COLLECTIVE BARGAINING AND THE PROFESSIONAL TEAM SPORT INDUSTRY

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INTRODUCTION

In the economic history of American civilization, it has been a common phenomenon for employees to join in concerted efforts to rectify what is perceived to be their employer's oppressive rule. In light of the common assertion that professional athletes are little more than "peon[s]" or "slaves," and the fact that professional athletics has increasingly assumed the trappings of ordinary business enterprise, it is hardly surprising that unionization has been steadily creeping into the arenas of the professional team sport industry. This "creep" has, in fact, reached the point that recognized exclusive collective bargaining agents—in the form of players associations—currently represent most players in collective bargaining with the club owners.

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3 The advent of collective bargaining in professional football is described in Shulman & Baum, supra note 1, at 94-102.

4 The advent of collective bargaining in professional football is described in Shulman & Baum, supra note 2; see also Krasnow & Levy, supra note 1. The scope of the National Football League Players Association is considered in Labor Relations in Professional Sports, supra note 1, at 11.

5 See, e.g., Labor Relations in Professional Sports, supra note 1, at 91; see also Wall Street Journal, Aug. 23, 1967, at 1, col. 1. It is noteworthy, however, that the players associations have never thought of themselves as a union, but rather as an "association." See Hearings Before the House Subcommittee on Antitrust and Monopoly of the House Committee on the Judiciary, 89th Cong., 1st Sess. 104 (1964) [herein-
The emergence of these players' "unions" has been much less than a precipitous event, since they have been a periodic characteristic of the professional team sport scene since the very early days of organized baseball. It is only in the recent past, however, that collective bargaining agents have been an ongoing feature of the sports industry.

The emergence of a countervailing power in this particular market has, to date, had relatively little impact on the structure of the organized professional sports. In fact, the "labor situation" in professional sports is still only in its infancy. As time goes on, however, the parties appear to be relentlessly headed down a path that can lead them only into the same "thicket" of problems that has for many years beset the labor-management relationship in other areas of American industry. As this path is traveled, the parties will increasingly find themselves immersed in the labor law. This is certainly predictable, but as yet it seems that the parties have not fully appreciated—or at least that appreciation has not been articulated—the hurdles that will almost certainly appear.

The purpose of this article will be to outline the types of problems which seem to be present in the professional team sport industry when it is covered by the veil of the labor laws. What will basically flow from this discussion is, simply, that when the owners and players enter the arena of formalized collective bargaining, they literally start a new ball game. In that arena, their relationship and conduct is governed by a vast scheme of statutory and decisional rules which are the product of some forty years of experience in other areas of American commerce. These rules may cause quite unexpected changes to occur in the sporting leagues, and they will, to be certain, put the owner-player relation upon a new foundation.


It has, thus, been observed that "players have [periodically] organized unions which thrived for a fleeting moment, made their impact on . . . [sports] law, and then faded into history." H.R. Rep. No. 2002, 82d Cong., 2d Sess. 172 (1952). An interesting discussion of the fate of one such union is contained in Seymour, St. Louis and the Union Baseball War, 51 Mo. Hist. Rev. 257 (1956).

One representative of the players has, for example, expressed the opinion that "we have never really seriously considered" the labor laws or their impact. 1964 Hearings, supra note 5, at 104.

Perhaps the easiest example of the new relationship is evidenced by the frequent reports that club owners, or their agents, assemble their players for the purpose of discussing various matters pertaining to their relations, see, e.g., Washington Post, Apr. 8, 1972, § E, at 1, col. 1-3, and that the player representatives on the various teams are more often than not traded by their club owners. See Labor Relations in Professional Sports, supra note 1, at 194 Brown, supra note 2, at 19-20. Though such actions are perfectly permissible absent the labor laws, they are clearly impermissible once the parties enter the collective bargaining arena, bound as it is by the various strictures of the national labor policy. One of those policies is embodied in section 8(a)(1) of the National Labor Relations Act, which provides, broadly, that the employer shall not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," 29 U.S.C. § 158(a)(1) (1970)—that is, the rights to self-organization, to bargain collectively, and to engage in other concerted activities for their own aid and protection. National Labor Relations Act § 7, 29 U.S.C. § 157 (1970). Thus, when owners or their agents assemble their players to discuss labor relations, they may well be committing a section 8(a)(1) unfair labor practice. The owner is, however, entitled to a free speech right under the labor laws, inasmuch as Congress added section 8(c) in the Taft-Hartley amendments in 1947 to provide that an employer is free to express any view so long as it "contains no threat of force or reprisal or promise of benefit." National Labor Re-
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Once in the collective bargaining arena, owners can no longer refuse to bargain over particular contract or bylaw provisions by invoking the shibboleth that it would bring the sport to an early grave, because any item relating to wages, hours, or other terms or conditions of employment is a mandatory subject of bargaining about which the owners have a duty to bargain in good faith. The players need no longer take any part of their “condition” as a “fact of life,” for they have within their grasp the power to make the owners bargain about its continued existence. There is, however, a concomitant to that new power; once within the “friendly confines” of the labor law, individual players may not complain about the terms and conditions negotiated by their bargaining agent, for they are all equally bound by its actions. This basic labor policy of submitting the will of the minority to that of the majority may bear most heavily upon the so-called superstars, for once the majority of average ballplayers realize the power in their hands, they may use the interests of the stars for the furtherance of their own self-interest.

Perhaps the most important aspect of the advent of collective bargaining is that all courts should in the future treat disputes in this industry the same as they do disputes in the steel industry—that is, they should leave the parties to their remedies under the labor laws, either before the NLRB or the courts themselves. In short, though the professional team sport industry may present collective bargaining problems in some rather unique, perhaps even sui generis, circumstances, they are, nonetheless, labor problems and should be treated as such.

I

COVERAGE OF THE NLRA

The first issue that must be addressed when considering the relationship between a particular industry and the labor laws is, of course, whether the coverage of the National Labor Relations Act (NLRA) is broad enough to include the industry in question. It has long been a familiar rule that inasmuch as the NLRA is


These comments simply evidence the fact that having submitted themselves to the labor process, owners and player representatives alike must familiarize themselves with the strictures contained therein. This familiarization has apparently taken place, judging by the NLRB charges that have been filed. See Labor Relations in Professional Sports, supra note 1, at 14, 15, 26, 93. See also Washington Post, Apr. 8, 1972, § E, at 1, cols. 1-3. That NLRB decisions have been relatively infrequent is, perhaps, evidence that NLRA strictures are sufficiently in hand to be used by both sides as either shield or sword.

It is important to note that in Flood v. Kuhn, 407 U.S. 258 (1972), Mr. Justice Marshall observed, in his dissenting opinion, that the Court has rendered the collective efforts of ballplayers “impotent.” Id. at 292. This is, with all due respect, a slightly overbroad conclusion. As will be developed herein, players associations are no more or less “impotent” than are any other labor organizations.

Labor Relations in Professional Sports, supra note 1, at 87. It has been noted, however, that any such remedy may be somewhat illusory. See 1957 Hearings, pt. 2, supra note 2, at 2654. Though that objection may have some appeal, it has never dampened the attitudes of courts considering labor disputes in other industries.
based upon the commerce clause of the Constitution, its coverage is coextensive with that clause's reach.11 Thus, every industry that is in or affects interstate commerce is subject to the provisions of the NLRA.12

In order to conclude that the NLRA covers the professional team sport industry, therefore, it need only be found that their activities are involved in interstate commerce. Though this may at one time have been an issue of merit, its further consideration lacks even academic interest in light of the Supreme Court's recent pronouncement that "[p]rofessional baseball is a business and it is engaged in interstate commerce."13 A similar determination had already been made with regard to football,14 basketball,15 boxing,16 hockey,17 and golf.18 It can, therefore, be said with some confidence that the NLRA's coverage does, in fact, include the professional team sports.19

Even though the NLRA is so applicable, the NLRB has the statutory power to decline to assert jurisdiction where, in its opinion, the impact of a particular industry on interstate commerce is not so "sufficiently substantial to warrant the exercise of its jurisdiction ...."20 Although the Board has exercised this discretion over some professional sporting industries,21 it seems clear that it will not do so with regard to the organized team sports. This view is given probative weight by the

13 Flood v. Kuhn, 407 U.S. 258, 282 (1972); see also American League of Professional Baseball Clubs, 180 N.L.R.B. 189 (1969); 1957 Hearings, pt. 1, supra note 2, at 47. See generally Martin, The Labor Controversy in Professional Baseball: The Flood Case, 23 Lab. L.J. 567 (1972). A similar result has been reached with regard to amateur softball. See Amateur Softball Ass'n of America v. United States, 467 F.2d 312 (10th Cir. 1972).
19 See New York State Div. of Human Rights v. New York—Pennsylvania Professional Baseball League, 36 App. Div. 2d 364, 320 N.Y.S.2d 788, 799 (1971) (Cardamone, J., dissenting); 1957 Hearings, pt. 1, supra note 2, at 47 ("we have to recognize that professional football now is under the National Labor Relations Act"). Although it may have at one time been believed that the antitrust exemption enjoyed by some professional sports exempted them all from NLRA coverage, this view has been rejected on numerous occasions and need no longer be grounds for argument. The theory and its rejection are considered in Hoffman, Is the NLRB Going to Play the Ball Game?, 20 Lab. L.J. 239, 242-43 (1969).
21 The most recent instance of this discretionary exercise is Yonkers Raceway, Inc., 196 N.L.R.B. No. 81 (1972), where the Board declined to assert its jurisdiction over harness racing because it lacked sufficient impact on interstate commerce. See also Centennial Turf Club, Inc., 192 N.L.R.B. No. 97 (1971).
Board’s recent decision in *American League of Professional Baseball Clubs*, a case involving baseball umpires, where it held that professional baseball is an industry in or affecting commerce and that, therefore, it is subject to NLRA coverage and NLRB jurisdiction. The Board observed that its policy of encouraging collective bargaining through protection of employee rights to self-organization and choice of representation would be best fulfilled by asserting its jurisdiction and subjecting any labor dispute to resolution under the NLRA.

Though it is never wise to predict the result of as yet undecided and unlitigated cases, there should be little remaining uncertainty as to the coverage of the NLRA and the jurisdiction of the Board with regard to the professional team sports. Not only is the coverage of the Act and the jurisdiction of the Board broad enough to cover the players themselves, but it will also include all other employees in the industry from bat boys to maintenance men.

II

**CHALLENGING THE RESULTS OF COLLECTIVE BARGAINING UNDER THE ANTITRUST LAWS**

Having passed the initial hurdle of the applicability of the labor laws to the industry, it is next necessary to examine the antitrust laws as they apply to collective bargaining. This inquiry is of singular importance because of the current propensity of disappointed athletes to challenge various provisions of their contracts or their treatment—of which the *Flood v. Kuhn* litigation is currently the most prominent example—as being in violation of the antitrust laws. If such challenges are more often than not unsuccessful, it would be an exercise of some futility to consider further the labor laws, since the collective bargaining process would, in that event, be pre-empted by the federal antitrust laws. Thus, it is necessary to find some means through which the interests of the players can be adequately protected.

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23 *Id.* at 192-93. See also *35th Annual Report of the National Labor Relations Board* 22-26 (1970). It is to be noted, however, that member Jenkins was of the opinion that the Board should decline to assert its jurisdiction over professional baseball. *180 N.L.R.B.* at 194.
25 With regard to coverage, question might also arise as to whether the players associations are “labor organizations” within the meaning of the NLRA. See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). Section 2(5) defines a labor organization to include “any organization . . . which exists for the purpose, in whole or in part, of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (1970). Thus, any employee group which deals with employers about wages and other conditions of employment is a labor organization. In *American League*, the League also argued that the umpires’ organization there in dispute was not a labor organization since the umpires were allegedly “supervisors.” The Board, however, held that the umpires were not supervisors and that the organization was a labor organization since it existed for the purpose of dealing with employers about wages and conditions of employment, *180 N.L.R.B.* at 192-93; *see also Krasnow & Levy, supra* note 1, at 772-74, indicating that the players associations would also meet the statutory test.
26 *See 180 N.L.R.B.* at 193.
of accommodating the antitrust and labor laws as they apply to the professional team sport industry.\textsuperscript{26}

An antitrust attack upon contract provisions or individual treatment raises, in the labor context, the primary question of whether the action complained of presents an issue of labor law which is generally the subject of an antitrust exemption.\textsuperscript{29} The parameters of that exemption have been the subject of several relatively recent Supreme Court cases that have evolved a fairly clear geometry. In \textit{United States v. Hutcheson},\textsuperscript{30} the Court made the general holding that union activity will generally be immune from antitrust attack.\textsuperscript{31} This general rule was then hedged a bit in \textit{Allen-Bradley Co. v. Local Union 3, IBEW},\textsuperscript{32} where the Court said that the exemption would be lost to a union that aided "non-labor groups to create business monopolies and to control the marketing of goods and services."\textsuperscript{33} The line that the Court has thus drawn "is the line between the product market and the labor market."\textsuperscript{34} Probably the most important of the cases, however, is \textit{Amalgamated Meat Cutters v. Jewel Tea Co.},\textsuperscript{35} where an employer brought suit to invalidate a provision in its collective bargaining agreement which restricted the hours during which it could operate. This case is significant because it did not involve a question of a conspiracy amongst labor and non-labor groups, but rather whether an agreement is immune from attack by one of its signatories because of the labor exemption from the antitrust laws—precisely the type of attack a disappointed

\textsuperscript{26}With regard to the antitrust laws and professional sports, it has been said that "the antitrust laws are aimed at preventing certain types of restrictive agreements between competing businesses. Yet the concept of organized team sports requires in some instances the kind of cooperation which the antitrust laws forbid." \textit{Hearings Before the Senate Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 2} (1965). In earlier testimony, it had been observed that the antitrust laws were necessary for players only to the extent that they had no control over their own contract provisions. \textit{Hearings Before the Senate Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess. 110} (1964). These views serve only to reinforce the fact that some means of harmoniously resolving the competing policies of the antitrust and labor laws is necessary for the orderly expansion of collective bargaining in professional sports. This is, indeed, the very question that Mr. Justice Marshall said in \textit{Flood v. Kuhn} should be explored. 407 U.S. at 294. The exploration herein should provide an easily applied geometry with which to decide player antitrust challenges to provisions of future collective bargaining agreements.


\textsuperscript{30}312 U.S. 219 (1941).

\textsuperscript{31}Id. at 233-37.

\textsuperscript{32}325 U.S. 797 (1945).

\textsuperscript{33}Id. at 808. \textit{See also UMW v. Pennington, 381 U.S. 657, 665-66 (1965)}.

\textsuperscript{34}Jacobs \& Winter, \textit{Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage}, 81 \textit{Yale L.J.} 1, 26 (1971) [hereinafter cited as Jacobs \& Winter].

\textsuperscript{35}381 U.S. 676 (1965)
athlete would make. This raised, the Court said, the question of whether the challenged provision was

so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide arm's length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with non-labor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.

Finding the challenged provision to be so related, the Court held it to be immune from antitrust attack.

_Jewel Tea_, thus, mandates that a collective bargaining agreement provision is exempt from the antitrust laws where it relates to "wages, hours and working conditions," and its purpose is to effectuate a beneficial policy of the union and not the employer. It is significant, however, that the term "wages, hours and working conditions" as used by the Court in this context does not refer solely to mandatory subjects of bargaining. This was made clear in _Jewel's_ companion case _United Mine Workers v. Pennington_, where a coal company had, by cross complaint, challenged a wage agreement as being part of a conspiracy between the Mine Workers and the larger coal companies to drive the smaller operators out of business. Since a wage agreement would have clearly been a mandatory subject of bargaining, the Court observed that "compulsory" subjects of bargaining are not automatically exempt from antitrust scrutiny, though it also said that it would give "great relevance" to the Board's demarcation of the bounds of the duty to bargain.

Justice Goldberg added significant concurring opinions in both _Jewel Tea_ and _Pennington_, though he dissented from the Court's opinion in _Pennington_. He felt that all mandatory subjects of bargaining should be immunized because any other solution would leave all collective bargaining provisions open to attack, inasmuch as the Court's opinion in _Pennington_ would allow the necessary conspiracy finding to be made whenever a union and employer collaborate or discuss the impact of their

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38 Id. at 689.
37 Id. at 685-89.
39 Id. at 697. These cases are all considered in some detail in Comment, Labor Law and Antitrust: So Deceptive and Opaque are the Elements of These Problems, 1966 Duke L.J. 191.
38 381 U.S. 657 (1965).
39 Id. at 659-61.
40 Mandatory subjects of bargaining are those that relate "to wages, hours, and other terms and conditions of employment." NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). The subjects which are mandatory are chronicled and discussed in C. Morris, The Developing Labor Law 389-424 (1970) [hereinafter cited as Morris].
41 381 U.S. at 714-15. It is to be noted, however, that in American Federation of Musicians v. Carroll, 397 U.S. 99 (1968), the Court seems to have been unsure of the mandatory subject of bargaining's relationship to the antitrust laws. It said, per Mr. Justice Brennan, that "[e]ven if only mandatory subjects of bargaining enjoy the exemption—a question . . . upon which we express no view . . . ." Id. at 110. This hesitation seems to belie the clear expressions in _Pennington_ and is, therefore, in no way probative of the view of Justice Goldberg that the exemption is bounded by the mandatory subject of bargaining rubric. _See_ note 43 infra and accompanying text.
agreement upon competing employers, since that finding could "be inferred from the conduct of the parties." Just as Justice Goldberg seemed to have had too little faith in the ability of triers of fact to discern the presence in fact of actual conspiratorial animus, so did he place too much faith in the "mandatory" label. It seems clear, as the Court observed in *Pennington*, that "there are limits to what a union or an employer may offer or extract in the name of ... [mandatory subjects of bargaining], and because they must bargain does not mean that the agreement reached may disregard other laws." Justice Goldberg's opinion does, however, express the very tangible fear that the power to make antitrust attacks upon collective bargaining agreements may well undermine the authority of a bargaining agent, a subject which will be shortly explored.

When a disappointed professional athlete challenges a provision of his collective bargaining agreement through the antitrust laws, therefore, his suit will be dismissed unless he can prove that the agreement provision did not relate to "wages, hours and working conditions" and that it was negotiated by his bargaining representative as a co-conspirator with the owners in pursuit of non-player oriented benefits. Since, moreover, the labor exemption is not limited to compulsory subjects of bargaining, the courts need not burden themselves with making that determination. So long as it is shown that the provision in question relates to "wages, hours and working conditions" and was negotiated by the union for its own purposes, the provision being attacked is cloaked with antitrust immunity, and the suit should be dismissed. If the suit is dismissed, the disappointed player would then be relegated to pursuing a remedy under the labor laws before the NLRB.

It is noteworthy, however, that Messrs. Jacobs and Winter have recently suggested that matters which are the subject of collective bargaining should never be open to antitrust challenge by disappointed members of the bargaining unit, because such challenge "would effectively destroy collective bargaining by undermining the authority of the bargaining representative ..." This argument tends to overstate the case since it assumes that many such challenges will succeed; there is no reason to believe that collective bargaining provisions in professional athletics would be stricken any more often than they are in other industries. The fear expressed by Jacobs and Winter does, however, reflect that of Justice Goldberg in his concurring opinions in

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43 381 U.S. at 665.
44 Id. at 664-65. See also Riverton Coal Co. v. UMW, 453 F.2d 1035, 1041 (6th Cir. 1972).
45 As is indicated by *Jewel Tea*, these same rules should apply to a challenge brought by the owners. See Jacobs & Winter, supra note 34, at 28.
46 In *Flood v. Kuhn*, 309 F. Supp. 793 (S.D.N.Y. 1970), the defendants did allege that the baseball reserve clause was a mandatory subject of bargaining and, therefore, exempt from the antitrust laws. Id. at 805-06. The court, however, was of the opinion that the reserve clause was not part of the collective bargaining agreement. Id. at 806 n.51. The Second Circuit found it unnecessary to pass on the mandatory subject of bargaining issue, 443 F.2d at 268, as did the Supreme Court, 407 U.S. at 285. It is to be noted that should such a determination become necessary, the Court said in *Jewel Tea* that it would not be within the NLRB's exclusive primary jurisdiction. 381 U.S. at 684-88.
47 Jacobs & Winter, supra note 34, at 27. See also 1957 *Hearings*, pt. 1, supra note 2, at 1252.
Jewel Tea and Pennington that triers of fact will readily invalidate the provisions in question on a more or less ad hoc basis.48

The "subversion" concern is, as noted, a very real fear, but the solution is not to spread the labor exemption beyond the bounds expressed in the Allen-Bradley, Jewel Tea and Pennington cases by exempting all mandatory subjects of bargaining, as proposed by Justice Goldberg, or to bar disappointed members of the bargaining unit from complaining about the provisions negotiated by their bargaining agent, as proposed by Jacobs and Winter. Rather, the solution is to work out these concerns in such a way as to maintain the integrity of the Supreme Court's enunciated standards and yet to insure that the bargaining agents' authority will not be unduly undermined. The proposed solution would be as follows: assuming that a disappointed player, such as Curt Flood, should complain about a provision in the collective bargaining agreement, such as the reserve clause, under an antitrust theory, the provision would be invalidated only if it were found that the provision did not relate to "wages, hours or working conditions" and that a conspiracy existed between the bargaining agent and the owner-employers—the present standard of the Supreme Court; to ensure the proper protection of the bargaining agents' authority, however, a conspiracy could be found only when it were also shown that the bargaining agent had violated its duty of fair representation—49—that is, if the bargaining agent properly represented the interests of the majority of its members, it could not be found to have participated in a conspiracy to benefit the owner-employers, and the terms of the bargaining agreement could not, therefore, be invalidated by antitrust attack. This is, in fact, a necessary predicate to the continued vitality of bargaining agent authority for if its actions could be undercut by a single member of the bargaining unit simply because a particular provision was antithetical to his, but not the majority of the other members', interests, then the agent would be placed in an utterly untenable position. If it represented the majority interest, as the duty of fair representation compels it to do, then particular members could invalidate particular provisions under the antitrust laws, and if it represented the particular interest of a minority of its members, then it could be the subject of fair representation attack by the majority.

Thus, the proposed solution would seem to accommodate both the scope of the antitrust exemption and the agents' fair representation duty, since violation of the former could be found only if there were also a violation of the latter. If an agent were to bargain in consort with the employer-owners for the primary purpose of benefiting the employer-owners in their product market, and not in its labor market, then it might not be fairly representing the interests of the majority of its members and could have no grounds upon which to object to having the provisions so negotiated invalidated.50 If, on the other hand, the bargaining agent reached an agreement with

48 See note 43 supra and accompanying text.
49 The duty of fair representation is discussed at some length at notes 143-51 infra and accompanying text.
50 It is true, of course, that a bargaining agent could negotiate a collective bargaining agreement term in consort with an employer which primarily benefited the employer in its product market but
the employer-owners in such a way as to fulfill its duty of fair representation, then it should be able to successfully defend a minority attack upon the provisions negotiated by asserting the fact that it properly performed its statutory duty of fairly representing its members. This solution is, moreover, no more than an expedient means by which to accommodate the potentially conflicting provisions of the antitrust and labor laws, a process specifically adopted by the Supreme Court in Hutcheson. 51

It must be noted, of course, that the proposed solution would apply only where disappointed members of the bargaining unit seek to invalidate specific provisions of a collective bargaining agreement, and would not foreclose antitrust attack in other situations. 52 Thus, there would be no reason to oppose legislation subjecting professional sports to the antitrust laws, 53 so long as a solution such as that proposed were also adopted to protect the stature of bargaining unit representatives.

Should this proposed solution be adopted, a court should then approach an antitrust challenge to a term contained in a collective bargaining agreement by making four preliminary factual determinations—(1) whether the term in question relates to “wages, hours and working conditions,” (2) whether it was arrived at through bona fide collective bargaining in which (3) the players’ representative was not acting in consort with the owners, and in which (4) it fulfilled its duty of fair representation. If these questions are all answered in the affirmative, then the case should be dismissed under Jewel Tea. If it is found that the second question is answered in the affirmative but the third in the negative, then the court should determine whether the union met its duty of fair representation. If that also is answered in the negative, then relief should be granted; but if it is answered in the affirmative, then the case should be dismissed, as indicated in the proposed solution. If it is concluded that the second question must be answered in the negative—that is, that the owners imposed the term as a unilateral matter, and not as part of the collective bargaining agreement 54—then the court should proceed to analyze it under the antitrust principles involved, because if the term was not the product of bona fide collective bargaining it should have no special antitrust immunity, 55 and in that case the

which was not detrimental to the employees. The duty of fair representation as here used, however, looks to the beneficial results of bargaining to the majority of employees, not simply the lack of detriment. This view is consistent with the relevant inquiry of the labor antitrust exemption. Thus, in Jewel Tea the Court was concerned with whether the terms in question were negotiated by the union “in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups.” 381 U.S. at 690.

51 312 U.S. at 231.
52 See Jacobs & Winter, supra note 34, at 27-28.
53 See note 29 supra.
54 This was the conclusion reached by Judge Cooper in the district court’s preliminary opinion in Flood v. Kuhn, 309 F. Supp. at 806 n.51.
55 Thus, in Flood v. Kuhn, 407 U.S. 258 (1972), Mr. Justice Marshall observed in his dissenting opinion that [t]here is surface appeal to respondents’ argument that petitioner’s sole remedy lies in filing a claim with the National Labor Relations Board, but this argument is premised on the notion that management and labor have agreed to accept the reserve clause. This notion is contradicted,
bargaining agent's authority would not be undercut because it never had a voice in the negotiation of the particular term. If a violation is then found, the term would be stricken. It is to be kept in mind, however, that even if the term were stricken, the parties would still be free to include it in a future collective bargaining agreement, because it would then be exempt from antitrust attack by a disappointed bargaining unit member, as indicated in the analysis hereinbefore presented.56

This lengthy discussion of the antitrust principles involved in player suits to invalidate collective bargaining agreement terms was necessitated by the ambiguity in this area of the law as a general matter, and because if bona fide collective bargaining is initiated in the professional team sport industry there will surely be many changes in the existing structure of owner-player and superstar-journeyman relations which will give rise to antitrust litigation by disappointed parties. This discussion is of value, in this regard, because it is believed that it sets forth an easily applied framework to analyze such player or owner challenges, while preserving the essential policies of both the labor and antitrust laws.

III

The Appropriate Bargaining Unit

Having concluded that the NLRA covers the professional team sport industry, and that there is a harmonious means available to resolve the antitrust aspects of player challenges of particular contract provisions, consideration should now be given to other problems that are likely to arise as the owners and players embark upon their sojourn down the collective bargaining trail.

The initial step in any analysis of a group of employees and the NLRA is to determine what will be the appropriate unit for purposes of collective bargaining.57 This is important because it will establish the scope of controversies that particular bargaining representatives may pursue with particular employers. Over the years, the Board has worked out a fairly clear scheme of rules for the making of this determination. Without involving NLRB procedures, the parties may agree amongst themselves as to what the appropriate unit shall be, but if they fail to do so, the NLRB will itself make the determination.58 In making that determination, the Board will use a number of tests which include (1) the extent and type of union organization of the employees; (2) the bargaining history in the industry; (3) the

56 See 1957 Hearings, pt. 2, supra note 2, at 2655-57. Thus, it has been observed that "what is an illegal and unreasonable restraint of trade [in violation of the antitrust laws] very well may not be an unfair labor practice." Id. at 2657. But cf. the opinion of Edward Garvey, Executive Director of the National Football Players Association, in Brown, Because of a Clause, a Clause, Sports Illustrated, May 1, 1972, at 67.


similarity in the duties, skills, interests and working conditions of the employees; 
(4) the organizational structure of the company; and (5) the desires of the employees.90

In the professional team sports, the appropriate unit could be the team; the league; the sport, with or without the minor leagues thereof; or the entirety of the industry without regard to the different sports. Any or all of these unit sizes are feasible, and it seems clear that the Board’s determining tests would facilitate any of them, inasmuch as there is virtually no bargaining history in any of the sports, the necessary skills are essentially identical, the organizational structure of all employers is similar, and the players might desire any such size. The appropriate unit, therefore, would seem to depend upon the extent and type of union organization in the industry. Although the natural unit would seem to be the team,90 since the players on any one team are employed by its owner and not by the league or sport itself, it seems clear that the preferential size of the bargaining unit in this industry is the sport, except where there are two separate leagues within the same sport. Thus, the present unit in football and baseball is the entire sport,61 while in basketball it is the league,62 there having been as yet no merger in that sport.63

A. Multi-Employer Bargaining and “Constructive Merger”

The present size of the bargaining unit in each sport, however, is relatively unimportant, inasmuch as one may safely take as given the present scope of the various units in the industry. What is important are some of the other rules that govern bargaining unit determinations as a general matter. The first is that the inclusiveness of the bargaining unit is an issue that is a proper subject for discussion at the bargaining table, and when raised; it is a permissive subject of bargaining—that is, it is one which does not require the other party to bargain and which does not allow the proposing party to resort to economic sanctions for its obtaining.64 Once a bar-

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90 These factors are individually discussed in Morrise supra note 41, at 217-22.
63 Legislation to facilitate the merger is, of course, now before Congress. S. 2373, 92d Cong., 1st Sess. (1971). But cf. S. 2616, 92d Cong., 1st Sess. (1971), introduced by Senator Ervin to specifically apply the antitrust laws to professional sports in full force. Senator Ervin’s views are recorded in 117 Cong. Rec. 15451 (1971). The merger question is considered in some detail in two volumes of hearings. See Professional Basketball Merger, pts. 1 & 2, supra note 62.
64 See NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958). Thus, in Douds v. International Longshoremen’s Ass’n, 241 F.2d 278 (2d Cir. 1957), where the union resorted to a strike when bargaining reached impasse over its demand for a broad extension of the bargaining unit, the court held it in violation of its duty to bargain pursuant to section 8(b)(3). It said that “[s]uch a demand interferes with the required bargaining ‘with respect to rates of pay, wages, hours and conditions of employment’ in a manner excluded by the Act.” Id. at 283. See also AFL-CIO Joint Bargaining Committee, 184 N.L.R.B. No. 106 (1970); Steere Broadcasting Co., 158 N.L.R.B. 497, 507 (1966).
gaining unit determination has been made, therefore, either by the Board or the parties themselves, it may be altered by the Board or by the parties' mutual agreement, so long as that agreement does not disrupt the bargaining process. Thus, although bargaining unit determinations seem already to have been made in the team sport industry, that fact would not preclude the parties from adjusting the size of the unit to meet their own convenience.

The second group of rules that is important are those that have grown up to govern the phenomenon known as multi-employer bargaining. This refers, simply, to the quite common practice of several employers in one industry bargaining with a single union. These rules are important because the unit that has been seen to be the chosen size in the team sport industry is the sport-wide unit, which is, of course, a multi-employer bargaining unit, as is even the league-wide unit in basketball. In light of the fact that multi-employer bargaining is common in other parts of the entertainment industry, it hardly seems surprising that it should also be found in professional sports.

The history of multi-employer bargaining long antedates the Wagner Act, and was, at least in its origins, designed as a technique of countervailing power whereby small employers could join together to match the bargaining strength of the union which represented its employees—that is, the multi-employer group would become the bargaining agent for the group. The rules which have grown up to govern this bargaining technique all revolve around the central principle that the wider bargaining unit is entirely a consensual matter. Thus, in determining the appropriateness of such a unit, as opposed to the presumptively appropriate single employer unit, the Board requires a controlling history of collective bargaining on a multi-employer basis, or a joint agreement between the employers and the union that a multi-employer unit is appropriate. Similarly, the settled criterion for determining the inclusion of any particular employer within that unit is whether it unequivocally intends to be bound in collective bargaining by the group, rather than pursuing his own individual bargaining. Thus, delegation of authority to a common bargaining

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68 See generally Morius, supra note 41, at 237.
69 See NLRB v. Strong, 393 U.S. 357 (1969). It is worth noting, however, that the group agreement is not cast in stone. Thus, individual negotiations at the local level will not cause dissolution, or withdrawal from, the multi-employer unit. See The Kroger Co., 148 N.L.R.B. 569, 573 (1964). Similarly, retention by the employers of the right to approve or disapprove the agreement negotiated will not invalidate the wider unit. See Quality Limestone Products Co., 143 N.L.R.B. 587, 591 (1963).
73 See Western Ass'n of Engineers, 101 N.L.R.B. 64 (1952); see also Calumet Contractors Ass'n, 121 N.L.R.B. 80, 81 n.1 (1958).
agent will signify the requisite intent, although mere adoption of a contract already negotiated will not render the adopting firm a member of the multi-employer group. The corollary to these consensual inclusion rules is that any employer, regardless of previous bargaining policy or practice, may withdraw from the wider unit at any time, but to be effective it must be shown to have manifested an unequivocal and timely intention to withdraw therefrom on a permanent basis. When an employer so withdraws his motive for doing so is immaterial. These same withdrawal rules also apply to the union members of the unit.

The multi-employer rules indicate, therefore, that owners and players may withdraw from the present unit whenever it is determined that they could negotiate more advantageously in individual bargaining. Although as a practical matter such action seems unlikely, it is significant to note that the authority for it does exist and could be used as a viable bargaining tool by either side.

Considered together, these two rules indicate that the scope of the bargaining unit is a matter that is subject to the consensual agreement of the owners and players. Although it may seem difficult to determine why this fact is itself important, that is not because of its lack of importance, but is, rather, because of the difficulty in foreseeing the future events which would make it important. The best current example of its importance, perhaps, is the current merger dispute involving the American and National Basketball Associations. If Congress should not grant the merger, the leagues could, at least in theory, get the results of formal merger by utilization of the multi-employer bargaining unit device, without the necessity of going to Congress, hat in hand, for a formal antitrust waiver. The results of formal merger could be obtained because the fruits sought to be gained thereby are all equally available from collective bargaining discussion. Thus, the goals of merger are the establishment of a common draft, and end to the "raiding" of players and other relatively anti-competitive, from the players' point of view, policies. Though these

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76 When members of an association jointly bargain, their bylaws should specify that collective bargaining agreements negotiated by the association bind all members, see Governe & Drew, Inc., 106 N.L.R.B. 1316, 1319-20 (1953), because if loose group action is followed, the Board may find the absence of the requisite intent. See, e.g., Electric Theatre, 156 N.L.R.B. 1351 (1966).
77 National Electrical Contractors Ass'n, 131 N.L.R.B. 550, 551-52 (1961); see also Jewish Bakery Ass'n, 100 N.L.R.B. 1245, 1246 (1952).
78 See Johnson Optical Co., 87 N.L.R.B. 539 (1949).
79 See B. Brody Seating Co., 167 N.L.R.B. 830 (1967). This is generally accomplished by notice, and the proper notice rule requires that written notice of the intention to withdraw be given before the contractually set date for modification. Retail Associates, Inc., 120 N.L.R.B. 388 (1958); but cf. Imperial Outdoor Advertising, 192 N.L.R.B. No. 183 (1971) (oral notice sufficient). If not so given, the notice is not timely. Thus, in NLRB v. Strong, 393 U.S. 357 (1969), the Supreme Court refused to allow withdrawal where the employer gave notice after the negotiated agreement became effective.
81 See Evening News Ass'n, 154 N.L.R.B. 1494, 1495 (1965).
83 See Professional Basketball Merger, pt. 2, supra note 62, at 856.
factors may seem to raise a serious antitrust specter— the reason, of course, for the congressional merger consent—they are all factors that could validly become parts of a collective bargaining agreement, and be thereby lodged in a harbor safe from antitrust challenge by either owners or players.

Given the multi-employer rules already considered, the owners and players in the two leagues simply would need to agree to bargain on a joint basis. By so doing, the owners would be agreeing to bargain via the multi-employer device, while the players associations would, by agreeing to bargain as one, simply be presenting themselves in a coalition bargaining posture.\footnote{Coalition bargaining refers, simply, to the presentment of a common front by several unions to a single employer, just the converse of multi-employer bargaining. Recent cases have left no question that in the absence of a clearly improper motivation, coalition bargaining is as permissible as is its multi-employer counterpart. See General Electric Co., 173 N.L.R.B. 253 (1968), aff'd, 412 F.2d 512 (2d Cir. 1969); American Radiator & Standard Sanitary Corp., 155 N.L.R.B. 736 (1965); Standard Oil Corp., 137 N.L.R.B. 690 (1962), enforced, 322 F.2d 40 (6th Cir. 1963).} So long as all parties agreed to the procedure, their action would be perfectly permissible as a matter of labor law—which is no more than to state the familiar shibboleth that the right of both employers and employees “to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme.”\footnote{See General Electric Co. v. NLRB, 412 F.2d 512, 516 (2d Cir. 1969).} The provisions agreed upon should be immune from antitrust attack, moreover, so long as the terms negotiated relate to wages, hours or working conditions, and were the result of bona fide collective bargaining, where the union met its duty of fair representation and did not conspire with the employers.\footnote{See Labor Relations in Professional Sports, supra note 2, at 65-72; Professional Basketball Merger, pt. 2, supra note 62, at 227, 303. The players in the ABA, however, seem generally to be in favor of the merger legislation. Id. at 138, 144; but cf. id. at 140.}

The difficulty with such a procedure, of course, is that multi-employer bargaining requires consent, and, at least to date, the players in the NBA have been adamantly opposed to the merger.\footnote{See notes 27-55 supra and accompanying text.} Thus, it is unlikely, that they would agree to the joint bargaining, which would, after all, have the same practical effect. This intransigence could, however, be overcome if the owners were to agree to a particular demand of the players—such as abolition of the option clause in favor of a less restrictive alternative—in return for the joint bargaining, though this would itself pose a hazard to the owners, inasmuch as the players could opt out of the unit after getting the favored term. Withdrawal might itself be precluded by making any such acquiescence conditional upon maintenance of the multi-employer unit, upon other terms agreed upon as the \textit{quid pro quo} for the multi-employer unit—such as the common player draft—or the owners could simply negotiate a long-term contract.

It would, therefore, appear that these bargaining unit rules could be used to obtain a “constructive merger,” though there would, of course, be many difficulties if such a course of action were to be undertaken. Although this is not the place to finally resolve those difficulties, such potential use of the bargaining unit rules
nicely illustrates the type of issue that can find its way into the sports picture once the owners and players have entered the collective bargaining arena.

B. Inclusion of the Commissioner in the Bargaining Unit

In considering the appropriate scope of the bargaining unit in professional sports, it is also necessary to consider the attempt of at least one players association to include their league commissioner within the bargaining unit as an employer.\textsuperscript{87} The purpose behind such inclusion would be to make the disciplinary powers of the commissioner a subject of collective bargaining, as opposed to the present “self-government” system over which the players associations have very little control. This self-government system came into existence originally to preserve the integrity of baseball in the wake of the Black Sox scandal in 1919,\textsuperscript{88} and has since spread to the other professional team sports.\textsuperscript{89} It gives the commissioner the power to maintain order and discipline in all aspects of his particular sport by acting as final arbiter of any disputes that may arise—\textit{he has, thus, both investigative and judicial power.}\textsuperscript{90}

To determine whether a players association could succeed in an effort to include the commissioner in the bargaining unit, attention might be focused on a question that has frequently arisen in industrial labor relations—whether an employers’ asso-

\textsuperscript{87} See Labor Relations in Professional Sports, supra note 2, at 76, 92, where it is indicated that this attempt was made by the NFL Players Association in 1968.


\textsuperscript{89} See Labor Relations in Professional Sports, supra note 2, at 25, 76, 92.

\textsuperscript{90} The Standard Player Contract in the NFL provides, for example, that All matters in dispute between the Player and the Club shall be referred to the Commissioner and his decision shall be accepted as final [and the player] . . . hereby releases and discharges the Commissioner . . . from any and all claims . . . arising out of . . . any decision of the Commissioner.


There are, thus, two systems of self-government in the professional team sport industry—that is, the collective bargaining system and the commissioners’ system—both of which are concerned with the terms and conditions of employment. To solve this particular problem, the players association and owners in the National Football League, in 1968 and 1970, made the constitution, bylaws and standard player contract of the league, which gave the commissioner his power, subject to the provisions of the collective bargaining agreement in the event of conflict between the former and the latter, NFL Agreement art. II, § 2, art. III, § 1, with the commissioner to be final arbiter of disputes which therein between arose, NFL Agreement art. XI; National Football League Standard Player Contract § 4, except that in the 1970 agreement it was provided that the final arbitrator in an injury grievance would be chosen by the commissioner from a list approved by the parties. NFL Agreement art. XI; National Football League Standard Player Contract § 14.
COLLECTIVE BARGAINING

islation is an “employer” within the meaning of section 2(2), and thus an appropriate member of the bargaining unit; though it must be noted that the inclusiveness of the term “employer” has generally arisen in the context of unfair labor practice charges, rather than in unit determination disputes so that their authority may be somewhat limited. The term “employer” is defined in section 2(2) to include “any person acting as an agent of an employer, directly or indirectly.” Thus, where the employers’ association negotiates collective bargaining contracts on the member employers’ behalf, it is their agent and, therefore, an employer itself. Where the agency relationship is less clear, however, a contrary result is reached. In Metro-Goldwyn-Mayer Studios, for example, the Board found that a motion picture producers’ association was not an “employer” where, although it negotiated on behalf of some employers, there was no evidence to indicate that it was authorized to control labor policies or to handle the employment problems of its members. Although the MGM case was decided prior to the Taft-Hartley amendments which added the specific agency language to section 2(2), it is a clear indication that to come within the “employer” term the association must be participating in the collective bargaining process on behalf of the employers, and that the extent and character of the association’s participation must be clear to all parties.

The commissioner could be included, therefore, only if it were found that he participated in the collective bargaining process on behalf of the owners. It is important to note that the commissioner is subject to the direct control of the owners, but not the players, since it is the owners who control his appointment, salary, and tenure. Generally the commissioner has the power to veto specific contracts that are negotiated. In addition, it has been reported that the commissioner of baseball
took an active part in settling the baseball strike in the spring of 1972\textsuperscript{100} and that to avert a similar occurrence the owners have given him added powers in the collective bargaining process.\textsuperscript{101}

In this light, it would seem that the commissioner could be included since it appears that at least in some sports he participates in the collective bargaining process.\textsuperscript{102} This result is of little real significance, however, inasmuch as the commissioner’s disciplinary powers would be subject to collective bargaining whether or not he were actually to be included in the bargaining unit. Disciplinary powers are clearly within the concept of the terms and conditions of employment and would, therefore, be mandatory subjects of bargaining about which the owners must negotiate. Thus, the players could demand that they be given full procedural due process rights in all disciplinary matters,\textsuperscript{103} and this would be a subject about which

\begin{footnotesize}
\textsuperscript{100}Thus, it was reported that Commissioner Kuhn was, in fact, “getting into the thick of things.” Washington Post, Apr. 5, 1972, § D, at 1, col. 2. It was also suggested that he might resolve the strike dispute. Washington Post, Apr. 6, 1972, § G, at 2, col. 5.

\textsuperscript{101}See Indianapolis Star, July 8, 1972, at 25, col. 1.

\textsuperscript{102}In this regard, it is worth noting that in American League of Professional Baseball Clubs, \textsuperscript{180} N.L.R.B. 189 (1969), the Board used language which does, in fact, indicate its finding of a relationship between the commissioner and owners in the American League of Baseball which approaches that of an agency, though the question then before it was whether the Board should decline jurisdiction over baseball because of the commissioner self-government system. This system, the Board said, would not induce it to decline jurisdiction because

\begin{quote}
[1]he system appears to have been designed almost entirely by employers and owners, and the final arbiter of internal disputes does not appear to be a neutral third party freely chosen by both sides, but rather an individual appointed solely by the member club owners themselves. We do not believe that such a system is likely either to prevent labor disputes from arising in the future, or, having once arisen, to resolve them in a manner susceptible or conducive to voluntary compliance by all parties involved. Moreover, it is patently contrary to the letter and spirit of the Act for the Board to defer its undoubted jurisdiction to decide unfair labor practices to a disputes settlement system established unilaterally by an employer or group of employers.
\end{quote}

\textsuperscript{180}Id. at 191 (emphasis added). The relevance of this language in the present context is that the Board wholly disavowed any intent to allow a governance system to exist outside the confines of the NLRA, and its own jurisdiction, even though such lack of deference may tend to disrupt the self-governance system. See 35th Annual Report of the National Labor Relations Board 22, 26 (1970). Thus, in response to the assertion that Board processes could be used to deprive the commissioner of disciplinary powers, the Board said that “Board processes only prohibit discipline based upon Section 7 considerations.” \textsuperscript{180} N.L.R.B. at 191 n.14. The fact that such processes would interfere with the self-government system was, therefore, irrelevant.

It is also worthy of note that a proposal has recently been made to establish a federal agency to supervise the grievance machinery in the professional team sport industry. See Comment, Discipline in Professional Sports: The Need for Player Protection, 60 Geo. L.J. 771 (1972) (this article also contains an excellent review of the disciplinary system’s operation, and a constitutional basis upon which to challenge alleged abuses of power therein). In opposing a bill exempting the proposed merger of the American and National Basketball Associations, Senator Ervin threatened that if the bill were to pass he would introduce legislation to create such an agency. 117 Cong. Rec. 15451 (1971). It is the opinion of this writer, however, that no such agency system is necessary, since the disciplinary system may be adequately handled within the framework of the collective bargaining process. Thus, in a Report on Organized Baseball, a House committee once observed that it “would be unwise in the extreme to saddle professional baseball with a new governmental bureau to control its destiny.” H.R. Rep. No. 2002, 82d Cong., 2d Sess. 231 (1952). See also 1957 Hearings, pt. 2, supra note 2, at 2657, 2671.

\textsuperscript{103}Procedural due process rights have been grudgingly finding their way into the labor law. The most recent controversy has been over when an employee has the right to be represented by counsel in employer confrontations. The rule that the Board and the courts first adopted was that representation
the owners would be required to bargain in good faith. Inclusion of the commis-
sioner may be seen, then, to be somewhat of an academic question; although it does
demonstrate, again, the ambiguity now present in the sports industry due to the
advent of collective bargaining and its adherent labor law principles.

C. A Separate Superstar Bargaining Unit

Inasmuch as circumstances may arise wherein the superstars of a particular league
would like to establish themselves as a separate bargaining unit, it is necessary that
attention be given to the question of whether the superstars may constitute a bar-
gaining unit apart from that which represents the mass of players. The basis of
such a decision would be that superstars are a group identifiably different from
the average players, and require, therefore, a separate bargaining representative to ade-

equately protect their best interests. Since there could not be two separate repre-
sentatives in the same unit, the stars would have to be able to establish a separate
bargaining unit in order to have their own representative.

As a matter of labor law, the permissibility of the superstar unit may be con-
sidered from either of two vantage points. First, as has already been seen, bargaining in the team sport industry is on a multi-employer basis, so that a superstar
unit could be said to constitute an attempt to effect a partial withdrawal from the
multi-employer unit. Partial withdrawal questions have usually arisen when an
employer, rather than a portion of its employees, seeks to withdraw from the multi-
employer unit to pursue individual bargaining with a union; it has generally been
allowed when timely notice has been given.

The attempt by a union to sever a class of employees from all employers, however, raises a far different question, involving as it does an attempt to fragmentize the bargaining unit. In such cases, the
Board has consistently followed the rule that a union's petition to separately represent
a sub-group of employees will be denied in the multi-employer context if it seeks

would be allowed in disciplinary but not investigatory interviews. See Texaco, Inc., 168 N.L.R.B. 361 (1968), enforcement denied, 408 F.2d 142 (5th Cir. 1969); see also Texaco, Inc., Los Angeles Sales Terminal, 179 N.L.R.B. 976 (1969); Jacobe-Pearson Ford, Inc., 172 N.L.R.B. No. 84 (1968). Realizing that this distinction was more metaphysical than real, the Board recently adopted a rule which states that an employee is entitled to representation where "the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses." Quality Mfg. Co., 195 N.L.R.B. No. 42 (1972). It seems clear, in any event, that employees are entitled to representation in disciplinary interviews. This tends to make somewhat of a shambles of owners' comments that a player's attorney should always be barred because of the fact that the owners take care of the players, 1957 Hearings, pt. 2, supra note 2, at 1253, and that they, the attorneys, are "rabblerousers" and "flannelmouths." Id., pt. 3, at 2877.

This desire might, for example, arise if the majority of the members of the bargaining unit—that is, the "average" ballplayers—should decide to require their bargaining agent to negotiate terms which would favor their interests to the detriment of the superstars. Such a situation might, again for example, occur when the agent is directed to negotiate for a schedular salary structure, as opposed to the present minimum salary term. See notes 152-58 infra and accompanying text.

See note 66 supra and accompanying text.

See, e.g., Walker Electric Co., 142 N.L.R.B. 1214 (1963); Hotel & Restaurant Employees & Bar-
severance of fewer than all employers in the unit. Where, however, the severance sought is coextensive with the existing bargaining unit, the petition will be allowed, so long as the requirements of an ordinary severance procedure are satisfied.

The second viewpoint from which this question may be considered is that of the severance rules themselves. Severance is a common phenomenon in industrial labor relations, and when it takes place the extent to which employees have organized in the past may not be given controlling weight in determining whether a new group is appropriate—though bargaining history is important. Severance questions have arisen primarily in the area of craft severance from larger industrial unions, and although the NLRB has followed a somewhat erratic path in the past, it recently stated the standards that it would follow in making craft severance decisions. In Mallinckrodt Chemical Works, the Board said that it would consider the following factors in craft severance cases: (1) whether a tradition of separate representation exists; (2) the history of collective bargaining of the employees and plant involved; (3) whether the employees have established and maintained their separate identity; (4) the history and pattern of collective bargaining in the industry involved; (5) the degree of integration in the employers’ production process; and (6) the qualifications of the union seeking to “carve-out” a separate unit. In spite of this array of factors, it has been reported that the Board will be quite reluctant to permit severance, basically because by so doing it will be “sowing the seeds of labor relations instability” by undermining the bargaining position of the majority employee group.

Applying the Mallinckrodt criteria in the present context does not portend a promising result for the superstars. There has not been a tradition of separate representation—individual salary negotiations do not constitute separate representation—there

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111 At an early date, the Board had taken the stand that no craft severance would be allowed so long as the industrial union had had a successful history of bargaining for the craft unit and had adequately represented the craft’s interest. American Can Co., 13 N.L.R.B. 1252 (1939). This stance was softened slightly in General Electric Co., 58 N.L.R.B. 57 (1944), but it was the Taft-Hartley amendments that turned the tide. Taft-Hartley added section 9(b)(2), which provides that a prior Board determination shall not preclude the establishment of a craft unit. National Labor Relations Act § 9(b)(2), 29 U.S.C. § 159(b)(2) (1970). The Board, however, still limited severance, and in National Tube Co., 76 N.L.R.B. 1199 (1948), it held that severance would be denied where the industry in question was highly integrated. The Board then decided that, in essence, a craft could seek severance whenever it chose. American Potash & Chemical Corp., 107 N.L.R.B. 1418 (1954). Finally, the Board adopted its present position in Mallinckrodt.


113 162 N.L.R.B. at 397.

is an established history of league-wide bargaining, and the superstars have not main-
tained a separate identity. Indeed, the superstars are in a position similar to that of the
instrument mechanics in Mallinckrodt, who were denied separate unit status because
they were an integral part of the production process, did not constitute an identifiable group
since their separate interests had been submerged in the broader
community, had been adequately represented by the industrial union, and “the
interests served by maintenance of stability in the existing bargaining unit... outweighed
the interests of affording... [a few employees] the opportunity to change
their mode of representation.”

Even if the stars were to prevail on one of these two theories, an exacerbatingly
difficult factual determination would have to be made—that is, what would be the
basis of distinguishing a “superstar” from a “non-superstar”? Such a distinction
could be made on the basis of years in the professional league, salary or on some
other basis such as batting average, average point production, earned run average,
pass completion percentage or any other statistical measure, all of which would suffer
from the demonstrable difference that exists between different positions within a
given sport and between the same positions over a period of time. Even if a jurisdic-
tional boundary could be reached, there would remain the problem of a constantly
fluctuating membership; from year-to-year some players would not meet the sta-
tistical measure because of having had a bad year, sickness, or some other factor.

In light of the present league-wide bargaining, the factual difficulty that would be
involved in having a separate superstar unit, and the Board’s reluctance to allow
partial withdrawal or grant severance petitions, it seems unlikely that the superstars
could establish their own bargaining unit. Superstars must, therefore, expect that
they will have to seek satisfaction of their interests and grievances within the larger
bargaining community.

IV

The Impact of Collective Bargaining on Particular
Agreement Provisions

Although the core of this analysis is the simple proposition that the owners and
players in the organized professional sports are now subject to the vicissitudes of
the national labor policy, as is graphically illustrated by the foregoing discussion of
the bargaining unit, attention must also be given to the effect of that determination
upon some of the particular provisions that will be contained in future collective
bargaining agreements. In light of the increasingly recognized economic power of

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316 There is, however, room for the contention that superstars in at least one sport have in fact
maintained their separate identity and that the league-wide bargaining was based only upon a special
agreement. It has, thus, been reported that when the National Football League Players Association
was formed, the superstars conditioned their joining upon an agreement that the Association would bar-
gain only for a minimum salary term, leaving them free to use their greater bargaining power for their
own benefit. See Labor Relations in Professional Sports, supra note 2, at 91. In light of this agreement,
one seeking to splinter a superstar unit in the NFL could well have a basis for arguing a compliance
with at least one of the Mallinckrodt standards.

317 162 N.L.R.B. at 399.
the players and their opinion that their contracts are "legal monstrosities," it seems clear that the terms and conditions of their employment will be a subject of not inconsiderable controversy in future bargaining sessions.

The breadth of subject matter available for consideration at this juncture spans the entire field of labor-management relations in professional sports. Inasmuch as the thrust of this inquiry is to simply illustrate the impact of the labor laws on professional sports, attention will be limited to what is perceived to be the two most important aspects of current negotiations—the minimum terms and conditions of employment provisions and the various means of allocating players and restricting their mobility.

Before considering these two types of provisions, it is worth noting that the chief difficulty in analyzing terms or clauses in present or future collective bargaining agreements in the professional team sport area is that such provisions generally have no counterpart in the industrial labor relations contexts heretofore dealt with by the NLRB and the courts. When a clause in a sports agreement is considered, therefore, resort must be made by rough analogy to situations that have arisen in industrial labor relations, and the rules that have been fashioned there around, in order to have some understanding of its permissibility. It is by this process that the two

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118 An example of the type of controversy which might arise is the recent disagreement between the NFL Players Association and the team owners over the installation of artificial turf on football fields. The Players Association demanded bargaining over the turf issue, but the owners denied they had an obligation to bargain during the term of the current collective bargaining agreement. The NLRB held that the future installation of artificial turf on football fields was a mandatory subject of bargaining because the form of the playing field and its effect on the health of players was a condition of employment. National Football League Management Council, 203 N.L.R.B. No. 165 (May 30, 1973), 1973 CCH NLRB Dec. ¶ 25,406.

119 Perhaps the best way to illustrate this is to simply take a non-random example of a problem that could arise in future professional sports collective bargaining. Concern has been expressed by players over the transfer of a particular team franchise from one city to another. See Labor Relations in Professional Sports, supra note 2, at 71. Franchise movement is, of course, roughly analogous to the "runaway shop" phenomenon in the industrial labor area. To illustrate the difficulty involved in comparing sports problems to industrial labor problems, the law relating to runaway shops will be considered and then applied to the sports phenomenon of the moved franchise.

In analyzing runaway shop problems, a distinction has been drawn between a threatened and an actual move. See, e.g., Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 269-75 (1965). For present purposes, let us assume that an actual move is about to be made, and that there has been no threat thereof to get concessions at the bargaining table. Thus, attention will be directed only at the rules which have evolved when the change is actually accomplished.

As a general proposition, it may be stated that a plant dislocation will be an unfair labor practice under section 8(a)(3) if motivated by a desire to hinder or prevent union activity. Darlington Mfg. Co. v. NLRB, 397 F.2d 760 (4th Cir. 1968); NLRB v. Southland Paint Co., 394 F.2d 717 (5th Cir. 1968); NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957); United Shoe Workers v. Brooks Shoe Mfg. Co., 183 F. Supp. 568 (E.D. Pa. 1960); Brooks Dodge Lumber Co., 158 N.L.R.B. 1054 (1965), enforced, 389 F.2d 1005 (9th Cir. 1968); Rome Products Co., 77 N.L.R.B. 1217 (1948); Schiefer Millinery Co., 26 N.L.R.B. 939 (1940); Klotz & Co., 23 N.L.R.B. 746 (1939). If, however, the employer can show that the move is made in the good-faith belief that it is necessary for economic or other valid business purpose reasons, it is permissible. See NLRB v. Rapid Bindery, 293 F.2d 170 (2d Cir. 1961); Mt. Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954); Royal Plating & Polishing Co., Inc., 152 N.L.R.B. 619 (1965), enforcement denied, 350 F.2d 191 (3d Cir. 1965); Dove Flocking & Screening Co., 145
general types of terms in sports agreements shall be analyzed to assess the impact of collective bargaining upon particular agreement provisions.

A. The Minimum Terms and Conditions of Employment Provision

Although the superstar, in the absence of collective bargaining, may negotiate a contract applicable only to himself, once a bargaining unit is certified by the NLRB, the collective bargaining agreement will provide for the minimum terms and conditions of employment to be applicable to all employees in the bargaining unit.

N.L.R.B. 682 (1963); Royal Optical Mfg. Co., Inc., 135 N.L.R.B. 64 (1962); Kipbea Baking Co., Inc., 131 N.L.R.B. 411 (1961); Brown Truck & Trailer Mfg. Co., Inc., 106 N.L.R.B. 999 (1953). Difficulty arises when the owner's duty to bargain over the change is considered. Although the NLRB has made its position clear that an economically motivated decision to relocate is a mandatory subject of bargaining within the purview of section 8(a)(5), see Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966); see also Morrison Cafeterias Consolidated, Inc., 177 N.L.R.B. 113 (1969), enforcement denied in part, 431 F.2d 254 (8th Cir. 1970); Miller Trucking Service, Inc., 176 N.L.R.B. No. 76 (1969); Drapery Mfg. Co., Inc., 170 N.L.R.B. 199 (1968); Thompson Transport Co., Inc., 165 N.L.R.B. 96 (1967), enforcement denied, 406 F.2d 688 (10th Cir. 1969); McLoughlin Mfg. Co., 164 N.L.R.B. 140 (1967); Pierce Governor Co., 164 N.L.R.B. 97 (1967), several courts of appeal have taken a contrary position. See Morrison Cafeterias Consolidated Inc. v. NLRB, 431 F.2d 254 (8th Cir. 1970); NLRB v. Thompson Transport Co., 406 F.2d 688 (10th Cir. 1968); NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967); NLRB v. Royal Plating & Polishing Co., Inc., 350 F.2d 191 (3d Cir. 1965); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965); Mt. Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954). The conflict between the Board and the courts of appeal is considered in Morris, supra note 41, at 418-22; Fairweather, The NLRB—Implementer of the National Labor Policy or Vice Versa?, 22 Lab. LJ. 294, 304-06 (1971). This conflict, however, poses little real difficulty. If the Board's viewpoint were to prevail, all that the employer must do is notify the union of its intention and then proceed to bargain about the decision in good faith. If such efforts fail, in spite of the good faith bargaining, the employer is then wholly free to make and effectuate his decision." Ozark Trailers, Inc., 161 N.L.R.B. 561, 568 (1961). If, on the other hand, the disagreeing court of appeals' viewpoint prevails, the employer is still said to have a duty to bargain about the effects of the decision, although he need not bargain about the decision itself. Morrison Cafeterias Consolidated, Inc. v. NLRB, 431 F.2d 254 (8th Cir. 1970); NLRB v. McLoughlin Transport, 406 F.2d 688 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965); NLRB v. Royal Plating & Polishing Co., Inc., 350 F.2d 191 (3d Cir. 1965). The duty to bargain over effects, moreover, will be satisfied by the employer's notification to the union of its decision, and if the union chooses to request no such bargaining, the employer will not be found to have violated its section 8(a)(5) duty. Young Motor Truck Service, Inc., 156 N.L.R.B. No. 56 (1966). Whether one chooses to follow the Board or the courts of appeal makes little real difference, of course, since the requirement to bargain over effects differs only in degree from the duty to bargain over the decision itself. See Morrison Cafeterias Consolidated, Inc. v. NLRB, 431 F.2d 254, 257-58 (8th Cir. 1970).

When a franchise is sought to be moved, then, the bargaining duties are fairly well spelled out if the "runaway shop" rules in fact apply. Thus, it seems clear that if the profit motive necessitates a change in the location of a sports franchise—that is, a partial closing as opposed to a complete shutdown—the owner will not commit a section 8(a)(3) unfair labor practice. See Ozark Trailers, Inc., 161 N.L.R.B. 561, 564-65 (1966); see also Schnell Tool & Die Corp., 161 N.L.R.B. 1313, 1316 (1967). Unfortunately, this is about all that is clear, because the sports industry has several unique features. Movement of a professional sports franchise is not quite the same as a runaway shop, inasmuch as the owner controls the employment options of his players and can compel them to follow the franchise. Thus, the parties must decide what effect this difference has upon the "rules." In this particular case, perhaps the effect is to make the question of franchise movement a mandatory subject of bargaining to begin with, so that the players should seek explicit and detailed recognition of their rights consequent upon such movement in the collective bargaining agreement. Since it may then be a mandatory subject, moreover, the players could support their bargaining position by standing upon all economic weapons at their disposal.

This is at best a rough example of the ambiguity caused by applying a relatively well established body of rules in a new context, but it should at least identify the basic difficulty presented by the application of the labor laws to the professional team sport industry.
the elected representative becomes the exclusive bargaining agent for all employees within the unit.\textsuperscript{120} Thus, individual employees no longer have complete freedom to bargain on their own.\textsuperscript{121} If individual bargaining is carried on in conflict with the efforts of a certified bargaining agent, moreover, the employer may commit an unfair labor practice by failing to bargain collectively with the representatives of the majority of his employees.\textsuperscript{122}

Since the collective bargaining agreement negotiated by a players' union will probably continue to cover only the minimum wages and conditions of employment,\textsuperscript{123} it is necessary to explore in some detail the rules which will apply to individual superstar bargaining on terms in excess of the common minimum. As a general matter, it may be observed that an employer will be considered to have violated his statutory duty to bargain if he deals directly with an employee, or any other agent who is not the certified representative,\textsuperscript{124} and who is a member of the bargaining unit,\textsuperscript{125} because by so acting the employer undermines the authority of the union and prevents effective collective bargaining, a major purpose of the NLRA.\textsuperscript{126} Once a collective agreement has been properly reached, however, an individual, but not the union,\textsuperscript{127} may negotiate for an individual contract the terms of which exceed, but do not derogate from, those contained in the collective agreement.\textsuperscript{128} When such a contract is negotiated the collective agreement is said to be incorporated into the qualifying individual contract.\textsuperscript{129}

\textsuperscript{120} National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970). Thus, the opinion expressed in Senate hearings that the majority of the ballplayers could not bind the remainder, see Hearings Before the Senate Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess. 110-11 (1964), is clearly in error.

\textsuperscript{121} See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Steele v. Louisville & Nashville Ry., 323 U.S. 192, 200 (1944). \textit{But cf.} International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local No. 494, 128 N.L.R.B. 1379 (1960), where the Board held a union to be in violation of sections 8(b)(1) and 8(b)(2), 29 U.S.C. §§ 158(b)(1), (2) (1970), when it excluded an employee who had succeeded in obtaining higher pay on his own.

\textsuperscript{122} National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970). See also National Licorice Co. v. NLRB, 309 U.S. 350, 357-59 (1940). Thus, in Dazey Corp., 106 N.L.R.B. 553 (1958), the Board held that such action could violate section 8(a)(5) for failing to bargain with the majority, as well as section 8(a)(1) for encouraging the minority to abandon the majority.

\textsuperscript{123} See NFL Agreement art. IV, § 1. See also Shulman & Baum, supra note 2, at 1745; Note, \textit{Curt Flood at Bat Against Baseball's Reserve Clause}, 8 San Diego L. Rev. 92, 94 n.12 (1971).

\textsuperscript{124} See Peoples Motor Express, Inc. v. NLRB, 387 F.2d 905 (4th Cir. 1967); Mutual Industries, Inc., 159 N.L.R.B. 885 (1966), \textit{enforced}, 387 F.2d 275 (9th Cir. 1967).

\textsuperscript{125} See Smith's Van & Transit Co., 126 N.L.R.B. 1059 (1960).

\textsuperscript{126} See J. I. Case Co. v. NLRB, 321 U.S. 332 (1944); NLRB v. Cooke & Jones, Inc., 337 F.2d 580 (1st Cir. 1964); NLRB v. Union Mfg. Co., 179 F.2d 511 (5th Cir. 1950). This rule applies equally to the modification of contracts. Adolph Coors Co., 159 N.L.R.B. 1604 (1965); Williams Coal Co., 11 N.L.R.B. 579 (1939). A union may, however, acquiesce in a practice of non-representative negotiation, and when the employer then bargains with those employees, it is not in violation of its section 8(a)(5) duty.

\textsuperscript{127} See UAW v. J. I. Case Co., 250 Wis. 63, 26 N.W.2d 305 (1947). See also NLRB v. Darlington Veneer Co., 236 F.2d 89, 89 n.2 (4th Cir. 1956).

\textsuperscript{128} J. I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944).

The clearest application of these rules was made by the Supreme Court in *J. I. Case Co. v. NLRB,* in which it observed that "where there is great variation in [the] capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining." Any such practice must, however, be looked upon "with suspicion," since the conferral of such advantage may be "disruptive of industrial peace" and be "at the long-range expense of the group as a whole." Where such contracts are permissible, moreover, the Court said that they may not "subtract from the collective ones."

*J. I. Case,* then, is instructive for the present inquiry only to the extent that it carves out a narrow area within which a superstar may negotiate for terms in excess of a minimum standards contract—that is, where there is a great variation in the capacity of the members of the bargaining unit and where the individual contracts are not less advantageous than the collective bargain. Although there are no decisions in this area involving athletic superstars as such, there is authority in the entertainment field. In *Midland Broadcasting Co.*, the employer negotiated a collective bargaining agreement which included a provision providing for the negotiation of better terms than those contained in the "union contract." Relying upon this provision, the employer then negotiated individual "talent" contracts with its artists, which afforded the artist an opportunity to earn a bonus over the minimum rates of pay guaranteed by the union contracts but which also placed restrictions on the artists' performance for anyone except the immediate employer. These individual contracts were challenged as being violative of the employer's duty under section 8(a)(5) to bargain in good faith, inasmuch as they contained less favorable terms than did the union contract—that is, they were not within the narrow rule of *J. I. Case.* The Board, however, found no such violation, and upheld the contracts saying that "[i]t is not sufficient . . . to show that a particular provision of the talent contract, taken by itself, is less favorable than a particular term of the union contract."

What the Board seems to have held, therefore, is that in determining the permissibility of an individual contract, it is the totality of the contract that must be

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130 U.S. 332 (1944).
131 Id. at 338.
132 Id. at 338-39.
133 Id. at 339.
135 93 N.L.R.B. 455 (1951). See also Television Film Producers Ass'n, 93 N.L.R.B. 929, 930 (1951).
136 It is not without significance that the restriction bears more than a passing resemblance to the reserve and option clauses, that are now generating so much controversy. Inasmuch as the Board sanctioned this type of clause in *Midland Broadcasting,* one might seek to argue that the reserve clause is also a proper term in a collective bargaining contract under the NLRA. Such argument would also indicate that the status of the clause under the antitrust laws is largely irrelevant. See Jacobs & Winter, supra note 34, at 17-28, though that article did not rely upon authority comparable to *Midland Broadcasting.*
137 93 N.L.R.B. at 456. The Board observed that "[i]f we were to strike down the burdensome provisions and leave only the bonus provisions . . ., we would be making a new and different contract for the parties. That is not the function of this Board."
considered, not particular terms. Thus, according to *Midland Broadcasting*, a less favorable term may be negotiated without an employer violation of section 8(a)(5) so long as the totality of the individual contract is not less favorable than the totality of the union contract. Although the “totality theory” is attractive, its underpinnings are rather weak. In light of the language in *J. I. Case* that less favorable terms may not be negotiated in individual contracts, the course of wisdom will be to assume that the standard against which any individual provisions will be tested is one which compares the individual and union contracts “term by term,” not by the totality of terms. Though it might be argued that such an approach would not pose much difficulty, since it is only the salary term which is presently the subject of individual negotiation in the professional team sport industry, there are other “individual” terms in particular player contracts—for example, it is reported that some players are able to negotiate no-cut or no-trade clauses in their contracts. Like the higher-than-minimum salary terms, however, such clauses are more, not less, favorable than the standard contract provisions and would not run afoul of either the *J. I. Case* or *Midland Broadcasting* rules.

It is clear, then, that superstars need not suffer economic loss because of the advent of collective bargaining and that the club owner need not risk a section 8(a)(5) unfair labor practice by negotiating a minimum standards contract with the players association and an individual contract with the more talented players, so long as the proper negotiation procedure is followed. The association should first negotiate a minimum standards contract which contains all terms and conditions of employment and which, as in *Midland Broadcasting*, also contains a specific provision allowing individual members of the bargaining unit to negotiate for more favorable terms than those contained in the collective agreement. When the collective agreement is complete, the individual may then negotiate for the more favorable terms that he deems a necessary *quid pro quo* for his services, assuming always that the collective agreement is part and parcel of whatever individual agreement he may reach with the employer.

1. The Union’s Duty of Fair Representation

In considering the right to bargain individually, it is also necessary to consider the fact that the players association may itself be subject to a charge that such a negotiation procedure violates its duty of fair representation. The basis of such a con-

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138 See notes 130-33 *supra* and accompanying text.
140 See Jacob & Winter, *supra* note 34, at 9-10.
141 *supra* note 34, at 9-10.
142 The specific clause involved in *Midland Broadcasting* was as follows:

The Company further agrees that nothing in this contract shall be deemed to prevent any staff artist from negotiating for or obtaining better terms than the minimum terms provided herein . . .

93 N.L.R.B. at 455 n.t.
143 In the 1970 NFL Agreement, for example, it is provided that “individual NFL players have the right to negotiate regular season compensation above the minimums established in this Agreement.” *NFL Agreement*, art. IV, § 1.
tention would be that by negotiating for a contract which set merely minimum standards, the association failed to fairly represent the vast majority of its members, since if the contract had included a detailed wage schedule applicable to all members, the majority would have benefited from the inclusion of superstars in the schedule—that is, it seems clear that if a wage schedule is negotiated at fixed levels, with no provision for individual bargaining above the bargained for figures, the presence of the superstars in the bargaining unit will cause the levels adopted to be higher than if they were not present. Any such salary term would be, of course, highly detrimental to the superstars. The issue, therefore, is whether the duty of fair representation permits the union to negotiate a minimum standards contract which makes provision for additional compensation to the more talented members of the bargaining unit.

The duty of fair representation was originally established by the Supreme Court in a series of opinions arising under the Railway Labor Act, but has since been applied to the NLRA. The first explanation of the doctrine came in Steele v. Louisville and Nashville Railway Co., which was based upon racial discrimination complaints. There the Court held that a labor organization must "represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents." That is, the representative must act "without hostile discrimination" amongst its members. As it had done earlier that year in J. I. Case, however, the Court allowed room for the union to make provision for the exceptionally talented amongst its membership. The Court said that variations in the terms of the contract may be made so long as they are based on "relevant differences" amongst the employees, "such as differences in seniority, the type of work performed, [and] the competence and skill with which it is performed."

There does not, unfortunately, appear to be any decisional authority dealing with a situation comparable to that involved in the negotiations for minimum standards contracts and individual bargaining by superstars. In light of the language of Steele, however, there is little chance that a union would be held to have violated its fair

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141 It is, in this light, of interest to note that the agreement in the NFL has, as noted at note 142 supra, a minimum salary term for the regular season salaries with provisions for individual higher than minimum salary negotiations. For pre-season games, however, there is a schedular salary scale, with the amount received depending upon the length of service. NFL Agreement art. IV, § 3. This at least indicates that schedular salaries have a foothold in the professional team sport industry. Whether they will ever be applied to regular season salaries is, of course, a question without present answer.
144 It is to be noted that in Midland Broadcasting, the Board did not raise this question. It did seem to indicate, however, that if such a complaint were processed through the grievance procedure, it might then be a proper subject for its scrutiny.
146 323 U.S. at 203. See also Vaca v. Sipes, 386 U.S. 171, 177 (1967).
147 323 U.S. at 203.
representation duty by negotiating the minimum standards contract which puts those with superior skill in an advantageous position vis-à-vis their less talented peers, assuming, of course, the absence of a discriminatory motive and the presence of overall membership benefit.181

2. A Maximum Salary Term

The preceding discussion has assumed that a minimum salary contract is negotiated. That, of course, is the present, and most easily envisioned, situation.182 It is not, however, clear that a players' union might not opt for a maximum salary contract based upon schedular salary figures183—that is, a contract which more clearly resembles those negotiated in other industries. Such a contract would, in fact, appear to make economic sense to the non-star players, who presumably would benefit from such a "common denominator" approach.184 Since they would certainly constitute a majority of the bargaining unit, the non-stars could surely compel the bargaining representative to negotiate such a contract. If a maximum salary contract were negotiated, moreover, the superstars would have no basis for legal complaint.185 That contract would be for the overall benefit of the bargaining unit as a whole, and the mere substitution of majority for minority advantage would certainly not constitute "hostile discrimination" such as to constitute the necessary predicate for a fair representation challenge. In addition, the superstars would be barred from negotiating on their own, for if the employer bargained with them as individuals, whether or

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183 Such a schedular scale has, in fact, been negotiated in the NFL for pre-season games. See NFL Agreement art. IV, §3; Labor Relations in Professional Sports, supra note 2, at 78. It is worth noting, however, that Bob Feller, one-time head of the Major League Players Association, once said that "I definitely do not think that collective bargaining could be put into baseball in salary talks . . . ." 1957 Hearings, pt. 2, supra note 2, at 1330.
184 Thus, it has been observed that there are players, stars and superstars, who unquestionably have far greater bargaining power individually . . . than they would have if the bargaining was conducted for them by an [collective bargaining] agent [representing all players, stars as well as non-stars]. Labor Relations in Professional Sports, supra note 2, at 75. It would also seem to put the players association in a more advantageous bargaining position. Thus, it has been observed that the effect of the minimum salary term has been to sharply reduce the Union's role as bargaining agent and has resulted in greater emphasis by the Union on the matters remaining within the area of collective bargaining. It has forced the Clubs to consider simultaneously the cost impact of money matters in collective bargaining and the cost impact of individual demands.
185 Id. at 91.
186 Thus, it has been observed that [i]f minimum salaries can be negotiated, so too can maximum salaries. But if maximum salaries are held to be illegal in baseball because they discriminate against the best players, then they should also be illegal in the steel industry because they discriminate against the best steelworkers. It is elitist to view industrial workers as fungible and to treat them as though there are no differences in efficiency.
Jacobs & Winter, supra note 34, at 21.
not they were members of the union, he would be committing an unfair labor practice under section 8(a)(5). Once a bargaining representative is elected, it represents all members of the bargaining unit in negotiations with employers on wages and all other terms and conditions of employment, and, absent discrimination violative of fair representation, all members must rely on internal union politics to secure their own advantage. And, as has already been observed, the superstars will probably not be able to successfully invoke partial withdrawal or severance procedures to establish their own bargaining unit should the majority seek to submit the individual benefit of the stars to the overall good of all players.

B. The Allocation of Players

The allocation of players is yet another feature of the professional team sport environment which will unquestionably be a part of the collective bargaining process. Allocation takes place at all points in a particular player’s career. Initially, he is the subject of a common draft which will determine for which team he may or may not play. During his career he may be traded without his consent pursuant to contract and bylaw provisions or be put into a common pool for expansion purposes. If he plays out his option in football or basketball, his volitional relocation may be conditioned upon the club with which he seeks association compensating the club he is leaving; and if he plays baseball, the reserve clause will prevent any voluntary change in employment. All of these rules have the ostensible purposes of en-

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156 See notes 120-22 supra and accompanying text.
157 Thus, it has been recently observed that the “existence of unions in professional sports thus negates any possibility of individual bargaining except as permitted by the collective bargain.” Jacobs & Winter, supra note 34, at 9.
158 See notes 104-16 supra and accompanying text.
159 Thus, the NFL Standard Player Contract provides that
[1]t is mutually agreed that the Club shall have the right to sell, exchange, assign or transfer this contract and the Player’s services hereunder to any other Club in this League.

NATIONAL FOOTBALL LEAGUE STANDARD PLAYER CONTRACT § 9. This clause has been attacked as lacking mutuality, and that it does, therefore, confer an unconscionable advantage on the owners. 1957 Hearings, pt. 2, at 2644.
160 The option clause in football reads as follows:
The Club may, by sending notice in writing to the Player . . . renew this contract for a further term of one (1) year on the same terms as are provided by this contract, except that (1) the Club may fix the rate of compensation to be paid . . . which . . . shall not be less than ninety percent (90%) of the sum set forth [herein] . . . ; and (2) after such renewal this contract shall not include a further option to the Club to renew the contract.

NATIONAL FOOTBALL LEAGUE STANDARD PLAYER CONTRACT § 11; see also NFL AGREEMENT art. VIII.
161 This rule is contained in NFL CONSTITUTION & BYLAWS art. 12.1 (H), and is referred to as “Rozelle’s Rule” by the players. See Labor Relations in Professional Sports, supra note 2 at 16, 24, 29. See generally Wall Street Journal, Aug. 23, 1967, at 19, col. 3; 1964 Hearings 106-07; Brown, Because of a Clause, a Clause, Sports Illustrated, May 1, 1972, at 63; Note, Baseball’s Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism, 12 WM. & MARY L. REV. 859, 874-75 (1971). A similar provision has been proposed in the National Basketball Association. See Professional Basketball Merger, pt. 1, supra note 62, at 153.
162 The reserve clause is basically provided for in Major League and Professional Baseball Rules, where it is said that each club may place its players on a reserve list, “and thereafter no player on any list shall be eligible to play for or negotiate with any other club until his contract has been assigned or he has been released.” Flood v. Kuhn, 309 F. Supp. 793, 796-97 (S.D.N.Y. 1970).
suring that players will not willy-nilly shift from team to team, thereby incapacitating personnel planning, interfering with the stimulation of spectator identification, and, of course, inflaming price competition amongst teams, which will all greatly increase the costs of fielding a competitive team.

This scheme of rules may be classified for present purposes as simply different means of restricting the players', but not the owners', ability to determine for whom they shall play in the future. Because of their clearly restraining nature, the different rules have frequently been the subject of antitrust challenge in the courts. Although the reserve clause in baseball is clearly the most restrictive, it has been upheld against antitrust challenge for several decades, as have the option clauses in basketball, football and hockey.

The reserve system was once described by former owner Bill Veeck as "motherhood, the flag and apple pie all rolled into one," as far as the owners were themselves concerned. Wall Street Journal, Aug. 23, 1967, at 19, col. 4. The players have been heard to say "that it is totally illegal and not a bargainable position, it violates the antitrust laws and is illegal." Labor Relations in Professional Sports, supra note 2, at 68. The pros and cons of the reserve clause are considered in H.R. Rep. No. 2002, 82d Cong., 2d Sess. 208-28 (1952).

32 Law and Contemporary Problems

164 See Washington Capitals Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969); Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir.), cert. denied, 385 U.S. 840, rehearing denied, 385 U.S. 942 (1966); Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972); Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969); Central New York Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 181 N.E.2d 506 (1961); Dallas Cowboys Football Club v. Harris, 348 S.W.2d 37 (Tex. Civ. App. 1961). But cf. Nassau Sports v. Hampton, 355 F. Supp. 733 (D. Minn. 1972); Philadelphia World Hockey Club v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972); Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261 (D. Mass. 1972). It has normally been challenged by players who have "jumped leagues," in an effort to muster a defense against the injunction suit which is invariably brought against them by their former employer. Some courts have viewed the contracts in question as being contracts of adhesion requiring that they be strictly construed against the owners, see, e.g., Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240, 245 (1969); but cf. Washington Capitals Basketball Club, Inc. v. Barry, 304 F. Supp. 1193, 1197 (N.D. Cal.), aff'd, 419 F.2d 472 (9th Cir. 1969). Others have granted the injunctions, though they have generally been limited to the period of the option, see, e.g., Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir. 1966), at least so long as there is no showing of "unclean hands" on the part of the prior owner. See New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 297 F.2d 471 (5th Cir. 1961); Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969) (plaintiff had so soiled its hands during the contract negotiation process that the court felt required to invoke the equitable "clean-hands" rule against it); but cf. Washington Capitals Basketball Club, Inc. v. Barry, 419 F.2d 472, 478 (9th Cir. 1969). There is, therefore, nothing as a matter of general contract law improper about the restraint on mobility posed by the option clause. Thus, in Washington Capitals Basketball Club, Inc. v. Barry, 304 F. Supp. 1193 (N.D. Cal.), aff'd 419 F.2d 472 (9th Cir. 1969); the court observed that such provisions are not of themselves "unconscionable, unenforceable or otherwise void." Id. at 1197.

It is worthwhile to indicate the rationale upon which the courts seem to base their decisions. The basic view is that in contracts involving personal services, the parties may negotiate a negative covenant to ensure that the employer gets the exclusive right to display the player for a given period of time. Thus, they follow the venerable English decision of Lumley v. Wagner, 42 Eng. Rep. 687 (1855), to grant injunctions to ensure that the player plays for no one else during the period of the contract. The courts will not, however, sanction a long-term contract; at least they will not enjoin a player from playing elsewhere for more than one or two years, depending on the length of the contract and the option involved. The reason for this is that unlike other types of personal services, the services rendered by ball-players are ephemeral and will last for only a short period. They must, therefore, have at some point the freedom to negotiate for better terms of employment. See Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240, 245 n.9 (1969).
In none of these cases, however, have the courts been presented with the permissibility of such rules as a part of a collective bargaining agreement. As has already been observed, when a term of a collective bargaining agreement is challenged as being in contravention of the antitrust laws, the plaintiff should be able to succeed only if he shows that the term does not relate to "wages, hours or working conditions," that it was not arrived at through bona fide collective bargaining and that the players' bargaining agent was acting in consort with the owners and did not fulfill its duty of fair representation. Absent such a showing, the term should not be stricken, with the result that the unhappy challenger would be left to his remedy under the labor laws. This is an entirely justifiable result, since it is the labor laws, not the antitrust laws, which should determine the permissibility of terms contained in collective bargaining agreements, except in the rare cases where a plaintiff can successfully carry the burden of proof already considered.

When these mobility restrictions are analyzed under the labor laws, it seems fairly clear that there is nothing, as a prima facie matter, impermissible about their inclusion in a collective bargaining agreement. With regard to the reserve and option clauses, reference might be made to Midland Broadcasting Co., where, as already noted, the employers inserted in the collective bargaining agreement, in addition to the minimum salary term, a restraint on the entertainers' performing for any other party. The Board, however, failed to even comment upon this provision, except to note that its purpose was "designed . . . to assure that the . . . [employer] would receive the exclusive benefit of its investment in the artist"—the same purpose behind the reserve and option clauses. Though this lack of comment does not, to be sure, indicate that the Board has placed its imprimatur upon mobility restraints, it does seem to indicate that the mobility restraint is simply another of the items available to the collective bargaining participants. In short, it is believed that so long as the mobility restraint adopted for use in the professional team sport industry is permissible as a means of general contract law—and, of course,

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156 An attempt was made to do so in Flood v. Kuhn, but the Supreme Court never reached the question. The argument was, however, noted by Justice Marshall in his dissent, 407 U.S. at 294, as it had been by the courts below. See 443 F.2d at 268; 399 F. Supp. at 806. A similar attempt was made in Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261 (D. Mass. 1972), but was rejected because of there being no evidence that the hockey reserve clause had ever been the subject of collective bargaining negotiations. See generally, Martin, The Labor Controversy in Professional Baseball: The Flood Case, 23 Lab. L.J. 567 (1972).

157 See notes 27-55 supra and accompanying text. Thus, the oft invoked opinion of the players associations that such clauses violate the antitrust laws, see Labor Relations in Professional Sports, supra note 2, at 68, is in error, and their efforts should be directed toward ameliorating the effects of such clauses at the bargaining table.

158 In light of this conclusion, one is bound to view the action proposed by Senator Ervin to congressionally outlaw the reserve clause, see Indianapolis Star, Aug. 10, 1972, at 48, col. 1, as being an overly emotional response to what is at best simply another difficult labor problem in American industry.
antitrust law—it will be permissible in the collective bargaining arena. Since any such restraint is certainly a "term or condition" of employment, moreover, it is a mandatory subject of bargaining about which the parties must bargain but need not reach agreement.

When the player drafts are considered, a similar approach should be taken toward determining their permissibility in collective bargaining. The college drafts serve the same type of restrictive purpose as do the other mobility restraints—that is, to reduce the outlay of bonus money on untried rookies and to equalize playing talent in order that pennant competition will be stimulating and intense. Although the player draft has been said by the Supreme Court to present a significant group boycott issue in the antitrust context, it seems to be perfectly permissible as a matter within the realm of collective bargaining.

The basic objection to the player draft itself has been that it deprives the entrants to the market—that is, the incoming rookies—of the right to make their own bargain with the team of their own choice at a time when they are not a part of the collective bargaining process that agreed to the draft. Although that objection has merit, there is ample labor law authority for such provisions. In Local 24, Teamsters Union v. Oliver, the Supreme Court stated that a collective bargaining agreement could regulate the entry of certain third parties to work being performed by members of the then present bargaining unit, though the third parties were not a part of the bargaining process. Similarly, in Fibreboard Paper Products Corp. v. NLRB, the Supreme Court required that the parties bargain about the "contracting out" of work, although by doing so those parties would, to some extent, be regulating the entry of non-present third parties to the work in question. Though these cases are not directly applicable, and not, therefore, dispositive of the issue, they are indicative of the fact that as a matter of collective bargaining such procedures are not in and of themselves impermissible.

The player draft does, of course, have a rough counterpart in industrial labor

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172 When the player allocation rules are submitted to collective bargaining, many variations on the option and reserve clause may be forthcoming. Several possibilities are suggested in Flood v. Kuhn, 316 F. Supp. 271, 275 n.13 (S.D.N.Y. 1970); Note, Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism, 12 Wayne L. Rev. 839, 874-76 (1971). See also Professional Basketball Merger, supra note 62, at 153, where it is reported that the NBA has proposed that instead of the option clause there be instituted a right of first refusal—that is, in Senator Hruska's words if a player, number 1, is with Club A and getting $100,000 a year, and some other club offers him $150,000 a year, the home club can keep him if they match the $150,000; but if they don't he can move.

173 See R. Andreano, No Joy in Mudville 184 (1965).

174 See Haywood v. National Basketball Ass'n, 401 U.S. 1204, 1207 (1971). It is also to be noted that the NBA rule preventing a player from becoming eligible for the player draft until four years have elapsed since his high school graduation, has been declared to be an unlawful group boycott. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).


177 See Jacobs & Winter, supra note 34, at 15-16.
relations in the hiring hall, for which the NLRB and the courts have worked out a relatively clear scheme of rules. The basic function of the hiring hall is to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen, as well as haphazard and uneconomical searches by employers, by performing what amounts to a clearinghouse function for a particular labor market. The rules which presently cover such arrangements were first set out in Local 357, Teamsters Union v. NLRB, where the Court held that hiring hall arrangements were improper only where they were operated in a discriminatory manner to the expense of non-union members.

As is the player draft, the hiring hall is simply one means of accomplishing the desired result of allocating employees at the least cost and effort. The hiring hall is, of course, distinguishable from the player draft to the extent that in the hiring hall the employee may or may not accept the job to which he is referred, whereas the player draft is a “mandatory arrangement” in which the player has no choice. Nonetheless, such systems have a proper place in the collective bargaining process, as is evidenced by Fibreboard, Oliver and the hiring hall cases. When the draft is considered as a bargaining matter, moreover, it would appear to be a mandatory subject of bargaining, as was the “contracting out” clause in Fibreboard, since where a player is assigned will clearly have an effect on the “terms or conditions” of his employment, although those being drafted will not, of course, be members of the bargaining unit at the time of negotiations.

This is by no means an exhaustive discussion of the labor law implications of the various means used to restrict the mobility of players. The consideration of the reserve and option clauses and the player draft are, however, sufficient to illustrate the theory that should surround the collective bargaining table. So long as the parties comply with their prescribed bargaining duties, the agreement that is reached will not be invalidated under the labor laws, and the bargaining agent of the players will not be subject to collateral attack so long as he fairly represents the majority of those in his bargaining unit. In addition, a disappointed player will not be able to have a particular clause set aside as being in violation of the antitrust laws unless he can carry the rather stringent burden of proof hereinbefore considered.

V

Strikes and Lockouts

The activity that will provide, perhaps, the most tangible evidence of the incursion of the federal labor law into the arenas of professional sport will be the

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180 In so doing, the Court repudiated a more specific precautionary formula established by the NLRB. See Mountain Pacific Chapter, 119 N.L.R.B. 883 (1958). For a more lengthy discussion of hiring halls, see Momus, supra note 41, at 712-14.
efforts of both owners and players to utilize their economic weapons to enforce bargaining table positions or to rectify other grievances. Resort to economic warfare is, in a sense, the essence of the collective bargaining process, inasmuch as that process is simply a procedurally formal means of requiring opposing parties to resolve their disputes and opposing self-interests. When this cannot be done peacefully, then the contest of economic weapons becomes the means by which controversies are won, lost, or compromised—that is, the party whose economic ability is strongest prevails. In this sense, then, the study of strikes and lockouts—the primary economic weapons respectively, of the players and owners—is relevant to the present inquiry as a simple means of evidencing the type of activity that can be expected when owners and players reach impasse at the bargaining table or elsewhere.

A. The Players' Right to Strike

The primary weapon in the players' arsenal of economic weapons is the strike, which is defined as the act of employees refusing to work as a means of coercing their employer to accede to a demand that they have made upon him but which he has refused. Though neither the Constitution nor the common law provides employees with an absolute right to strike, federal statutory law makes it a potent weapon by declaring that the action of employees terminating their employment or ceasing to perform work shall not violate the law of the United States, and that the federal courts shall have no power to issue temporary restraining orders or temporary or permanent injunctions against activities growing out of labor disputes. The most important provisions, however, are those contained in the NLRA, which guarantee employees the right to engage in strikes and other forms of concerted activities, and that the right to strike shall not be impeded or diminished by any of its provisions, except as may be therein specifically stated. These provisions show, simply, that the right to strike is accorded considerable solicitude, and that when properly

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181 Thus, in NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960), the Court noted that "the presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system ...." Id. at 489.

182 See Jeffrey-DeWitt Insulator Co. v. NLRB, 92 F.2d 134, 138 (4th Cir. 1937). See also Point Reyes, 110 F.2d 608, 609-10 (5th Cir. 1940) (equating "strike" with the presence of an employee-employer relation in which the former have quit work).


185 See generally Norris, supra note 41, at 522 n.22.


187 Norri-LaGuardia Act § 1, 29 U.S.C. § 101 (1970). Section 7 also gives employees the right to refrain from participating in any such activities.

188 National Labor Relations Act § 13, 29 U.S.C. § 163 (1970). NLRB v. Eric Resistor Corp., 373 U.S. 221, 233 (1963). The specific exceptions to this rule are contained in National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (1970), and include, amongst other things, strikes to obtain so-called "hot cargo" agreements, secondary boycotts and to settle work assignment disputes. A further restriction is in id. § 8(d), 29 U.S.C. § 158(d) (1970), which requires a 60-day "cooling-off" period when a party is seeking to modify or terminate an existing collective bargaining agreement, during which a strike may not be lawfully employed.
employed it is an economic weapon which "implements and supports the principle of the collective bargaining system."  

The right to strike is not, however, without limitation, so that even when on strike the union will be bound by its obligation to bargain in good faith, and will lose its protection when it consents to the inclusion of a "no-strike" clause in a collective bargaining agreement, or when it engages in activity that involves either an unlawful objective or the use of improper means. In addition, the employer may undertake to impose sanctions upon the strikers. His ability to do so, however, will be limited by the fact that a striking employee remains, nonetheless, an "employee"—that is, he retains his "protected" status—and by whether the strike is predicated upon the employer's unfair labor practices or upon the employees' own economic desires. If it is an unfair labor practice strike, the employees who have not participated in strike misconduct or been discharged for cause are entitled to reinstatement and to vote in all elections, even if replacements have been hired. In an economic strike, however, the employer may hire replacements and need not reemploy the striking employees, but, because the strike is still protected activity, the employer may not discriminate against a striker on account of his strike activity, unless that activity itself constitutes misconduct.  

A strike will be properly employed only if it arises in a "labor dispute," which is defined to include any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. National Labor Relations Act § 2(9), 29 U.S.C. § 152(9) (1970). In determining whether a labor dispute is present, moreover, "[t]he wisdom or unwisdom of the men, their justification or lack of it" cannot be utilized as determinative factors. See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 344 (1938).  


National Labor Relations Act § 8(b)(3), 29 U.S.C. § 158(b)(3) (1970). In NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 494-95 (1960), the Court noted that an ordinary economic strike would not be evidence of a failure to bargain in good faith, and that the reason for that "[i]s not that it constitutes a protected activity but that . . . there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining."  

See Boys Mkt., Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970) (federal courts may grant injunction to enforce no-strike clause); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939). This will not be true where the strike is to protest an employer's unfair labor practices. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).  


188 Such objectives are noted at note 187 supra.  


199 See, e.g., NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380-81 (1967) (if strikers are available
When professional athletes resort to the strike as a means of coercing their employer's acquiescence or capitulation to their demands, therefore, they will encounter a substantial body of law that will determine the permissibility of their actions, and of their employer's response, as well as the sanctions that may be applied to each.

B. The Owners' Right to Lockout

In contrast to the power of the players to strike, the primary economic weapon available to the owners is the ability to "lockout"—that is, the power to withhold employment as a means of economically coercing concession or acquiescence at the bargaining table. Although this power was at one time relatively restricted, it is now quite clear that it is a perfectly permissible means of economic coercion, so long as bargaining is pursued in good faith and is utilized only after the bargaining process has reached stalemate or impasse.

The permissible extent to which the lockout may be employed is best illustrated by *American Ship Building Co. v. NLRB*, where an impasse had developed after good-faith bargaining, and fearing that the union would call a strike at the most profitable time of the year, and thus produce the greatest economic leverage, the employer locked the employees out until an agreement was reached some two months later. In upholding the employer's action, the Supreme Court observed that the use of a temporary layoff solely as a means of bringing economic pressure to bear upon the employer's bargaining position, after an impasse had developed in a good-faith

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2. In addition to the lockout, the employer may also permanently replace economic strikers, see notes 198-200 supra and accompanying text; terminate his entire business, see *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); institute unilateral changes in working conditions, see *Local 155, Int'l Molders & Allied Workers v. NLRB*, 442 F.2d 742 (D.C. Cir. 1971) (though here such change was "inherently destructive," and, as such, impermissible); or stockpile supplies and products to withstand a work stoppage, see *American Ship Bldg. Co. v. NLRB*, 380 U.S. 306, 316 (1965).


4. This relatively restricted permissibility was the result of the fact that the Board held lockouts to be presumptively unlawful, except in single-employer lockouts, see *Bett's Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951) (to avert immobilization of autos brought in for repair); *International Shoe Co.*, 93 N.L.R.B. 907 (1951) (to forestall "quickie" strikes); *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1945) (to avoid spoilage due to sudden work stoppage); *Link-Belt Co.*, 26 N.L.R.B. 227 (1940) (to prevent sit-down strikes, and in multi-employer situations where a "whipsaw"-strike tactic was utilized by the union).
bargaining effort, would not be an unfair labor practice. This practice would not, it said, interfere with the right to bargain collectively or the right to strike. and would not of itself be evidence of a discriminatory animus toward the union involved. Although there was considerable objection on the Court to the majority's opinion, American Ship does accord to employers a potent economic weapon with which to wage economic warfare. This was made even more clear by NLRB v. Brown, a companion to American Ship, in which the Court upheld the temporary use of non-union personnel to replace union members locked-out by a multi-employer group after a union had struck one of its members. It has also been indicated that a pre-impasse lockout may be justified if a good-faith bargaining effort is present.

Use of the lockout is not, however, without limitation. In analyzing its use in particular circumstances, the primary inquiry will be the motivation of the employer for its utilization. When it is used defensively—that is, when it is used only to defend against actual or threatened union action—as it was in American Ship and

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205 Id. at 308-18.
206 The right to bargain collectively, the Court observed, “does not entail any ‘right’ to insist on one’s position free from economic disadvantage.” Id. at 309.
207 In this regard, the Court observed that it is true that recognition of the lockout deprives the union of exclusive control of the timing and duration of work stoppages calculated to influence the result of collective bargaining negotiations, but there is nothing in the statute which would imply that the right to strike “carries with it” the right exclusively to determine the timing and duration of all work stoppages. The right to strike as commonly understood is the right to cease work—nothing more. No doubt a union’s bargaining power would be enhanced if it possessed not only the simple right to strike but also the power exclusively to determine when work stoppages should occur, but the Act’s provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power. Thus, we cannot see that the employer’s use of a lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to bargain collectively or with the right to strike.

Id. at 310.

208 Although the Court did note that the locked-out employees would suffer economic disadvantage, it added that “there is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes.” Id. at 313. See also NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962); American Brake Shoe Co. v. NLRB, 244 F.2d 489 (7th Cir. 1957).

209 In concurring opinions, one by Mr. Justice White, 380 U.S. at 318-27, and the other by Mr. Justice Goldberg, joined by Chief Justice Warren, id. at 327-42, it was, essentially, stated that the facts of American Ship justified the result, but that the Court should not have utilized such broad language to reach it, inasmuch as other cases would not be quite so clear.


211 Id. at 288-90. In reaching this opinion, however, the Court was careful, as it was not in American Ship, to tie its decision to the facts at hand. Id. at 287-88. See generally Oberer, Lockouts and the Law: The Impact of American Ship Building and Brown Food, 51 CORNELL L.Q. 193 (1966).


213 Thus, in American Ship, the Court observed that proper analysis of the problem demands that the simple intention to support the employer’s bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful.

Brown, the lockout is clearly permissible under a motive inquiry, inasmuch as a defensive motivation will ordinarily be economic. Where the lockout is used offensively, however, the motivation is more likely to be non-economic. Thus, although the lockout has been allowed as an offensive measure, the employer may not couple it with the use of non-union replacements, since that would be inherently destructive of the employees’ rights and would not serve any legitimate business purpose.215 Similarly, the lockout will be unlawful if used by an employer who demonstrates a hostility to the principles of collective bargaining,216 who has engaged in bad-faith bargaining,217 or who uses the lockout as a means to avoid bargaining,218 to interfere with the union organizational efforts,219 to retaliate against striking employees,220 or to punish those engaged in union activities,221 or if it is used by an employer who has no substantial business interest to justify his action.222 In short, when the lockout is inherently destructive of employee rights and does not support a legitimate and substantial business interest of the employer, it will be unlawful.223

As is the case with the players’ right to strike, when the owners seek to use the lockout, there will be a wealth of authority with which to evaluate the permissibility of their action under the circumstances. Since there is nothing in the nature of professional sport that would justify exceptional rules, the ordinary strike-lockout rules of industrial labor relations will apply with full force to economic warfare in sporting disputes—as will all the rest of the federal labor law. The alert adversary will, therefore, familiarize himself with these rules before his opponent makes resort to this economic arsenal, since that familiarization may tell him that such resort might, under the circumstances, be unlawful. Armed with such knowledge, he will be better prepared to make intelligent, strategic, and lawful use of his own economic weapons once the warfare commences.

214 Thus, in American Ship the lockout was in response to a threatened, and feared, strike during the peak business season which would cripple the business, 380 U.S. at 303-04, and in Brown the union had already struck one member of the multi-employer group. Id. at 281. See Inland Trucking Co. v. NLRB, 440 F.2d 562, 564-65 (7th Cir.), cert. denied, 404 U.S. 858 (1971).


218 See, e.g., NLRB v. Tak Trak, Inc., 293 F.2d 270 (9th Cir.), cert. denied, 368 U.S. 938 (1961). See also NLRB v. Truck Drivers Local 449, 353 U.S. 87, 93 n.18 (1957).

219 See, e.g., NLRB v. Somerset Classics, Inc., 193 F.2d 613 (2d Cir.), cert. denied, 344 U.S. 816 (1952); NLRB v. Long Lake Lumber Co., 138 F.2d 363 (9th Cir. 1943).

220 See NLRB v. Golden State Bottling Co., 353 F.2d 667 (9th Cir. 1965).


223 See Local 195, Int’l Molders & Allied Workers v. NLRB, 442 F.2d 742, 747 (D.C. Cir. 1971); Lane v. NLRB, 418 F.2d 1208, 1212 (D.C. Cir. 1965).
The purpose of this article has been to illustrate the types of problems which may arise once the principles of collective bargaining are applied in full force to the professional team sport industry. Based upon the present attitudes and actions of players and owners alike, it does not seem that either have as yet come fully to grips with the impact of collective bargaining on their industry.

As was said at the outset, once they enter bona fide and full-blooded collective bargaining, the parties should find themselves literally in a new ball game. No longer will owners, or their managers, be able to treat the players as their children, at least not without the players' consent at the bargaining table; no longer will owners be able to trade, blacklist, or otherwise harass the union's player representatives, at least not without subjecting themselves to unfair labor practice charges and other "labor" remedies; and no longer will either side be able to shield their intransigence on particular issues by claiming that the issue in question is not bargainable, for in the collective bargaining arena all issues are in the realm of good-faith debate. When agreements are negotiated, individual players should no longer be able to invoke the antitrust laws to challenge agreed upon provisions because so long as their bargaining agent has met its duty of fair representation to the majority of players in the bargaining unit, there should be a complete defense against the challenge. Players must, then, air their grievances through the agreement-established procedures and in accordance with NLRB dictate—that is, unsatisfied expectations must seek vindication via internal, not external, proceedings.

Change can also be expected to take place in the internal dynamics of the players associations, which should enable them to more adequately meet the needs of all ballplayers, stars and journeymen alike. The basis of such internal realignment might be a realization that the main purpose of any employee organization is to represent those who, on their own, lack bargaining power to stand against the adversary. Thus, more interest in the journeymen, non-star ballplayer may become apparent, especially when it is considered that the bargaining agent's primary duty is to the majority which is unlikely to be composed of superstars. This theory is the cornerstone of the American labor movement, and to expect it to at some point find fruition in the sports industry would hardly be prophetic.

In short, as the players and owners continue to align themselves in the adversary posture of labor-management negotiation, it is only inevitable that their every move should be judged by the standards of the National Labor Relations Act. The invocation of these standards, moreover, portends far reaching change in the heretofore paternal relation of the owner and the player, as well as the sibling relation of star and journeyman. This change will surely cause relative upheaval in these several relations. Given the stakes in this ball game, one waits with avid expectation for the unfolding of this new chapter in American commercial relations.