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PUNT, IMPASSE OR KICK: THE 1987 NFLPA ANTITRUST ACTION

by

ELYZABETH JOY HOL福德*

INTRODUCTION

Professional sport has recently attracted economic, legal and labor-related research generating a plethora of papers, articles and books. Concurrently with this academic interest, professional sport is continually in the general public's eye. The media covers the business of professional sport as well as the actual sporting events. Courtrooms and congressional hearings are as much a part of the game as athletic stadiums and equipment. The business aspects of professional sport dominated the media when a twenty-seven day strike disrupted the 1987 NFL football season, which included the hiring of replacement players, the filing of numerous labor charges by both the NFL Management Council (NFLMC) and the NFL Players' Association (NFLPA) and the dismal end of the strike after many players crossed the picket lines to return to play.1 On the day that the NFLPA announced that the strike was over, they also shifted into their final goal line defense: the filing of an antitrust action against the National Football League (NFL) and each individual franchise. On January 29, 1988, a memorandum and opinion was filed concerning the cross-motions for summary judgment in that case. This article is designed to analyze both the antitrust issues raised in that case and the immediate impact of the district court's memorandum and opinion. To facilitate the analysis, there is a brief history of the NFL and the NFLPA, a section outlining the history of collective bargaining between the two parties including the 1987 strike issues, a discussion of antitrust litigation involving football with emphasis on the current antitrust filing followed by a discussion and analysis of the January 29, 1988, opinion.

THE PLAYERS IN THE GAME

One of the entertainment-oriented aspects of professional sporting events is that, much like live theatre, the spectator may obtain a program to identify the players and to view the athletic equivalent of an academic vita: the players' statistics. This section of the article serves as the reader's program for purposes of identifying the parties and reviewing their recent histories.

The NFL

The powerful business entity known as the National Football League that the

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1 According to a UPI poll, the NFL strike was the top sports story of 1987. 1987's Top Story: NFL Strike, The Sporting News, January 11, 1988 at 34.
general public sees today is a far cry from its humble beginnings in the 1890's. Professional football began as a weekend past-time formulated from western Pennsylvania and Ohio teams which had been loosely organized by employers, YMCAs or athletic clubs. There were no formalized leagues; games were scheduled by individual teams. In an attempt to organize the sport with rules (and for increased profitability), the American Professional Football Association was formed in 1920 and renamed the National Football League two years later. The NFL did not meet with instant success. Professional teams did not have the built-in spectator market that collegiate teams of the era automatically enjoyed. The low salaries of players and coaches, coupled with the nominal league fee, made it relatively inexpensive to field a team. Consequently, numerous small town franchises were created and dissolved in the early years of the league.

In search of larger markets, professional football began evolving into its more recognizable form when the small town franchises moved to bigger cities. George Halas’ Decatur, Illinois team moved to Chicago. By the end of the depression, the Green Bay franchise was the only small town franchise which survived. The league continued to sputter and totter through the war years and through accusations that the professional game lacked the quality of collegiate play. To increase spectator following, the league made dramatic rule changes. These rule changes were accompanied by dual divisions, championship games and the institution of a college player draft system. By the end of the 1940’s, the game of professional football and the league organization behind it were recognizable as the game and the league organization of the 1980’s.

The single external factor which has had the most influence on the business of professional football is television. It is as if football were designed for television. The marriage of television moguls and sport magnates sent football into a money making frenzy. Television influence on football was quickly apparent. Halftimes were initially reduced from 20 minutes to 15 minutes so that the games

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3 Id. at 252.

4 This is still true today; the only truly small town-based NFL team is the Green Bay Packers.

5 In 1933, the hashmarks were moved ten yards inside the sidelines and a forward pass was permitted from anywhere behind the line of scrimmage. By 1943, free substitutions were permitted. B. RADER, supra note 2, at 253.

6 Grasping the popularity of televised sport, the three major networks jumped from fifteen hours of sport coverage per week in 1970 to twenty-five hours of sport coverage per week in 1980. The “first down within four plays” requirement of football sets up recurring crisis points that maintain a viewer’s attention span. B. RADER, supra note 2, at 243, 245. In 1978, ESPN was born as a 24-hour all sports cable channel. ESPN currently is turning a healthy 10.3% profit and is continuing a contract with the NFL to present Sunday night games and the pro bowl. Ryan, ESPN’s Big Play, Continental Magazine, October, 1987, at 33.

7 Football commissioner “Pete” Rozelle’s first negotiated contract for television rights to the 1964 NFL season was a dramatic, highly publicized horse and pony show in which the sealed network envelope bids were opened in a high-powered network/NFL meeting. The $14.1 million bid by CBS provided one million dollars per franchise which was ten times what any franchise had made from television contracts in the past. D. HARRIS, THE LEAGUE: THE RISE AND DECLINE OF THE NFL (1986).
could fit into network two-and-a-half hour programming slots and referees began receiving signals from television crews to take commercial time-outs. Television contracts have become the lifeblood of the league. The advent of cable coverage of sporting events has added to the NFL coffers and delighted many fans. Although there is doubt as to whether or not NFL television revenues can continue to grow in the exponential fashion of the past, it is clear that television contracts will continue to be a major revenue source.

The internal factor which has had the most influence on the business of professional football is the close-knit, fraternal nature of the NFL owners. In the past, this "clubbiness" was the pervasive influence on everything that the league did, prompting one author to coin the phrase: "League Think." This group of owners was and continues to be an amazing combination of some of America's business wunderkind. Ownership of a professional team seems to be part fantasy, part ego satisfaction, and part mania for most of these modern day industrial barons. Acting in conjunction with each other under the umbrella of one league, the NFL owners operate as a cartel with an amazing show of sheer power which is virtually unmatched by other industries.

Professional football team owners are in the elite, privileged professional sport industry. No other industry in America has been able to provide its owners with the special legal treatment to which sport team owners are accustomed. These privileges include: exclusive franchises with exclusive rights, prohibited entry of new owners, special congressional antitrust exemptions, exclusive broadcasting rights, extensive employee control devices, sweeping tax advantages and local government subsidy of publicly financed stadiums. Professional football team

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8 It has reached the point where one wonders if the tail is actually wagging the dog. To accommodate more commercial segments, the network viewing time has been expanded from two and one-half hours to three hours. B. RADER, supra note 2, at 245.

9 In 1981, the average club in the NFL grossed $15.6 million from all sources. In 1986, each club made more from only their network television contract: $17.6 million per club. NFL network contract rights have grown from $79 million in 1967 to $493 million in 1986. NFLPA, Game Plan 87: A Commitment to NFL Players Past, Present, Future. The NFLPA estimates that league revenues will reach one billion dollars per season in 1988. However, the football saturation of the viewing audience has become a concern for the NFL and network executives. The history of steadily increasing TV contracts may have ended. D. HARRIS, supra note 7, at 644.

10 This is far different from professional baseball and professional basketball where owners have remained more autonomous. B. RADER, supra note 2, at 254.

11 D. HARRIS, supra note 7, at 13.


13 D. HARRIS, supra note 7, at 22.

14 The sheer power of the NFL owners operating together as one unit is evident from the history of rival leagues. Under extreme economic pressures from the NFL, the World Football League collapsed, the American Football League became the American Football Conference (a part of the NFL) and the United States Football League totally collapsed.

owners enjoy an even more unusual benefit in their ownership: teams, competing against each other in the business market, are permitted to “divvie up” television revenues and gate receipts. In the arena known as professional football, the NFL has firmly established itself as the only game in town.

The NFLPA

Similar to the NFL, the NFLPA had humble beginnings. The unionization of players seemed to have its birthplace with some Cleveland Brown players in 1954. Under the fledging union’s threat of antitrust litigation and in the throes of congressional hearings on the antitrust issues, the NFL recognized the player’s union in 1957. Early union activities included setting minimum salary standards with uniform injury provision clauses. It was not until 1959 that the union succeeded in forcing the owners to provide a pension plan for the players.

In 1968, the NFLPA was registered as a labor union with the U.S. Department of Labor. Initially, player representatives unanimously voted to reject the Teamsters Union efforts to organize players. However, continued organizing of professional football players proved to be an arduous task. The nature of the sport, the tight-knit organization of the owners and the attitudes of the players themselves thwarted the early attempts of presenting a unified front to the owners. As part of a 1979 unification effort, the NFLPA became a chartered affiliate of the AFL-CIO.

Unlike the NFL, the Players’ Association has not risen to a position of pre-eminence in the sport industry. The organization seems to be continually struggling for recognition not only in the media, but also among its members. The brief history of the union has been embroiled in conflict. In the public’s eye, the union has taken on the persona of its executive directors. From 1971 through 1983, this persona was the abrasive and aggressive Ed Garvey. Hard fought strikes amid internal controversies over his leadership marked his tenure as executive director. Former Oakland Raider player and three year president of the NFLPA, Gene Upshaw, replaced him. Mr. Upshaw sought a change in the style of representation.

16 Reportedly, home teams receive sixty percent of gate receipts and visitors receive forty percent. The net effect is that a team like the Green Bay Packers with the league’s third worst record in 1986 drew $16.7 million from its share of league TV game revenues and $6.4 million in gate receipts while paying little more than $10 million in salaries. Judis, supra note 12, see also, Scott, Long & Sompii, Free Agency, Owner Incentives and the NFLPA, 4 J. LAB. RESEARCH 257 (1983) (hereinafter Scott).


18 Although free agency and other player restraint issues have been highly publicized in the recent bargaining attempts between the NFLMC and the NFLPA, salary levels and pension benefits remain as continuing key issues between the parties. See infra note 37.

19 P. STAUDOHAR, supra note 17.

20 Four salient factors have been identified as slowing the unionization of professional football. First, many players subscribe to the ‘amateur myth’; to them, unions are the antithesis of true sport. Second, one or two players on a football team can be replaced causing less “team damage” than in other professional sports. Third, the tight-knit owner’s cartel in football has been shrewdly dominated by Pete Rozell. Fourth, fewer games with more athletes involved have made unionization of football a slow process. B. RADER, supra note 2, at 349.
to a more moderate stance. To date, Gene Upshaw is still the executive director of the NFLPA. Similar to its early beginnings, the union continually struggles for recognition and unity among players.21

COLLECTIVE BARGAINING HISTORY

The story of the collective bargaining between the NFL and the NFLPA is best told through the chronological review of past negotiations. In this instance, this becomes a review of strikes and lockouts.

1968

In 1966, the merger of the AFL and the NFL had the foreseeable result of a decline in players' salaries.22 At the same time, there was intense media attention given to the burgeoning NFL television contracts. As part of their bargaining package, the players submitted a list of demands which included higher minimum salary and increased owner contribution to the pension plan.23 In the summer of 1968, the players decided to strike the training camps and the NFL retaliated by locking out the veterans from training camps. Resolution of the strike occurred when owners agreed to increase the base pay of football players and to increase payments to the pension fund. The classic pattern of labor negotiation which had occurred in other industries now became the rule in professional football negotiations: the presentation of demands, counteroffers, impasse and subsequent strikes and lockouts.

1970

The 1970 bargaining issues again centered mainly on the strict dollar issues. The players raised concerns over the pension plan, compensation for exhibition games and post season performance and grievance procedures. An impasse was reached. After a seventeen day lockout and an additional three day strike, the matters were resolved. As one author noted, these early walkouts did not seem to be punctuated with the same rancor that marked the later management/labor con-

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21 This struggle for unity is evidenced by the continually voiced threat of another union. During the 1987 strike, it was rumored that another union movement headed by Art Wilkinson was seeking player signatures and had, in fact, filed for recognition with the National Labor Relations Board (NLRB). Telephone interviews with regional NLRB offices did not confirm this filing. Unions in general are facing a period of declining membership and declining participation from current members. ALF-CIO Committee, Report, The Changing Situation of Workers and Their Unions (1985).

22 History does repeat itself. The AFL-NFL salary situation was mirrored in 1983 through 1985 by the USFL-NFL salary situation. 1983 was the first year of USFL operations. Average NFL player salaries rose twenty-five percent over 1982 average salaries. In 1984, there was a twenty-five percent increase over the 1983 figure. In 1985, there was a nineteen percent increase over the 1984 figure. The USFL ceased operations at the end of the 1985 season. Average NFL player salaries rose only five percent in 1986. NFLPA Game Plan, supra note 9; Judis, supra note 12.

23 At the time of these football negotiations, baseball owners contributed about $4.1 million per year to baseball's pension fund while football owners contributed only $1.4 million per year to football's pension fund. Nearly 20% of the football players made under $15,000 in 1968. B. RADER, supra note 2, at 349-50.
flicts in professional football.24

1974

Collective bargaining in professional football shifted direction in two respects in 1974: "freedom issues" were raised and the ensuing strike was a deeply bitter confrontation between the parties.25 The freedom issue causing the most controversy was the Rozelle Rule which provided that Commissioner Rozelle could award compensation in the form of one or more players and/or draft choices to a player's former team if the club signing the player could not reach agreement over terms of the signing.26 Negotiations came to a standstill and the players embarked on a forty-four day strike. Amid a crumbling sense of unity, the players announced a fourteen day moratorium and returned to training camp. Although the players still deemed further management offers unacceptable, they chose not to resume the strike and they continued playing.27 This unsettled controversy in professional football raged on through the 1975 and 1976 seasons.28 In 1977, a collective bargaining agreement was entered into which altered some of the player mobility practices of the NFL, but which effectively allowed the NFL to continue to control player movement in the industry.29 Some have considered the fact that management was willing to bargain on and make concessions concerning some of the freedom issues as a positive sign of the union's strength.30 Others view the

24 P. STAUDOHAR, supra note 17, at 60.
25 The so-called freedom issues in football include the issues relevant to the free agency of players: the Rozelle Rule, the college draft of players, the No-Tampering Rule, and the use of the Standard Player Contract. See infra notes 47 and 48.
26 The original Rozelle Rule was found in former Article XII, Section 12, Paragraph H of the Constitution and By-laws of the NFL which provided:
 Any player, whose contract with the League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signs a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.
Article XV of the 1977 Collective Bargaining Agreement between the NFLPA and th NFLMC and Article XV of the 1982 Collective Bargaining Agreement between the NFLPA and the NFLMC delineates the provisions of the right of first refusal/compensation system. Now, rather than allowing the Commissioner to determine the amount of compensation for clubs losing players, the right of first refusal/compensation system sets forth an elaborate system based upon playing years.
28 This was a very tense time for professional football. Congressional pressure was brought to bear during this period. Congressional leaders threatened to change their antitrust stance unless the owners would settle. The NFLPA also filed several unfair labor charges with the NLRB. G. SCHUBERT, R. SMITH & J. TREN-TADUE SPORTS LAW 157 (1986) [hereinafter G. SCHUBERT]. It was also during this interim period that several antitrust suits were filed. See infra text on Antitrust Litigation and Professional Football and accompanying notes.
29 Hard fought legal battles were incorporated into the class action settlement that ended the five-year strife between the parties. See Alexander v. National Football League, 1977-2 Trade Cas. (CCH) par. 61, 730 (D. Minta 1977), cert. denied, Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978).
30 G. SCHUBERT, supra note 28, at 156.
agreement in which players agreed to a modified draft, a compensation scheme for free agents and the pledge of no lawsuits and no strikes as too great a price to pay.  

1982

1982 was a year in which the controversies shifted back to the more clearly financial issue: revenue sharing. The NFLPA proposed a revenue sharing plan in which the players salaries would reflect fifty-five percent of each team's annual revenue and a seniority-based pay scale. This demand was altered to request that players have a share of the television revenues. A fifty-seven day strike ensued which effectively wiped out seven game dates of a sixteen game date schedule. Until the very last days of the strike, the players maintained their unity. Owners lost money during this strike because games were cancelled and television revenues suffered. With both owners and players suffering economic losses during the long strike, a contract was finally negotiated. The player mobility provisions of the 1977 collective bargaining agreement effectively remained intact while management agreed to an increased minimum pay scale and "money now" provisions.

1987

The union consolidated prior demands in the 1987 negotiations by detailing both financial and freedom issues. Salaries have continued to be a pressing issue in the NFL. Football's average salary and average pension payment are far less than either in baseball or basketball. Football salaries did rise dramatically during 1983 through 1985; however, this can be attributed to the competition for players presented by the now defunct USFL. The key issues of the 1987 negotiations were free agency, drug testing, guaranteed contracts, pensions, roster size, salary scale and protection for player representatives. Player mobility issues re-
remained in the forefront of the negotiation process in 1987. In spite of liberalization of the traditional free agency situation, only one player has actually moved as the result of a transaction that required draft choice compensation to the team losing the rights to the traded player.38

When the owners refused to negotiate in any way on the issue of free agency, the players began a twenty-seven day strike on September 22, 1987, that was marred by players crossing the picket lines, replacement games with "scab" players and picket line violence. Strike unity is very difficult for professional athletes. Many athletes find striking to be antithetical to their image as professionals.39 Strikes are also extremely costly to players. Strikes can shorten or terminate already time-limited careers while placing players with yearly tax shelter and investment commitments in a financially untenable position.40 The 1987 strike was no different; many players were willing to (and did) cross the picket lines when no apparent agreement was in sight.

Concurrently, the owners were able to win the public media battle. Although the laws are clear that employers must bargain with the certified employees' union over mandatory bargaining issues, our society seems to have a blind spot concerning the desirability of professional athletes collectively bargaining with their employer.41 While waging a public relations battle, the owners held replacement games with retired players and one-time NFL hopefuls that could not make the teams in regular season. Although initial response was minimal, the public eventually began supporting these games. The essential elements of a successful

 Guaranteed Contracts: the current situation is that only four percent of NFL contracts are guaranteed. The NFLPA recommended that contracts become guaranteed once a player makes the active list in his second season. The owners proposed that contracts should become guaranteed for the season once fourth year players had achieved three games on the active list.

 Pension: the current practice is that the NFL contributes $12.5 million annually. The NFLPA recommended that the NFL contribute $25 million annually, plus payment by clubs of $18 million, with interest, in delinquent contributions. The owners recommended that pension and severance benefits be combined with a total raise of about seventeen percent.

 Roster Size: it's currently forty-five players. The NFLPA suggested an increase to fifty-two on the roster with a limit of eighty at the opening of training camp. Owners recommended an increase to forty-seven.

 Salary Scale: currently $50,000 is the minimum, $230,000 is the average. The NFLPA recommended a $90,000 minimum escalating to $320,000 minimum for thirteen-year players. The owners recommended a $60,000 minimum escalating by $30,000 increments to $200,000 for fifteen-year players.

 Protection for Player Representatives: currently, there is no specified protection. The player reps are subject to grievance procedures. The NFLPA recommended that player representatives should not be traded or assigned without their consent. If they were released, they should be paid an amount equal to the average league salary from the leaguewide fund. The owners recommended the creation of a tripartite special board composed of an NFLPA representative, a club representative, and a neutral third party to resolve player rep problems.

38 Judis, supra note 12.
39 P. STAUHAR, supra note 17, at 68.
41 Electricians, teachers and other professionals bargain collectively on a regular basis, yet, collective bargaining by professional athletes does not have the public acceptance level that bargaining by other professionals does. Lock, Section 10(j) of the National Lawyer Relations Act and the 1982 National Football League Strike: Have that Flag? 7 ARIZ. ST. L.J. 143 (1985).
employees’ strike are timing, media support and unity; they were not evident in this strike. To increase pressure on the players and on their sense of responsibility, the owners deemed that the replacement games would be considered as part of the season’s standings. Although this action drastically altered the season’s standings, there is evidence that, regardless of win/loss standings in the league, owners will financially benefit. Very simply put, allowing the replacement games to count in regular season standings was no financial burden to the owners. By Thursday, October 15, 1987, players were reporting back to their teams en masse and the NFLPA announced the filing of an antitrust suit.

**ANTITRUST LITIGATION AND PROFESSIONAL FOOTBALL**

With the exception of the antitrust immunity granted to baseball in the *Federal Baseball* case, it is clear that professional sport leagues are subject to the provisions of antitrust law. In antitrust litigation related to professional football, there are three seminal decisions concerning player restraints which will be reviewed. This review is followed by a presentation of the issues raised in current litigation.

**The Kapp Case**

Joe Kapp began his career as an All-American at the University of California. He then played quarterback in the Canadian Football League, followed by a two year stint with the Minnesota Vikings and finally for the New England Patriots. Kapp brought suit against the NFL claiming that several rules were violative of the Sherman and Clayton Acts. In 1958, Kapp was drafted by the Washington Redskins. He didn’t find their offer amenable and decided, instead, to play in the Canadian Football League (CFL). He played for seven years with distinction in the CFL. However, the Redskins maintained him on their reserve list prohibiting any NFL team from negotiating with him during this period. While still under the obligation of an option year, Kapp negotiated a contract with the Houston Oilers. Because of this negotiating, he was suspended from the Canadian team. The NFL commissioner and then AFL commissioner invalidated the Oiler contract. The Minnesota Vikings reached an agreement with the Canadian team and the Redskins and obtained Kapp’s services for two years. Several teams negotiated with the Vikings, but were unable to reach an agreement as to the com-

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43 Scott, *supra* note 16.


45 There are many other cases involving football antitrust issues, however, the three cases chosen are considered to be the precedent-setting cases in the area of players’ freedom of movement.

pensation payment for Kapp's possible trade.

Eventually, the New England Patriots reached agreement with the Vikings. Kapp completed the remainder of the 1970 season with the Patriots. In 1971, the Patriots sent Kapp a Standard Player contract. The Standard Player contract included the option clause. Kapp found the contract unacceptable and refused to sign. Maintaining a player without the signing of the Standard Player contract would have been in violation of the NFL Constitution and By-laws; the Patriots asked Kapp to leave training camp.

Kapp's lawsuit challenged every player's restraint. His first challenge was to the collegiate draft system. Kapp claimed that this system eliminated his ability to negotiate with other teams upon his exit from college, even though the Redskins offer was unacceptable to him. His second challenge was to the No-Tampering Rule. Kapp argued that the interaction of the No-Tampering Rule and the college draft system forced him to play in the CFL and hampered his freedom to contract back into the NFL. His third claim involved the Standard Player contract and the fact that if he signed the contract, he was immediately bound to the constitution and by-laws of the NFL, the rules of the team and the rules of the NFL Commissioner without any negotiation on any of those factors. The Standard Player contract also included a clause which formed the basis of Kapp's fourth challenge: the option rule which allowed the contracting team to renew the player's contract at no less than 90% of the previous contract.

Finally, Kapp contended that the Rozelle Rule was in effect a "ransom" rule which effectively dissuaded teams from signing free agents because of the fear of severe penalties in the form of Commission Rozelle's ability (under the unilaterally imposed rule) to choose discretionary, unappealable forms of compensation to the player's former team. The plaintiff claimed that each of these rules, independently and in conjunction with each other, operated as a per se violation of the antitrust laws. Alternatively, the plaintiff felt that the rules failed to meet the rule of reason test and, as such, were violative of the antitrust provisions.

47 The college draft system operated (and operates) annually wherein each club can select prospective players from the college ranks. The selecting club then has exclusive rights to negotiate for that player's services. Id. at 76.

48 The No-Tampering Rule provided that even if unacceptable offers are made to the college draft choices, no other club may negotiate with that player without the consent of the selecting club. Further, no club may tamper with, negotiate with or make an offer to any player on the active, reserve or selection list of any other club without losing draft selections and possibly suffering fines from the Commissioner. Id.

49 The per se and rule of reason analyses arose through the process of judicial interpretation of the Sherman Act. The Sherman Act itself indicates that "every" contract or combination in restraint of trade is illegal. In early decisions, the Supreme Court determined that the intent of the Act was to limit only unreasonable restraints on trade. Chicago Board of Trade v. United States, 246 U.S. 231 (1918). The rule of reason test was developed to include a complete investigation of the alleged restraint, including the area of trade involved, the industry, notice and effect of the restraint, and possible alternatives to the restraint. This requires elongated pre-trial and trial procedures. The Supreme Court eventually adopted the per se analysis of antitrust restraints. The Court recognized that some restraints could be conclusively presumed to be unreasonable because of the "pernicious effect on competition and lack of redeeming virtue." Northern Pacific Railway v. United States, 356 U.S. 1, 5 (1958).
Defendants (the NFL as a league and its individual teams) contended that the rules in question were reasonable regulations that were necessary to maintain the integrity of the league and were certainly, under any circumstances, not tantamount to a *per se* violation. Alternatively, defendants claimed that, even if the rules were found to be violative of the antitrust laws, they were immunized from antitrust laws by having been the result of collective bargaining.\(^{50}\)

On plaintiff’s motion for summary judgment, the district court ruled that the rules (with the exception of the Option rule) were patently unreasonable restraints on trade violating the antitrust laws. Finding that no collective bargaining agreement was in effect at the time Kapp was forced to leave training camp, the court did not address the NFL’s contention that the rules were subject to a non-statutory exemption from antitrust provisions. At the trial on the issue of damages, the jury did not award Kapp any monetary damages. The summary judgment for Kapp and the jury’s failure to award damages were upheld by the appellate court.\(^{51}\)

**The Mackey Case**

As the appellate process unfolded for Joe Kapp, John Mackey and other players filed a lawsuit attacking the Rozelle Rule as a violation of the Sherman Act and the Clayton Act.\(^{52}\) Developing the argument raised in the Kapp defense, the NFL argued that the Rozelle Rule was exempt from application of the antitrust laws since it was part of the collectively bargained subject matter between the parties. The NFL also argued that, even if the exemption did not apply, the Rozelle

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\(^{50}\)This argument is known as the non-statutory labor exemption. The concept of this exemption developed because of the interaction of antitrust laws with national labor policies. On the one hand, there are the provisions of the Sherman and Clayton Acts which originally codified common law antitrust principles. The intent of these acts (and later amendments) was to regulate monopolistic practices and unfair restraints of trade. R. BERRY & G. WONG, THE LAW AND BUSINESS OF THE SPORTS INDUSTRIES 90 (1986). On the other hand, there are the interests of national labor policy which are designed to promote the organization of laborers into unions and to promote collective bargaining between the unions and the employers.

The original language of the Sherman Act condemns every contract and combination in restraint of trade. Although the intent of this Act is aimed towards business entities, literal interpretation would also include the collective actions of employees to actively organize into unions. After years of concerted efforts by unions, sections of the Clayton Act and, later, portions of the Norris-LaGuardia Act clarified that some union activities were specifically exempted from antitrust attack. This created the *statutory* labor exemption for specified union activities.

One antitrust problem in professional football revolves around the player restraints which are included in collective bargaining agreements. The question is: are they subject to antitrust litigation? A judicially created theory of non-statutory labor exemption from antitrust review has developed. Amalgated Meatcutters v. Jewel Tea Co., 381 U.S. 676 (1965); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Connell Construction Co. v. Plumber and Steamfitters, 421 U.S. 616 (1975). It is generally accepted that, within specifically judicially set guidelines, the non-statutory antitrust exemption does exist concerning issues which have been collectively bargained between unions and professional sport leagues. Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1 (1971). The development of some of these judicial standards are presented in the Mackey case. See infra note 52 and accompanying text. There is a very thorough discussion of the non-statutory labor exemption in WEISTART & LOWELL, supra note 34, at 5.05.

\(^{51}\)There is speculation that the failure to award damages may be unique to the set of facts presented. WEISTART & LOWELL, supra note 34, at 509.

Rule was a necessary element to the success of the league by maintaining the competitive balance of the league.

At the trial level, the district court found the rule to be a classic group boycott by employers. As such, it was held to be a *per se* violation of antitrust laws. Alternatively, the court felt that there was no evidence to support the argument that the removal of the Rozelle Rule would destroy the competitive balance of the league. Consequently, the district court found that the Rozelle Rule would fail the *rule of reason* test. The district court also rejected the NFL's argument that the labor law exemption applied.

On appeal, the NFL argued two issues: whether or not the labor exemption applied to the Rozelle Rule and, if not, whether or not the Rozelle Rule actually was in violation of the antitrust laws. The NFL claimed that the Rozelle Rule was a part of the collectively bargained agreement of the parties and, as such, was subject to the non-statutory labor exemption. Recognizing the tension between labor and antitrust laws, the court identified a three prong test for establishing whether or not the non-statutory labor exemption would be applicable. First, the restraint on trade must primarily effect only the parties to the collectively bargained agreement. Second, the agreement must concern a mandatory subject of bargaining. Third, the agreement must be a product of bona fide, arm's length negotiations.

The court found that the first requirement was met. The court then conceded that the Rozelle Rule did not, on its face, fall within the ambit of the second prong of the test because it did not deal strictly with wages, hours and other terms and conditions of employment. However, the ultimate effect of restricting players' mobility in bargaining with and selecting the best offers was held to have the effect of depressing salaries, thus falling within the parameters of wage-related issues. The court then posited that there had been, effectively, no bona-fide, arm's length negotiations concerning the Rozelle Rule. The Rozelle Rule had remained virtually unchanged since its unilateral imposition by the league. Further, the rule did not inure to the players' or union's benefit. The court felt that there was no evidence of a quid pro quo bargaining on the issue.

Finding that there was no non-statutory exemption available in the case, the appellate court found that the Rozelle Rule was violative of the antitrust laws. The court chose not to apply the *per se* analysis referring to the unique aspect of the NFL which, the court felt, requires some level of coordination of efforts in order for the league to survive. Accordingly, the rigid *per se* analysis was held to be an

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53 *Id.* at 1009.
54 *Id.*
55 *Mackey*, 543 F.2d at 615.
56 *Id.*
57 *Id.* at 616. This analysis has been criticized as setting a precedent for judicial determination of the relative bargaining strengths and weaknesses of the parties rather than recognizing the prima facie evidence of quid pro quo bargaining. *Berry & Gould, supra* note 27, at 769; *c.f. Antitrust Litigation and Professional Athletes,* 2 WHITTIER L. REV. 530 (1980).
inappropriate standard.\textsuperscript{58} Utilizing the \textit{rule of reason} test, the court found that the owners could not justify the operation of the Rozelle Rule. Upholding the findings of the district court, the appellate court found substantial evidence to support the finding that the elimination of the Rozelle Rule would not affect player continuity, the quality of play or the level of competitiveness.\textsuperscript{59} Even if the evidence had reflected that the Rozelle Rule maintained competitive balance, the court felt that there were other more reasonable means to accomplish this end.\textsuperscript{60}

\textbf{The Smith Case}

While the appeals on both the \textit{Kapp} and \textit{Mackey} cases were pending, another challenge to the power of the NFL to restrain player movement was filed.\textsuperscript{61} In 1968, James “Yazoo” Smith was completing an outstanding rookie season as a defensive back for the Washington Redskins. In the final game of the season, he suffered a severe neck injury. In a suit against Pro-Football, Inc. (the Redskins) and the NFL, Smith attempted to recover treble damages for violation of the Sherman and Clayton Acts. Smith’s contention was that the operation of the college draft coupled with the NFL’s No-Tampering Rule had the ultimate effect of an unreasonable restraint on trade by limiting his business or property: his ability to market his unique talents.\textsuperscript{62} To complete that argument, he claimed that in a truly free market situation, he would have been able to negotiate a higher pay scale with the inclusion of injury-related income provisions.

Agreeing with the plaintiff, the district court held that these practices operated as a group boycott and were, as such, \textit{per se} violations of the antitrust laws. In a discussion which can be considered dicta, the court posited that the college draft would be considered a mandatory subject of bargaining, and, as such, \textit{possibly} subject to the labor law exemption concerning antitrust issues. However, the court found that Smith was drafted prior to certification of the NFLPA at a time when no collective bargaining agreement was in effect.\textsuperscript{63} This court fashioned a remedy in which the salary of another all-pro defensive back was utilized. There was a finding that in the absence of these restraints, Smith would have been able to enter a three year contract with injury provisions.\textsuperscript{64}

The appellate court found that the player draft was not a \textit{per se} violation of antitrust laws. Given the joint venture aspect of professional football, the draft and the No-Tampering Rule combination was not considered a classic group boycott. Applying the \textit{rule of reason} analysis, the court held that these factors ef-

\textsuperscript{58} Mackey, 543 F.2d at 619.
\textsuperscript{59} Id. at 620.
\textsuperscript{60} Id. at 621.
\textsuperscript{62} The appellate opinion gives an in-depth explanation of the college draft system and the No-Tampering Rule. Id. at 1175-1176. See also, supra notes 47 and 48.
\textsuperscript{63} Smith, 420 F. Supp. at 742.
\textsuperscript{64} Id. at 748.
effectively forced players to deal with only one team, severely curtailing their bargaining power in the marketplace. As such, the practices were in violation of the antitrust laws. The case was remanded for re-evaluation of damages.

Kapp, Mackey, and Smith: The Power Plays

These three antitrust cases cannot be reviewed without placing them within the context of the collective bargaining situation between the NFLPA and the NFL. All three cases were filed during the tempestuous interim period between the break off of negotiations in 1974 and the culmination of the 1977 Collective Bargaining Agreement. In each of the cases, the player restraints were originally challenged as per se antitrust violations. Each appellate court adopted the rule of reason analysis. The Mackey case specifically addressed the non-statutory labor exemption issue and set standards for analysis which have been utilized in other professional sport antitrust cases. Although the individual plaintiffs involved did not receive bountiful monetary rewards, the results of these cases served as powerful bargaining tools for the NFLPA. However, the 1977 Collective Bargaining Agreement between the NFLPA and the NFL included substantial player restraint provisions. Similarly, the Collective Bargaining Agreement of 1982 effectively retained the player restraint provisions intact from 1977. Critics of the NFLPA actions feel that the union “sold out” to bail itself out financially; proponents of the NFLPA actions feel that the union utilized the limited bargaining leverage of the cases to realize financial gains for the players. The 1987 football negotiations and the strike have brought these issues into high relief. The efficacy of antitrust litigation as a negotiation leverage tool is, again, being tested.

The Powell Case

On October 15, 1987, Marvin Powell, Brian Holloway, Michael Kenn, Michael Davis, James Lofton, Michael Luckhurst, Dan Marino, George Martin, Steve Jordan and the NFLPA filed a class action complaint against the NFL and each individual NFL team. The complaint as amended on November 2, 1987 sought injunctive relief, treble damages, cost of the suit and attorneys’ fees for alleged violations of the Sherman and Clayton Acts. Further, the plaintiffs sought declaratory judgment declaring that the player restraints imposed by the defendants are not subject to any theory of antitrust immunity.

65 Smith, 593 F.2d at 1189.
66 The court recognized that, at the time, no running back in the NFL had actually obtained a three-year contract. Id. at 1191. Similar to the end results that Joe Kapp experienced, Smith won his antitrust case but, after years of appeals, he recognized very little, if any, financial gain.
67 G. SCHUBERT, supra note 28 and accompanying text.
68 Most notable of the cases which adopts the analysis is McCourt v. California Sports, 600 F.2d 1193 (6th Cir. 1979).
69 G. SCHUBERT, supra note 28; Scott, supra note 16.
There are three specific practices that the plaintiffs alleged are operating to suppress competition for players' services: the Right of First Refusal/Compensation system, the College Draft and the NFL Player Contract. The position is that the Right of First Refusal/Compensation system was, in fact, a violation of antitrust law at the time it was incorporated into both the 1977 and 1982 collective bargaining agreements. Plaintiffs also challenge the College Draft alleging bad faith bargaining by the NFL and lack of an arm's length transaction as the reasons for holding the College Draft provisions invalid. Finally, the players alleged that the utilization of the NFL Player Contract is a unilateral imposition of terms which operates in a monopolistic way limiting the players' ability to market their skills. The suit claimed that the NFL's imposition of these provisions had the effect of a group boycott.

The players' last substantive claim was that any labor exemptions are inapplicable in this case. The first reason proposed relates to the tests enunciated in the Mackey case: the plaintiffs alleged that the issues of the lawsuit were not the product of bona fide arm's length bargaining and that the NFL's implementation of the provisions has been in bad faith. Alternatively, the argument was developed that even if the labor exemption may have provided any past protection for the restraints, the exemption ceased with the expiration of the last collective bargaining agreement. The players filed for partial summary judgment and injunctive relief on these issues.

In the answer to the amended complaint and counterclaim, the NFL contested the characterization of the NFL as a monopoly and the characterization of player restraints as violations of the antitrust laws. The NFL also alleged that even if the challenged player mobility provisions are restraints on trade, they are insulated from antitrust review by operation of the non-statutory labor exemption. On December 14, 1987, defendants filed a cross-motion for summary judgment on these issues.

On January 29, 1988, Judge Doty of the United States District Court, District of Minnesota, Fourth Division, issued a Memorandum and Opinion on plaintiffs' motions for partial summary judgment and for a preliminary injunction on defen-

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71 Interestingly enough, Article XIII, § I of the 1982 Collective Bargaining Agreement between these parties purportedly extends the college draft system through 1992.

72 Specifically, the players question the waiver system which is contained in Article XVI of the Collective Bargaining Agreement which denies any free agency until all twenty-eight NFL clubs waive their rights to pick up the player under the terms of his current contract. Plaintiffs' Amended Complaint at 25, Powell v. National Football League, 678 F. Supp. 777 (D. Minn. 1988).

73 On November 23, 1987 the plaintiffs filed a motion for partial summary judgment and a motion for injunctive relief to declare that the NFL willfully acquired and maintained monopolistic power in the major professional football market, and to enjoin defendants from continuing the right of first refusal/compensation system and usage of the NFL players contract. The college draft system was not addressed as a subject of the motion for partial summary judgment.
The court begins its memorandum by briefly tracing the history of the non-statutory labor exemption and then addressing the defendants' two alternative theories for applying that exemption: the absolute immunity theory and the survival doctrine.

**The Absolute Immunity Theory**

Defendants first argued that conduct in the context of collective bargaining relating to mandatory subjects of bargaining, and affecting only parties to the employment relationship, is not subject to the antitrust laws, whether or not there is a current or expired collective bargaining agreement. Citing the *Mackey* and *Kapp* cases as well as some non-sport case law, the court reasoned that broad, indiscriminate application of the non-statutory labor exemption to mandatory subjects of bargaining would not strike a proper balance between labor and antitrust laws. The court's analysis and ultimate rejection of the absolute immunity theory is correct. This portion of the decision adequately takes into account not only the facts of the case presented, but also the convergence of labor and antitrust policies.

**The Survival Doctrine**

Defendants' alternative position was that the non-statutory labor exemption actually survived the expiration of the collective bargaining agreement between the parties. In beginning this analysis, the court notes that in order for an exemption to survive any agreement, the exemption must have been existent while the agreement was in effect. In order to determine whether or not the non-statutory exemption existed during the life of the 1982 collective bargaining agreement, the court applied the three prong test developed in the *Mackey* case. The court held that "the alleged restraint on trade affected only the parties to the agreements sought to be exempted; the player restrains constituted a mandatory bargaining subject within the meaning of the National Labor Relations Act; and the player restraints sought to be exempted were, in all probability, the product of bona fide arm's length bargaining." The court's determination is highly questionable. The *Mackey* decision does not intimate that it intends an analysis of possibilities or probabilities, but rather the decision demands an analysis of the actual bargaining situation between the parties. Instead, this court opts to delineate the crucial requirement of bona fide arm's length bargaining in terms of probability. The court does cite factual support for this finding. However, it appears that the court is hesitant in making an actual finding of bona fide arm's length bargaining between these parties. The court's use of this probability standard is inappropriate.

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74 *Powell*, 678 F. Supp. at 783.
75 *Mackey*, 543 F.2d at 615.
76 *Id*.
77 *Id*.
In granting the defendants a summary judgment on this issue, the court states that the non-moving party in a summary judgment motion must produce enough evidence so that a reasonable jury could return a verdict for the nonmoving party. However, while enunciating this as a standard of review for a Rule 56 summary judgment motion, the court overlooks the intent and history of the case law behind Rule 56 of the Federal Rules of Civil Procedure which requires that the moving party meet the strict burden of showing that there is an absence of a genuine issue on the material fact in question. Summary disposition of an antitrust case is particularly fraught with danger given the complexity of issues and the fact that the facts may not be fully developed until trial. On the issue of bona fide arm’s length bargaining, which is germane to the third prong of Mackey analysis, this court chooses to summarily rule that there was, in fact, bona fide arm’s length bargaining because “the total package of employee benefits obtained by the NFLPA exceeded 51.2 billion, at least some of which, presumably, was relinquished in consideration for the system of player restraints contained in the Agreement.” The court presumes matters concerning an issue of material fact: whether or not there was bona fide arm’s length negotiation between these parties. Rule 56 analysis does require the nonmoving party to produce some evidence, but it does not seem to be designed for a court to base its determination on presumptions.

**Time Limits to the Survival Doctrine**

In finding that there was an existing non-statutory labor exemption and that the exemption survives the agreement, the next question the court addresses is the time span of that survival. The players argued that the exemption survives until the employees unequivocally express that they no longer consent to the imposition of the formerly exempted conditions. The court found dual reasons for rejecting this proposed standard: it would promote poor bargaining tactics on the part of employees by mandating that they take unyielding, unequivocal stands on issues rather than fostering good faith negotiations and, if employees have taken such a stance, an employer is theoretically subjected to instant antitrust liability. The court then addresses a survival doctrine time limit which was recently enunciated in the Bridgeman opinion. This test requires the employer’s continued imposition of the restriction until the employer no longer reasonably believes that

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78 Id. (citing Andersen v. Liberty Lobby, Inc., 477 U.S. 242 (1986)).

79 The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issues as to the material facts. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear who the truth is and excludes any real doubt as to the existence of a genuine issue of material fact. 6 J. Moore, W. Taggart & J. Wicker, MOORE'S FEDERAL PRACTICE f.56.15[3] (2d ed. 1981 Supp. 1988), emphasis added.


81 Powell, 678 F.Supp. at 784, emphasis added.

82 Id. at 786.

the restriction will be incorporated in the next collective bargaining agreement. The court rejected this standard, again, because it violates national labor policy: in this court’s opinion, the Bridgeman standard encourages employees to uncompromisingly manifest their unwillingness to bargain on the issues. 84

Defendants proposed that the non-statutory exemption continues indefinitely or, in the alternative, it continues throughout the life of the collective bargaining relationship between the parties. The court finds these suggested time limits (or lack thereof) to be violative of the basic principles of both labor law and antitrust law. These standards would allow illegal provisions to outlast the lawful provisions of a collective bargaining agreement. 85

The court fashioned an alternative time limit test. The court stated that the labor exemption as to a mandatory subject of bargaining survives the expiration of the collective bargaining agreement until the parties reach impasse. 86 The court finds this to be a simple standard of determining whether or not, after intense, good faith negotiations, the parties have reached deadlock. Judge Doty indicates the question of impasse is unclear in this factual situation. He intimates that the parties may not be as far apart as circumstances would suggest. 87 However, he declines making a determination on the issue of impasse because of the good faith bargaining requirement enunciated in his test. The decision notes that defendants had filed an NLRB charge alleging that plaintiffs did not bargain in good faith. 88 The court stayed any further decision pending a determination on the good faith issue from the NLRB. 89

IMPACT OF THE OPINION

The immediate impact of Judge Doty’s decision was that it placed both parties in limbo. From this decision, it appears that both the agreement and the player restraints survive the now-expired 1982 collective bargaining agreement. However, this decision raises three important legal issues. First of all, the decision implies

84 This court fails to note that another practical result of this standard is that it allows an employer to unilaterally determine when a non-statutory labor exemption continues or expires.
85 Powell, 678 F.Supp. at 787-88.
86 Id. at 788.
87 Id. at 789 & n. 22.
88 For some reason, the court chooses to ignore that plaintiff NFLPA has filed similar claims against defendants. NFLPA v. NFL, No.2-CA-22449 (N.L.R.B. filed September 22, 1987).
89 On April 28, 1988, memorandum decisions on the issue of good faith bargaining were released by the NLRB in two cases: Case 2-CB-12117 and Case 2-CB-12117 (as amended). In NLRB Case 2-CB-12117 the NFLMC alleged that the NFLPA had bargained in bad faith by refusing to meet and by refusing to bargain in good faith on wages, hours and other terms and conditions of employment. In NLRB Case No. 2-CB-12117 (as amended), the NFLMC alleged that the NFLPA had, additionally, refused to meet since January 29, 1988 and was forcing unilateral change of the system of right of first refusal/compensation. In NLRB Case No. 2-CB-12117, the memorandum concludes that there is insufficient evidence to establish bad faith bargaining by the NFLPA and the complaint should be dismissed. In NLRB Case No. 2-CB-12117 (as amended), the memorandum concludes that these the parties have, in fact, reached good faith impasse and the complaint should be dismissed. For the purposes of Judge Doty’s decision, the NLRB has found that the parties have reached impasse after good faith bargaining.
that the third prong of the Mackey case is now emasculated to merely a test of probabilities. That was not the wording of the Mackey case, nor does it seem to have been the original intent of that case. Although the relative bargaining positions of the parties and the issues are similar to those in the Mackey case, this court has determined that there is enough evidence to support a finding of bona fide arm's length negotiation. Second, this court purports to utilize a rule 56 of the Federal Rules of Civil Procedure analysis. The analysis is improperly executed in this decision because the court utilizes presumed facts to hold that the issue of bona fide arm's length negotiation is not a genuine issue of material fact. Third, after dismissing the differing length of survival tests which the defendants, the Bridgeman case and the plaintiffs proposed, the court then enunciates an impasse-following-good-faith-bargaining test for determining how long a non-statutory labor exemption will survive. Although the court declines to make a decision on that specific issue, the court implies that the parties have not, yet, reached impasse. This sets up a curious situation: what is impasse? How much more of a breakdown of negotiations do the players need to show? In footnote nine of the decision, the court clearly recognizes that there has been some level of breakdown in the negotiations. This court's opinion raises the very basic questions of what specific standards should be developed for sport industry antitrust litigation and how those specific standards should be applied. Temporarily, it left both parties in the unfavorable position of awaiting the NLRB determinations.

**CONCLUSION**

The Powell decision operates as a dual-edged sword. Clearly, it is not the broad, sweeping antitrust rescue mission that the NFLPA may have hoped for given the circumstances. At the same time, it is not clear victory for the NFL. The Powell opinion does decide the non-statutory exemption and the survival doctrine issues, but, at the same time, it lays out a nebulous impasse-following-good-faith-bargaining test. In effect, the court has sent a long, hard punt back to both parties with the clear message that antitrust litigation is no longer a cure for negotiation ills. Assuming the role of negotiator, perhaps the unspoken hope of this court's decision was that it would send the parties back to the negotiating table with renewed desire to resolve their differences outside of the courtroom.

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90 There is ample evidence of what many reasonable people would call impasse: the breakdown of negotiations, the strike and the filing of the Powell litigation.

91 Powell, 678 F.Supp. at 781.