale of the NFL's television rights and the NFL's merger with a viable competitor. The labor exemption has immunized anticompetitive player restraints which have evolved through an inherent mismatch in relative bargaining strength be-

390. Stated differently, the marginal cost of violating the Act should be greater than or equal to marginal benefits derived from the violation. E. MANSFIELD, *MICRO-ECONOMICS, THEORY AND APPLICATION* ch. 7 (1985). Perhaps the most drastic solution to the problems associated with the lack of competition and the unique employment relationship in professional sports would be to establish an administrative agency to regulate the entire industry. In the absence of complete deregulation, the industry needs a more comprehensive regulatory scheme. Conceivably Congress could exempt the entire professional sports industry from federal antitrust and labor law and establish an agency to oversee the nature of the employer-employee relationship and determine the desirable degree of competition in the industry.

The agency could be staffed with people familiar with the industry, economists to analyze the impact of various measures currently presumed to be necessary for the survival of the leagues, and statisticians to chart trends and recommend changes based on those trends. The agency could, if the industry was exempt from the antitrust laws, process and resolve disputes over various restraints of trade or, if the industry was not exempt from the antitrust laws, issue advisory opinions and recommendations based on its perception of the legality or illegality of the practice in question.

Like the NLRB, the agency also could develop rules concerning collective bargaining, investigate and prosecute violations of these rules, and process grievances in accordance with the procedures agreed to by the parties. These rules and procedures would be tailored to meet the unique needs of the parties and, presumably, would ensure that conditions of employment in the industry were not based entirely on strength or bargaining leverage. To avoid the disruption and adverse economic impact of strikes, the agency could assume the role of mediator or even arbitrator in collective bargaining disputes that reached impasse and were likely to result in a work stoppage.

In addition to ensuring compliance with rules governing collective bargaining, the agency also would be able to protect the interests of other constituencies, such as fans, stadium authorities, municipalities, and non-network television. These constituencies are affected by current league practices and the labor strife that has plagued the industry, but are not represented in the current scheme of league rules, random and inconsistent antitrust decisions, and general labor statutes. The agency could adopt or approve rules governing leasing and stadium arrangements, the movement of franchises, and expansion to prevent the types of situations that developed in Philadelphia and Indianapolis when the Eagles and Colts brought those cities to their respective knees. The City of Philadelphia paid an enormous ransom to keep the Eagles in Philadelphia while Indianapolis did the same to lure the Colts away from Baltimore, situations that developed partly because of the NFL's control over expansion. Finally, the agency could ensure that the fans were a factor in league decisionmaking by approving ticket prices, arbitrating labor disputes to eliminate strikes, and controlling the leagues' arrangements with network television to allow for the broadcast of games on non-network or pay television.

tween the owners and NFLPA. These exemptions have severely limited the application of federal antitrust law to industry restraints.

As a result of these exemptions, the level of competition common among employers in other industries does not exist in professional football. In fact, NFL owners operate in a market best described as monopolistic.³⁹¹ At the same time, this lack of competition, together with the unique nature of the employment relationship in professional sports, has essentially rendered the application of federal labor law meaningless. The procedures and substance of the NLRA are simply not suited for employees and employers in a monopolistic industry with the type of employment relationship that exists in professional sports.

Repealing one or both of the antitrust exemptions or amending the NLRA undoubtedly would help further the objectives of federal labor and antitrust law. Yet, no single measure will bring the industry within the scope of these laws. Instead, a combination of measures is necessary to achieve the goals of labor and antitrust policy. The following combination of legislative and judicial action advance both federal labor and antitrust policies.

1. Congress should amend the substantive provisions of the NLRA to accommodate the unique nature of the employment relationship in professional sports and to provide the parties with predictable rules regarding the scope of lawful and unlawful conduct. A number of changes—such as expedited unfair labor practice proceedings, an expanded use of injunctive relief under § 10(j) of the Act, an enumeration of mandatory and non-mandatory subjects within the industry, a more clearly defined policy regarding the scope of the labor exemption, and an enunciation the NLRB's primary jurisdiction vis-a-vis the courts with respect to disputes encompassing both federal antitrust and labor law—could be tailored to recognize the unique nature of professional sports. Congress also should incorporate a system of fines into the remedial provisions of the Act to discourage conduct that undermines the policies of federal labor law.

2. The Minnesota district court should outline the type of system regulating free agency that might satisfy the rule of reason.³⁹² Judicial guidelines regarding the reasonableness of free agent restrictions would foster both antitrust and labor policy. Upon expiration of the collec-

391. See *NFL v. USFL*, 644 F. Supp. 1040, 1057 (S.D.N.Y. 1986) (finding NFL had monopoly power), *aff'd*, 842 F.2d 1335 (2d Cir. 1987).

392. Precedent exists for the court to define a "reasonable" free agent system. In *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1187-88 (D.C. Cir. 1978), the District of Columbia Circuit, after condemning the NFL's amateur draft, suggested several less restrictive alternatives that would contribute to the League's goal of competitive balance without violating the antitrust laws. More recently, the Ninth Circuit in *Los Angeles Memorial Coliseum Comm'n v. NFL*, 634 F.2d 1197 (9th Cir. 1980), offered procedural suggestions to bring League rules governing the movement of one franchise into the home territory of another franchise under the protection of the rule of reason. *Id.* at 1201.

tive bargaining agreement, the League, provided it first bargained to impasse, would have the right under the NLRA to unilaterally implement a system that fell within the scope of the court's guidelines.³⁹³ Thus, the League could prevent the total chaos it fears would result from the complete and immediate elimination of the restrictions on free agency. More importantly, the League's action would be consistent with federal labor and antitrust law. In the event that the League thought it needed a more restrictive system, it would have an incentive to bargain with the union regarding such a system. To the extent that the League negotiated a more restrictive system, federal labor policy fostering collective bargaining would prevail over antitrust policy, and the more restrictive system would be immunized from antitrust attack by virtue of the nonstatutory labor exemption.

3. Finally, Congress should, in exchange for the preservation of the current statutory antitrust exemptions, require the League to provide an economic incentive for teams to win on the playing field. This could be accomplished by simply requiring the League to establish a pool of money to be distributed to the divisional winners and championship teams. The League always has argued that, because of the unique nature of the industry, teams cannot be expected to compete with each other for market share in the same manner that employers in other industries compete with each other; the owners' product is jointly produced and no team has an economic incentive to drive another team from the market.³⁹⁴ While this argument has merit, it does not justify the complete negation of federal antitrust policy within the context of the NFL. To further the policies of federal antitrust law, the League should be required to compete in a manner that is consistent with the unique nature of its product. The Chicago Bears do not have an incentive to drive the Minnesota Vikings out of business, but the Bears management should have an economic incentive to defeat the Vikings on the playing field. In the absence of such incentive, no guarantee exists that amending the NLRA or establishing reasonable parameters for restrictions on free agency will result in competitive bidding for free agents.

VI. CONCLUSION

In his opening statement in the *Mackey* case in 1975, NFL attorney Jim McKay addressed the district court: "Your honor, this case is brought by some young men who have grown rich beyond their wildest dreams by this great system which they now malign." The district court apparently failed to recognize the significance of this observation and concluded that the system maligned by the wealthy plaintiffs was a *per se* violation of section 1 of the Sherman Act. Unfortunately, the NFL, media, and the fans still believe that, because the average salary in the NFL

393. See, e.g., *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 64-66 (1964).

394. See, e.g., *United States v. NFL*, 116 F. Supp. 319, 323-24 (E.D. Pa. 1953).

exceeds \$200,000, the players have no right to seek the elimination of restrictions on free agency.

The NFL's right of first refusal/compensation system is an intra-league rule designed to prevent teams from engaging in competitive bidding for veteran free agents. Absent union approval for such a system, NFL owners should be forced to eliminate this system and exercise the same fiscal responsibility and good business judgment exercised by employers in other industries, and in fact by themselves in their business dealings outside of the NFL. Regardless of the average salary of NFL players, players have a right to decide where they will work and to receive salaries determined in a competitive market. "If the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian minded will believe that high pay excuses virtual slavery."³⁹⁵

The facts in the current dispute between the NFL owners and NFLPA are simple. The NFL's right of first refusal/compensation system, notwithstanding the recent liberalization of that system, almost certainly violates section 1 of the Sherman Act. The union has indicated unequivocally that it opposes the continuation of that system. Unless the owners entice the players to accept the system in exchange for other benefits, no court could conclude that a continuation of this restraint could be the product of good faith, arm's-length bargaining in the current negotiations.

Congress, in enacting the NLRA, contemplated that labor and management would determine their own terms and conditions of employment through collective bargaining and, if necessary, the use of economic weapons. The nonstatutory labor exemption is a judicial recognition of this objective. The exemption fosters and protects the collective bargaining process; it elevates the policy of collective bargaining embodied in the NLRA above federal antitrust law to exempt certain restraints agreed to during the collective bargaining process. Neither Congress nor the courts, however, contemplated that the labor exemption would be applied to permit a party with significantly greater bargaining leverage to unilaterally dictate terms or conditions of employment that violate federal antitrust law.

The NLRB's failure to resolve promptly management's refusal-to-bargain charge has prevented the Minnesota district court from promptly resolving the question of whether the labor exemption has expired. As a result, the current NFL-NFLPA dispute was not resolved prior to the

395. *Mackey v. NFL*, 543 F.2d 606, 622 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977) (citing *Gardella v. Chandler*, 172 F.2d 402, 410 (2d Cir. 1949)).

start of the 1989 season. Because of the continuous execution of individual contracts that do not necessarily coincide with the length of the collective bargaining agreement, and because of the twenty-five percent yearly employee turnover rate and the seasonal nature of employment in the industry, this delay could ultimately prevent a just resolution of the underlying antitrust dispute between the parties.

By concluding that the exemption expired with the agreement, the Minnesota district court could have contributed to a prompt resolution of this dispute. Instead, the court focused its legal analysis on specific principles of federal labor law and adopted a test that has prolonged the resolution of the antitrust issues raised by the players. By focusing solely on principles of federal labor law, the court failed to achieve the underlying purpose of the labor exemption.

The NLRA was designed for industrial employees. It was not designed for professional employees with a wide range of skills, short careers, and seasonal employment. Thus, neither the procedures nor substantive provisions of the Act accommodate the unique employment relationship in professional sports. Similarly, the antitrust laws were designed for industries in which firms compete on an economic basis for market share. They were not designed for an industry in which the product must be jointly produced by a group of competitors who, because of a congressional exemption from the antitrust laws, share industry revenues. As a result, the Board and the courts have been forced to interpret and apply federal labor and antitrust statutes within the context of an industry which is unlike industries for which these statutes were designed. Not surprisingly, courts have struggled and disagreed over the application of legal doctrine involving this intersection of federal labor and antitrust law.

Perhaps the only way to ensure an appropriate and consistent application of the antitrust and labor laws to the NFL is to amend these laws to accommodate the unique employment relationship in the industry and to eliminate the current legislative exemptions to the antitrust laws. In the absence of either of these alternatives and in light of the bargaining history between the NFL owners and NFLPA and the unique nature of the professional sports industry, only one application of the labor exemption to the facts in this dispute properly accommodates competing antitrust and labor policies. The labor exemption expired on August 31, 1987, the day the 1982 NFL-NFLPA Collective Bargaining Agreement expired. This application of the exemption would have eliminated the current delay and resolved questions concerning the Board's primary jurisdiction and the court's authority to determine the presence or absence of good faith bargaining. More importantly, this application of the labor

exemption would foster collective bargaining without completely subverting federal antitrust policy. The Minnesota district court failed to adopt this application of the exemption. For the sake of future collective bargaining in the NFL, the Eighth Circuit now has an opportunity to correct the district court's error.

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