# EXHIBIT H

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: ANTONY BROWN, ET AL., Petitioners v. PRO FOOTBALL,INC., dba WASHINGTON REDSKINS, ET AL.

CASE NO: 95-388

PLACE: Washington, D.C.

DATE: Wednesday, March 27, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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ANTONY BROWN, ET AL., :

Petitioners :

v. : No. 95-388

PRO FOOTBALL, INC., dba :

WASHINGTON REDSKINS, ET AL. :

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Washington, D.C.

Wednesday, March 27, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:20 a.m.

APPEARANCES:

KENNETH W. STARR, ESQ., Washington, D.C.; on behalf of the Petitioners.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

GREGG H. LEVY, ESQ., Washington, D.C.; on behalf of the Respondents.



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P R O C E E D I N G S

(10:20 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 95-388, Antony Brown v. Pro Football, Inc., doing business as the Washington Redskins.

Mr Starr.

ORAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONERS

MR. STARR: Mr. Chief Justice, and may it please the Court:

This case brings before the Court an important question under the implied labor exemption to the antitrust laws. At issue is the legality of unilateral action in the labor market taken by the 28 clubs of the National Football League which enjoy monopsony power.

Using the considerable enforcement authority of the Commissioner of the league, the clubs unilaterally imposed a drastic salary restraint by eliminating competition for a small minority of the 1,600 players of the National Football League.

Specifically, the restraint fixed the compensation of developmental squad players at a parsimonious $16,000 for the regular season in 1989.

The court below, reversing Judge Lamberth, shielded the NFL clubs from antitrust scrutiny. The court

found a complete repugnancy between antitrust and collective bargaining, and in the process gave professional sports leagues virtually the same exemption from antitrust scrutiny that only baseball had previously enjoyed, and that Congress has never seen fit to grant, and Congress knows full well how to create exemptions from the antitrust laws, as it did so explicitly in the statutory labor exemption.

For three reasons, we submit respectfully the result below should not stand. First and foremost, our primary submission, there is no clear conflict. There is no repugnancy between antitrust and labor policy in this particular setting of a competitive labor market.

To the contrary. For many years, from this Court's decision in Radovich through the seminal case of Mackey v. The National Football League and then beyond, McCourt from the Sixth Circuit, applying the Mackey analysis for professional hockey, the sports world, albeit subject to antitrust scrutiny with respect to restraints in the labor market --

QUESTION: Is Mackey a case from this Court, Mr. Starr?

MR. STARR: No, Your Honor, it's an Eighth Circuit case, Mr. Chief Justice. This Court has not had occasion to address this issue.

There have been, Your Honor, a number -- Mr. Chief Justice, a number of lower court decisions. Mackey, the Eighth Circuit decision, articulated what was for many years the subtle standard and applied in a wide variety of cases, and as a result, the sports world, although it was subject to antitrust scrutiny with respect to restraints in the labor market, enjoyed labor peace and a moderation of what would otherwise have been very extreme and rigid restraints and limitations on employ freedom, the economic freedom of players, which is ultimately what is at stake.

Not only is history and practical experience reflected by the 30 years of antitrust history, not only is history and practical experience a sure guide to the court in its decision here today, but so, too, is basic theory.

QUESTION: Well now, the 30 years you're talking about, what, dates from Radovich?

MR. STARR: From Radovich, then Mackey was decided in the 1970's, and then after Mackey a large number of decisions in various industries, Your Honor, including professional basketball.

QUESTION: Are you suggesting there were no contrary decisions from the courts of appeals during this period?

MR. STARR: Until 1989.

QUESTION: So the -- so it's from --

MR. STARR: The 1950's. This Court recognized the implied labor exemption in a series of cases in the 1960's. Antitrust scrutiny had been traditionally applied, other than to baseball -- this Court's historic decision in baseball had historically been applied.

After this Court articulated the implied labor exemption, numerous courts, led, first, by the Eighth Circuit, which was the first circuit to address this extensively in the 1970's, in the Mackey case, invalidated the Rozelle rule.

The Rozelle rule was challenged by players who were tied to the team under the reserve clause the Rozelle rule, tied to the team for which they were playing which had drafted them for the entirety of their careers.

The Eighth Circuit said, we apply a rule of reason analysis. There is no exemption from antitrust scrutiny.

And why is that? What is it that makes professional sports different than the other conventional industries that have shared with the Court concerns that to adopt the rule that has been embraced, now, for many, many years, until Powell and then recent decisions including --

QUESTION: The Powell -- Powell is an Eighth

Circuit Case, too, is it not?

MR. STARR: It is, Your Honor.

QUESTION: Do you think the Eighth Circuit thought Powell was inconsistent with Mackey?

MR. STARR: There was a division of opinion, but the Eighth Circuit as a whole still concluded -- and, in fact, we would still win, Your Honor, under the Powell analysis for this reason.

Powell still applied Mackey to say, for there to be an implied labor exemption there must have been an agreed-to term. The employees and management must have agreed. That is pivotal. That is the core of the implied labor exemption.

QUESTION: Then why doesn't the exemption disappear in any case in which there has been a collective bargaining agreement at the date at which the agreement expires?

I mean, in theory, why isn't there a violation during the negotiation period that you're talking about, whether or not that negotiation ultimately results in an agreement?

MR. STARR: Because the test, Your Honor, and this is our basic submission, is repugnancy. Is there repugnancy for the antitrust laws to apply?

Under circumstances where employers are coming

together to determine, what are our proposals going to be to the players association and the like, formulating those proposals and the like, are, I believe, protected by the implied labor exemption, which does what? It is, at its core, protecting the ability of employees through their labor organization to come together with employers through collective bargaining to reach an agreement.

QUESTION: Okay, but then the criterion is not agreement.

MR. STARR: I beg your pardon?

QUESTION: The criterion is not agreement, and I don't see why, in principle, the agreement should -- when there is an agreement following negotiations, I don't know why that should in effect be the touchstone, or its absence a demarcating point.

MR. STARR: Well, agreement is not, standing alone, the touchstone by any means. In fact, let me be clear about what the touchstone is. We think that by virtue of the Sherman Act and the National Labor Relations Act, two laws passed by the Congress of the United States, the issue is, is there repugnancy to applying the antitrust laws to this particular setting?

We know that there is not. We know it from practical experience, but we also know that the other side's essential submission is, well, you see, if you

allow antitrust scrutiny, that will end multiemployer bargaining, and we know that not to be true.

And in particular, what is the situation here? This is the unilateral imposition of terms of employment by the employer cartel.

QUESTION: And prior to that point there is a unilateral imposition by the multiemployer group of a bargaining position.

MR. STARR: And, Your Honor, we think that is inherently part and parcel of the collective bargaining process, which unilateral implementation of terms is not. That's the distinction, Your Honor.

QUESTION: Mr. Starr, I -- why does the conflict between the antitrust laws and the labor laws have to rise to the level of what you call repugnancy? I mean, it's not as though the Sherman Act is a clear, fixed prescription. As it's been interpreted by the courts it's a rule of reason. Why isn't it enough that it is a more reasonable disposition, given the labor laws, for a certain thing to take place, rather than that thing must be positively repugnant to the Sherman Act?

MR. STARR: Basic principles of statutory construction, that the court is under a duty to interpret the law so as to give full rein to both those --

QUESTION: To both statutes, but if --

MR. STARR: To both statutes.

QUESTION: -- one statute simply says, unreasonable restraints of trade are not allowed, why isn't it possible to say, well, in the context of labor negotiations, what's reasonable is quite different from what's reasonable in other contexts?

I mean, the Sherman Act is a very mushy statute. It's not the kind of a statute that establishes a, you know, a granite-like line which therefore is either repugnant or not repugnant to later statutes.

MR. STARR: Your Honor, the theory, it seems to me is, is there antitrust immunity? Are you immune from the entire scrutiny that you have just described as opposed to, must you at least be subjected to the restraining, constraining influences of the antitrust laws?

The question is immunity. What they are seeking is immunity with respect to what? Not bargaining positions. They're seeking immunity with respect to the implementation of terms, which is the substantive --

QUESTION: If you can make that nice, neat distinction, but I presume they also ultimately want some kind of a contract, and I'm not sure that the imposition of those terms after the moment of supposed impasse is somehow categorically distinguishable from the process

which I presume is not necessarily over.

MR. STARR: Your Honor, this Court has already charted the path in that very respect in Fort Halifax. It has said the unilateral implementation of terms is, in fact, quite a different kettle of fish than, and does not, in fact, intrude upon the collective bargaining process.

A trilogy of cases that our colleagues on the other side love to ignore, Metropolitan Life, Fort Halifax, and this Court's unanimous decision in Livadas, speak in terms of the collective --

QUESTION: Those were all ERISA cases, weren't they?

MR. STARR: No, Your Honor. Livadas was, in fact, a -- there were two issues involved in Metropolitan Life, and Fort Halifax, and among the issues -- and this Court addressed the National Labor Relations Act implied preemption issue with respect to all.

And, indeed, in Livadas, Your Honor, the key point made there was that as a matter of national labor relations policy and giving meaning to section 7's right on the part of employees to organize, that they should not be put to what, this Court's felicitous language, the unappetizing choice of choosing to associate together, to bargain, on the one hand, versus giving up substantive rights given to them by law.

Now, what is that body of law?

QUESTION: Those cases had nothing to do with antitrust.

MR. STARR: That is --

QUESTION: I mean, I was brought up at my mother's knee to believe that antitrust and labor law do not mix, but the very reason that the NLRA was passed was because judges decided it was a fine idea, under the antitrust laws, to start enjoining trades unions and interfering with the collective bargaining process.

So that's what my two questions are. First, why is this case about organized sports? There's nothing special about them, is there? This is --

MR. STARR: Yes --

QUESTION: Well, that's what I want to know. The first question is -- that worries me, and if the answer to this is no, then that's the end of that.

MR. STARR: Yes, the --

QUESTION: Why is this about organized sports any more than Schechter is about chickens? Why isn't this just a case about multiemployer bargaining units throughout industry?

MR. STARR: Because of the critical structure and nature of the sports industry, which is --

QUESTION: Well --

MR. STARR: -- which is -- which is -- comma, which is, competition in the labor market. Employer associations, in contrast to unions in conventional industries exist for the very purpose of preserving competition that the employers would like to eliminate.

QUESTION: In other words, you're saying that if, in fact, the antitrust law applies to the joint venture called the National Football League, it does not apply to the five automobile companies or the 95 contractors that might create a multiemployer bargaining unit. Is that your view?

MR. STARR: My view is there's implied labor exemption that the conventional industries can say exist because of what, unions in those conventional industries have joined together for the very purpose of eliminating competition in the labor market.

QUESTION: All right, so you're saying there is a distinction.

MR. STARR: Clearly --

QUESTION: Then if I were to believe there was not a distinction, and if there is, then this question is irrelevant, but I'm not positive that there is.

MR. STARR: Your Honor, if --

QUESTION: If there is a distinction --

MR. STARR: Your Honor, if I may --

QUESTION: Yes.

MR. STARR: -- I refer the Court to Mr. Levy's opposition to certiorari. He put a Roman numeral here, and it's called Roman numeral III, and he said, this doesn't apply outside sports. Sports is unique. Why? Because of competition.

MR. STARR: I would like to reserve, if I may --

QUESTION: My second question is this --

MR. STARR: Yes, I'm sorry.

QUESTION: -- that how do you work your exemption-nonexemption? There's a multiemployer bargaining union. There are unions.

MR. STARR: Employers associations --

QUESTION: Don't the employers, like the union, have to decide among themselves what will happen if they reach an impasse? Don't they have to talk to each other about what they're going to do --

MR. STARR: Yes --

QUESTION: -- and why isn't this all up to the labor board, and not up to courts?

MR. STARR: Well, first of all, what we are again talking about is not the process that Justice Souter was referring to as well in terms of the formulation of positions and the like. I believe that that is exempted by the implied labor exemption. Why? Because there would

be a clear repugnancy to insert antitrust laws into that setting, not with respect to the unilateral imposition of terms, which is a substitute for a bargaining agreement.

QUESTION: Mr. Starr, I have one short question, because I know you want to reserve your time. Was this subject of reserved players fairly comprehended within the scope of the collective bargaining discussions?

MR. STARR: No. Well -- oh, fairly comprehended within, there was bargaining to impasse what was -- there was never agreement.

QUESTION: Would you say it was fairly comprehended within the scope of the discussions?

MR. STARR: Yes.

Thank you, Mr. Chief Justice.

QUESTION: Very well, Mr. Starr.

Mr. Wallace, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

QUESTION: Mr. Wallace, would you tell us, please, why the National Labor Relations Board is not included in the brief filed by the Government? I guess you are here just on behalf of the --

MR. WALLACE: That is correct. It is unusual --

QUESTION: -- Federal Trade Commission.

MR. WALLACE: -- for the National Labor Relations Board to speak to issues of antitrust law. They're not issues that have come before the board.

We worked with the board and its staff in preparing our position, and we have a footnote at the end of our brief which reflects the board's view on this judgment and says that it's erroneous and would be detrimental to labor as well as antitrust policy, but beyond --

QUESTION: But it certainly isn't explained. We don't know what the position might be.

MR. WALLACE: I understand that, Your Honor. The -- we -- the board operates through majority vote. It was undergoing some transitions in membership at the time we briefed this case on an accelerated schedule, and it was not practical for us to go beyond what we had been authorized to say at the petition stage.

And I know the other side is trying to draw solace from the fact that the board said the judgment should be reversed rather than saying nothing, but I think that that cuts more against them than in their favor.

If I may, I'd like to emphasize that --

QUESTION: And I guess the AFL-CIO couldn't --

did they have a vacancy in their boards, too? They haven't filed an amicus brief here. That's rather surprising.

MR. WALLACE: We filed a brief, and the brief was prepared in collaboration and consultation with the board's staff, and they were consulting with the members.

I think it's important to bear in mind the distinction between whether there is antitrust scrutiny available and whether there is an antitrust violation.

This Court's decision in Connell Construction Company is a holding, with all respect, Justice Breyer, that labor and antitrust do mix, and that the exemption did not extend to the particular negotiation that was involved there in trying to get the employer -- that was a dissenting view in Connell that antitrust scrutiny had to be ousted, but the majority of the Court held to the contrary, and we have suggested in the latter two-thirds of our footnote 5 in our brief, that there are other ways to accommodate the policies of the National Labor Relations Act --

QUESTION: Mr. Wallace --

MR. WALLACE: -- in applying the antitrust laws without --

QUESTION: Mr. Wallace --

MR. WALLACE: -- expanding the exemption. Yes,

Justice --

QUESTION: -- before you go on with that, your time is short, and there is a question that I'd like to put to you, because the heart of your argument is that the impasse is the point at which the antitrust laws come in, and yet your brief was -- admitted that that's a difficult time to determine.

As Justice O'Connor asked, I thought that we would be enlightened by the view of the board on that question, because it seems to me that it would be -- from your own brief, it's very hard to know what is an impasse. Is this temporary? There is a precedent of this Court that suggests that. When is it really over?

MR. WALLACE: Well, we recognize that can be a difficulty, although not a difficulty of much consequence in a case of this nature in which the employers are imposing new terms that were not included in the expired agreement, and they're going beyond anything that the National Labor Relations Act would have required them to adhere to prior to impasse.

QUESTION: Well, the concession --

QUESTION: Mr. Wallace, isn't it true, as the respondents suggest in their brief, that the hope and expectation of the labor laws is that there is never a complete impasse, that you go to negotiation for as long

as you can.

When you -- it's proving fruitless, each party is left to its means of economic coercion, and they go to it, and then eventually is it not expected -- hoped and expected that they will come back to the table, and the impasse will be at an end?

MR. WALLACE: There's no doubt that that is true, and that bargaining can continue, and bargaining collaboration among employers in a multiemployer unit can continue, but the question --

QUESTION: So why is operating as a single employer unit up until the mini-impasse, okay, but between the mini-impasse and then during that period until they sit down to the table again they have to stop acting as a single employer?

MR. WALLACE: The National Labor Relations Act requires them to abide by terms of the expired agreement until impasse is reached, so their conduct is governed by that. After that, there is -- they would not be violating any requirement of the National Labor Relations Act to act individually in making any changes that they choose to make.

The question is, to what extent do -- does the labor act require collaboration among employers, not all of whom in these multiemployer groups are operating a

sports league where there is collaboration necessitated under a quite --

QUESTION: Is it require or permit, Mr. Wallace? I mean, even if the National Labor Board Act doesn't require it, it might permit it.

MR. WALLACE: The fact that it permits it, or has a remedy for it, is not enough for the judiciary to find an implied exemption from the antitrust laws when Congress never expressly granted an exemption, and under this Court's holdings it's only an exemption that is by necessary implication flowing from the very existence of the scheme of the labor act that is to be recognized --

QUESTION: Suppose this proposal --

MR. WALLACE: -- to the minimum extent necessary.

QUESTION: Suppose this proposal had come from the player's side of the table, but they wanted, say, $3,000 a week, and the employer said, we'll do $1,000 a week, then there's an impasse, then the employers impose the $1,000-a-week scheme, what result?

MR. WALLACE: Our view is that after impasse the employers cannot in concert agree to change the terms under which they will pay without antitrust scrutiny being applicable.

QUESTION: So the fact that the players

themselves negotiated it, or suggested it, is not relevant?

MR. WALLACE: It's relevant to whether it's a permissible change for individual members of the unit to make under the National Labor Relations Act, or for that matter it wouldn't violate the National Labor Relations Act for the group to make the change after impasse, but it would be subject to antitrust scrutiny, which might very well apply a rule of reason in the context of a sports league where you can't field teams individually. It's quite different from --

QUESTION: Well then, would that satisfy you if we affirmed the decision on the different ground that although there's no antitrust immunity the rule of reason in this situation permits employers to continue to operate as a single employer unit --

MR. WALLACE: Well --

QUESTION: -- between the temporary impasse and the final settlement of the dispute?

MR. WALLACE: Well, that is a question that the court of appeals did not reach, and I think it would be improvident for this Court to reach it, especially since it isn't presented or briefed here.

QUESTION: It seems like a distinction without a difference whether we say that the reason it's okay is

because you're exempted from the antitrust laws or you're subject to the antitrust laws but the antitrust laws permit this.

MR. WALLACE: But antitrust scrutiny is something that draws distinctions depending on circumstances and justifications for restraints that can be very different if you're trying to field teams against one another in comparison with --

QUESTION: Yes, but Mr. Wallace, then, I think your reasonable --

MR. WALLACE: -- producing motion pictures, for example, where one can go ahead without the other.

QUESTION: But Mr. Wallace, I think your reasonable defense might well apply to a rule that says only six players on the replacement squad, or something like that, but I don't see how you could say it's a reasonable -- doesn't violate the rule of reason to fix the specific salary level.

MR. WALLACE: I never said it would not violate the rule of reason.

QUESTION: But you didn't suggest we could affirm.

MR. WALLACE: I said that it -- I wouldn't suggest affirming. I -- what I suggested is that antitrust scrutiny doesn't --

QUESTION: You're just teasing us with the notion that the rule of reason might solve our problems.

(Laughter.)

MR. WALLACE: The rule of reason doesn't necessarily mean the defendant wins. The defendant still has to make a showing that satisfies the rule of reason. It just means that it's not a per se violation.

QUESTION: Thank you, Mr. Wallace.

Mr. Levy, we'll hear from you.

ORAL ARGUMENT OF GREGG H. LEVY

ON BEHALF OF THE RESPONDENTS

MR. LEVY: Mr. Chief Justice, and may it please the Court:

I would like to begin by following up on one of Mr. Starr's answers to Justice Breyer's question, and that is a question, or an answer about the choice required of certain unionized employees.

I agree with petitioners that in certain unionized industries employees have a choice to make, but it is not the choice that petitioners assert. It is not a choice between labor law rights and whatever antitrust rights they may have.

The choice, instead, is between collective bargaining with a single employer that bargains independently, and collective bargaining with a

multiemployer bargaining unit, a group of employers that bargain collectively as if they were a single entity.

The problem with petitioner's position is that they want to have it both ways. They want to take full advantage of the enormous benefits which this Court recognized in Bonanno Linen that employees receive when employers act collectively in the bargaining process, but at the same time, they also want to exploit the leverage of the antitrust laws which they can do only by claiming that each member of the multiemployer unit is required to act not collectively but independently. That fundamental inconsistency pervades petitioners' every argument.

From the standpoint of the union, multiemployer bargaining is voluntary. The union may withdraw its consent at any time before the bargaining process begins, but once it begins, multiemployer bargaining is a bilateral process providing rights and obligations that both sides must observe, and that neither side can escape.

That was the essence of this Court's opinion in Bonanno Linen. Once bargaining began, each employer was bound by it selection to engage in multiemployer bargaining.

QUESTION: May I ask you, Mr. Levy, I realize there's lots of difficulty determining when impasse occurs and so forth and so on, but in your view of the law, does

there ever come a time when the employers would be -- would not be free to act collectively by imposing a term such as was imposed in this case?

MR. LEVY: There may come a time, Your Honor.

QUESTION: And when would it come, in your view?

MR. LEVY: If the employees ultimately elect, in good faith, and not as a strategic matter to engage -- to get additional leverage in the collective bargaining process, to give up their rights under the labor laws, but I would argue that as long as they continue to bargain collectively, that --

QUESTION: I'm trying to hypothesize a case -- I understand the difficulty of measuring impasse, but where everyone would agree that there's really an impasse, there's no point in future bargaining. Could, at that point, the employers continue to assert their will in the way they did in this case?

MR. LEVY: Once the employers give up their bargaining rights, the employee -- excuse me. Once the employees give up their bargaining rights, the employers could not take any affirmative steps, exercise their economic weapons under the bargaining process. I agree with that.

QUESTION: What happens in that respect in -- forgetting professional sports, there are lots of

multiemployer bargaining units agreed to by unions. There's a history, isn't there?

MR. LEVY: Of course there is.

QUESTION: All right, so I've been searching, and I can't find board precedent. I want to know what the labor board thinks, and so I went in to try to find prior cases. I couldn't find any.

What is the normal practice in -- outside of professional sports? Why can't I find precedent? How do employers deal with this? Don't they normally say to each other, what we'll do if we reach an impasse, then don't they later implement it as part of a normal bargaining practice? What happens normally in labor law? There must be some history on it. Why can't I find it?

MR. LEVY: Well --

QUESTION: Aside from my own inabilities.

MR. LEVY: I can't answer that question as to why you can't find it, but there is no question, Your Honor, that Congress intended to encourage the practice of multiemployer bargaining.

QUESTION: We know that, but the issue would be, is a decision by employers a) reached after the impasse or b) reached prior, but implemented after? Is that a normal part of collective bargaining with a multiemployer bargaining unit?

I would look to the board for guidance there. It's up to them to say, not up to judges, so why can't I find what happens normally? What does happen normally?

MR. LEVY: The board has spoken on that subject, Your Honor.

QUESTION: Where?

MR. LEVY: In its brief in Bonanno Linen which this Court quoted in its opinion in Bonanno Linen. The board made clear that among the economic weapons available to the employers after impasse was to implement unilaterally the terms of its last good faith bargaining proposal.

The board has spoken on that, and in its decisions the board has repeatedly made clear in contexts involving multiemployer bargaining that unilateral implementation of the last good faith bargaining proposal is a -- is part and parcel of the collective bargaining process. It is a traditional leverage.

Now, it was only a few months ago, in the Silverman case, which we cited at page 30 of our brief, when the major league baseball implemented a unilateral terms and conditions of employment, that the baseball players went to the board, and the board agreed with the baseball players' position that that term had not been unilaterally implemented in accordance with the labor

laws.

And only 6 weeks later the NLRB had obtained an injunction against the court -- against the baseball employers' implementation of that term, and that's exactly what the football players should have done here.

They had a remedy if they were of the view that the unilateral implementation of these terms was not in good faith. Their remedy was to go to the labor board. They could have done that and had a ruling within weeks. Instead, we've had 6 years of expensive antitrust litigation that has plagued the defendants, it has plagued the courts, and it has poisoned labor relations in this industry.

Congress provided a remedy for this. If there's anything inappropriate, or if the employers implement terms that are unreasonable. The players elected not to pursue those remedies here.

In Bonanno Linen, to get back to Bonanno Linen, the Court made clear that once the collective bargaining process begins, the multiemployer bargaining process begins, both sides are bound by the rules and terms that apply in collective bargaining and the rules and terms that apply to multiemployer bargaining units.

And in Justice Stevens' concurring opinion, Justice Stevens pointed out that the individual employer

who wanted to withdraw from the multiemployer unit in Bonanno Linen knew what the rules were when it chose voluntarily to participate in the multiemployer bargaining process, and he wrote that there was nothing inappropriate about requiring that employer to abide by those rules throughout the bargaining process.

The same is true here. This case is nothing more than the flip side of Bonanno Linen.

QUESTION: Mr. Levy, the problem I have is, does the bargaining process ever come to an end, because I think you seem to agree that if it had come to an end, then the antitrust laws would kick in.

MR. LEVY: In this industry at least, Your Honor, I think it's clear that the bargaining process itself never comes to an end.

QUESTION: It never comes to an end.

MR. LEVY: The NBA players represented to the court in the Second Circuit in Williams, in a passage that we quoted from a brief, everybody knows in this industry that there's --

QUESTION: So basically what you're saying is there is an industrywide understanding that you never have impasse.

MR. LEVY: No. Impasse is merely a part of the collective bargaining process, Your Honor.

QUESTION: Ah.

MR. LEVY: Everybody -- everybody may anticipate --

QUESTION: See, all the other cases are before impasse. That's why this one's --

MR. LEVY: No, everybody anticipates that there will be impasse, but everybody also anticipates that impasse will ultimately be broken. That's what the labor board has repeatedly said, that impasse --

QUESTION: There's really no such thing as a real impasse, then.

MR. LEVY: I believe that a real impasse, as the labor board has articulated it, is simply a temporary stage in the process.

QUESTION: Yes.

MR. LEVY: But the NLRB has --

QUESTION: But it could be one that would justify decertification of the union.

MR. LEVY: In theory, that's right, Your Honor. In theory, that's right.

QUESTION: But what would it take -- something like that is what it would take for the antitrust laws to kick in. That's the point that I think you were referring to earlier.

MR. LEVY: That's right, although I would

condition that by saying that if decertification were intended merely to allow the union to gain additional leverage in collective bargaining, that the antitrust laws should not kick in. That's sort of strategic decertification, or tactical certification, in my view is disruptive of a collective bargaining process.

QUESTION: It's a new concept, good faith decertification.

(Laughter.)

MR. LEVY: Well, Justice Scalia, it is not a new concept. That issue was litigated in the district court in McNeil, and the court found on summary judgment that there had been no sham decertification even though the NFL claimed that that was what happened during the 1970's when the union decertified.

QUESTION: Mr. Levy, in this respect you are agreeing, if I understand you correctly, totally with Judge Edwards on that, it ends when the union decertifies so that there's no more bargaining regime.

MR. LEVY: I would like to add this wrinkle, Your Honor, that certainly after the union decertifies affirmative steps, affirmative exercise of economic weapons taken by the employers is not protected by the nonstatutory labor exemption.

There is a question which the courts have not

addressed about what happens to steps that the employers have taken prior to decertification that remain in place after the union decertifies.

In that situation, while the courts have not addressed it the Solicitor General has indicated that it would presumably be appropriate or necessary for the employers to have at least some period of time, a reasonable period of time to adjust their conduct to bring it in conformity with the antitrust laws, otherwise you have the anomalous situation of a private party controlling whether or not prior conduct taken by the employers that was lawful on day 1 became unlawful on day 2, and that, I think, would be an inappropriate course for the court to take, but of course, that issue isn't presented here.

With that caveat, though, I do agree with Judge Edwards.

QUESTION: Well, that position requires you basically to put the employees to a choice between preserving unionization or exercising their rights under the Sherman Act.

MR. LEVY: I don't think that's the choice the employees are confronted with, Your Honor. I think --

QUESTION: Well, it sounds very much like it --

MR. LEVY: I --

QUESTION: -- if you say it doesn't end until decertification, so --

MR. LEVY: I think there's an intermediate choice for the employees, and that is, they could decide no longer to participate in the multiemployer bargaining process. Once that happens, once there's no multiemployer bargaining, then you have a situation where --

QUESTION: The employees can make that choice?

MR. LEVY: It so -- the employees can certainly make that choice before the bargaining process begins.

QUESTION: Well, how about at impasse?

MR. LEVY: At impasse, no, I don't think the employees can make that choice.

QUESTION: So at that point they are put to the choice, stick with unionization or exercise rights under the Sherman Act, one or the other.

MR. LEVY: I think that's right if you accept the premise that they do have rights under the Sherman Act, that's right, there is a choice to be made there.

But the labor laws are structured in such a way that --

QUESTION: Does that penalize them in some sense under the National Labor Relations Act?

MR. LEVY: No, they have always --

QUESTION: I mean, we've been very protective of

employee rights --

MR. LEVY: Well, this is --

QUESTION: -- under the labor act, and does that kind of a choice in effect amount to a penalty?

MR. LEVY: This is not the type of situation like the Livadas case, to which Mr. Starr referred, where a State court imposed a penalty on an employee's decision to exercise his labor law rights.

In Livadas, Justice Souter made clear in his opinion for the Court that if a Federal statute were to impose the same choice, the issue would be entirely different. The issue then would be one of statutory harmonization, I think is the phrase that was used, and what we're asked -- what the process that's required here is the process of harmonizing the requirements of the antitrust laws with the requirements of the labor laws.

The key point here, though is, as Justice Breyer suggested earlier in the morning, is that the conduct that is at issue here is really conduct that is at the core of the labor laws, that at most it's at the very periphery of the antitrust laws. This conduct is conduct that is -- that involves a mandatory subject of collective bargaining.

QUESTION: But is there a way legally to bring the board into the making of this decision? That is, is



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it possible that if the board were to say, for example, that it is not an unfair labor practice for a group of employers to impose terms for the reason that it has nothing to do with the collective bargaining relationship in this instance, since many months ago they reached impasse, at that point the antitrust laws would kick in?

What I'm looking for is, is there a way to turn Justice Stevens' question about when you reach impasse, a real one so that collective bargaining's out of it, is there a way legally to bring the board into the making of that decision?

MR. LEVY: I would assume that there is --

QUESTION: What would it be?

MR. LEVY: -- Your Honor, that at some point the board could be asked to determine whether there is any prospect of further use of economic weapons ultimately leading to a collective bargaining agreement.

QUESTION: How could you do that? What would be the legal route?

MR. LEVY: Well, one approach would be for the employees to file an unfair labor practice charge with the board, just as they could have done here. The players, in our view, could have filed that unfair labor practice charge days after the NFL decided unilaterally to implement the salary term.

QUESTION: Contending what?

QUESTION: Yes --

QUESTION: Contending what?

MR. LEVY: Contending that the parties were not at impasse, an issue that they've stipulated to here, or that the proposal was not made in good faith. They could have argued that $1,000 a week wasn't enough, that to be a reasonable proposal it had to be $2,000 a week, but they never pursued that. That is the remedy that the labor laws have afforded them, and that's --

QUESTION: Does the board have the right -- I'm unfamiliar with this. Does the board have the right to determine the fairness of a proposal?

MR. LEVY: It has the right to determine whether or not a proposal has been made in good faith and negotiated in good faith.

QUESTION: And what would the standard be? How would they judge something like -- this is a new one on me.

MR. LEVY: They could -- one factor that they could look at is to look at the terms of the offer. I don't have any illusions here that if the NFL had implemented unilateral -- or unilaterally terms that would have paid these employees minimum wage, that -- about what the NLRB would have said in those circumstances.

They would have said that in the context presented that proposal was not made in good faith, but here the proposal was $1,000 a week, the employees had the right to go to the NLRB to challenge whether or not that term was sufficient, as one indication of whether it was negotiated in good faith, and they elected not to do that.

QUESTION: I take it one of your concerns is that if the petitioners prevail, then there will be an incentive, or an inducement to reach impasse on the part of the labor parties so that they can bring antitrust remedies.

MR. LEVY: That's right. In fact --

QUESTION: Did the board address that in other contexts, other than the duty to bargain in good faith? In other words, has the board told us that it has concerns with mechanisms that might lead to early impasse?

MR. LEVY: Other than to say that impasse --

QUESTION: Other than the duty to bargain in good faith.

MR. LEVY: -- is a temporary phase in the process, I don't know, but your prediction is, or your suggestion is precisely what happened in the eighties in the McNeil case, where after -- or in the Powell case. After the Eighth Circuit decided Powell, on the next business day the NFL Players Association came to the NFL

and said, we're at impasse, even though the district court in that case had made it clear that the parties' positions weren't that far apart.

And why did they say they were at impasse? Because they thought, they had the view that that would allow them to move forward and file an antitrust suit, and to get the leverage that an antitrust suit would provide them in the collective bargaining process.

That is an incentive -- given the compulsive power, the coercive power of an antitrust suit, treble damages and attorneys' fees, and the possibility of the intervention of the antitrust enforcement authorities, it is a very powerful addition to the collective bargaining process.

QUESTION: Mr. Levy, do we owe any deference to the views of the Federal Trade Commission and the antitrust division and the rather obscure view of the labor board on this matter?

MR. LEVY: I think not, Your Honor. There has been no request for Chevron deference, for example --

QUESTION: You don't have to make a request for it.

MR. LEVY: No, but there has been no request by the agency for that sort of deference, but I would like to make one point that I think is relevant --

QUESTION: Well, you have to give me a better answer than that. Your only answer is, we don't owe them deference because they didn't make a request for it?

MR. LEVY: No, this is an issue for the -- they haven't even made a request for it. This is an issue which the agencies are entitled to no deference, and it's the role of the courts to determine what the appropriate interplay is of the labor laws and the antitrust laws.

QUESTION: Well, why isn't it up to the board, very much, since the implied exemption grows out of the interpretation of the National Labor Relations Act as enacted against a background of the Sherman Act.

MR. LEVY: I think that the board has provided plenty of ingredients upon which this Court has relied in the past and upon which it should rely here to shape the Court's opinion.

It has made clear, for example, that impasse is a transient stage in the process. It has made clear that unilateral implementation of employment terms is an authorized economic weapon. It has made clear that multiemployer bargaining is favored.

Those are all items as to which this Court said in Buffalo as well as Bonanno Linen --

QUESTION: It has made clear that it disagrees with the judgment below.

MR. LEVY: But we don't know why, Your Honor, and I suggest that part of the reason that we don't know why is that the board is not prepared to sign on to some of the views of the labor laws that are articulated in the Solicitor General's brief, but on the question of deference, I'd like to go back to one other point that --

QUESTION: Well, for one thing, we don't have any agency ruling, we don't have any agency adjudication, and we have the agency coming in, at least one agency, and telling us how it thinks we ought to decide the case, but I didn't know that we applied Chevron deference to positions that are just taken in briefs.

MR. LEVY: You don't. That's my point, Your Honor. I agree with you entirely. There has been no request for deference of any kind here.

The only conclusion that I think you can draw here is that the -- that this Court, in reliance on the principles that have been articulated by the board in other decisions in other cases, in other briefs and representations to this Court, including in Bonanno Linen itself, and we cited the NLRB's brief in Bonanno Linen, and this Court cited it in its opinion itself, that those views ought to be the ones that shape this Court's opinion to the extent that it needs the views of any agency in determining the appropriate intersection of these two

bodies of law.

QUESTION: May I ask another question, Mr. Levy? This is really a tricky case. Is there any other case to which you can call my attention in which an implied labor exemption from the antitrust laws has been recognized when there was no agreement between a labor union and management?

MR. LEVY: Well, I'd start with the Eighth Circuit's decision in Powell, Your Honor, which -- when there's never been an agreement, excuse me, or where there's been no agreement on the --

QUESTION: When that which is sought to be exempt is not an agreement.

MR. LEVY: Yes.

QUESTION: In Jewel Tea it was an agreement, and --

MR. LEVY: In the Powell case is one example. There's Wetterau Foods in the Eighth Circuit, which we cite in our brief.

QUESTION: No cases from this Court, though.

MR. LEVY: No cases in this Court, no. There are only four cases that -- in which this Court has directly addressed the exemption. Each of those cases did involve an agreement, but the Court never held that an agreement was necessary, and I think all parties here,

including the Government and the dissent below, recognized that agreement is not necessary --

QUESTION: You see, one reason it occurs to me the agreement might be a touchstone, and I'm by no means at rest on this, is that the Sherman Act focuses its attention on agreements, and when you talk about processes, I think well, maybe there's no violation of the Sherman Act at all when you're just negotiating the processes. The thing that the Sherman Act always looks at is there an agreement in restraint of trade, and the exemption says, well, this category of agreements is not covered by the Sherman Act.

Now, I'm a little unclear why we don't have any category of agreements to which labor is not a party that are somehow brought within a labor exemption for labor -- you know, the labor union exemption, which up to now has focused on agreements --

MR. LEVY: Well --

QUESTION: -- which labor is a party.

MR. LEVY: -- in part I would answer your question by saying that labor has agreed to the process, and the process includes an arrangement whereby employers collectively can act together as a single entity in collective bargaining. They may together, as a single entity, implement proposed terms and conditions of

employment that have been bargained in good faith to impasse.

In effect, what the labor laws have done here is that they have removed the agreement, if you will, among the employers by treating the employers in the context presented here as a single employer.

QUESTION: And I suppose an agreement between the employer and the employees necessitates a subagreement among the employers. That is, they agree among themselves to come up with a particular offer.

MR. LEVY: In the multiemployer --

QUESTION: And they agree among themselves to bargain collectively, as a unit.

MR. LEVY: In the multiemployer context, that's certainly true.

QUESTION: Yes, but that agreement wouldn't violate the Sherman Act. Just agreeing on how you go into a bargain wouldn't -- that wouldn't violate the Sherman Act. You could subject to antitrust scrutiny and not have any problem. It would be if they all said, no matter what happens we're not going to pay these guys any more than $1,000 a week, forever and ever and ever. That would violate the Sherman Act.

MR. LEVY: Well, Justice Stevens, I think that if the employers agreed to lock out their employees at

impasse there's no question that that conduct would be protected by the nonstatutory labor exemption, even the petitioners state that, and that's a classic example of an agreement among the employers, if you will, that does not involve any consent or agreement of employees. You couldn't imagine any action taken by the employers to which the employees would be more likely to object than a lock-out.

QUESTION: But going back to the case in which there has been no consent to multiemployer bargaining, and the employers all agree that they will come up with a uniform set of terms, that's subject to the Sherman Act.

MR. LEVY: If you accept the premise that the antitrust laws apply to a labor market --

QUESTION: Yes. Yes.

MR. LEVY: I would agree entirely --

QUESTION: Yes. Yes.

MR. LEVY: -- Your Honor, that is subject to the -- and that's the reason why, if the employees agree, or the employees decide not to participate in multiemployer collective bargaining, that there is no antitrust issue of any kind presented here. That's sort of an intermediate stage for employees in numerous industries.

They want to have the benefits that are afforded

by multiemployer bargaining, joint pensions, health benefits, all of those sorts of things that the Court recognized in Bonanno Linen, but they also want to treat the employers as separate entities when it suits their bargaining interests.

One point I wanted to mention in response to Mr. Starr's comments about the notion of monopsony, and this shouldn't take long, but there are a couple of points I ought to make with regard to that issue, because the notion of monopsony, the concept of monopsony pervades the petitioners' brief, but it is quite interesting that that concept never appears anywhere in the briefs for the Government, the antitrust enforcement agencies.

The reasons are two. First and most important, there is no possibility here that the NFL could have exercised monopsony power in this market. The reason is that there's only one seller in the market. The only seller in the market was the union, and the union is no less a monopolist here than the NFL is a monopsonist. In fact, the unions --

QUESTION: But Mr. Levy, here I understood this collective bargaining agreement preserved the right of individual players to negotiate their own terms, their own salaries.

MR. LEVY: The collective bargaining agreement

did preserve the right --

QUESTION: So how can you say there's only one seller of services? Every player except this one group involved in this case are individual sellers.

MR. LEVY: Well, the collective bargaining agreement didn't preserve the right for these players --

QUESTION: No, I understand.

MR. LEVY: -- to negotiate their own salaries.

QUESTION: But as to the market as a whole you can't say there's only one seller.

MR. LEVY: Well, Your Honor, each of the employees may have been negotiating their salaries, but they were doing so through the auspices of the union, through the auspices of the National Football League Players Association.

QUESTION: I thought a lot of them had their own agents.

MR. LEVY: They do, but they are agents of the union, they are not agents of the players, Your Honor.

QUESTION: I see.

MR. LEVY: They're represented as the union.

But putting that aside, the record flatly contradicts the notion that for these players, that the NFL was the only purchaser of services in the market. The record is quite clear at pages 2004 and -5 of the court of

appeals joint appendix, as one example, that the Canadian Football League and the Arena Football League were active in this market. They hired some members of the petitioner class before they were developmental squad players for the NFL, and others they hired after, so there's no reason that monopsony ought to be an issue here.

Finally, one point I would like to emphasize is that the employees are not without weapons for remedies of their own if harsh or unreasonable employment terms are imposed by the employer. First and most important, as we've noted, the employer's right to implement an impasse is limited only to proposals that have been negotiated in good faith. The NLRB stands ready, as it did in Silverman, to enforce that requirement if unreasonable terms of unduly restrictive terms are imposed.

Second, and very important, the union has economic weapons of its own. The union can call a strike, it can authorize a slow-down, it can engage in peaceful picketing in an effort to persuade management to accommodate the union's views. None of those steps were taken here.

Third --

QUESTION: What would a slow-down be in a football game?

(Laughter.)

MR. LEVY: Well, the -- to give just one example, the players could -- they don't -- it doesn't have to be in a football game. It could be in practice. The players could refuse to report to practice.

They could do any one of a number of things that would, in effect, make life more difficult for their employers, but the weapons aren't limited to a slowdown. They could call a strike. They could engage in picketing. Those are traditional weapons that the labor laws afford to employees, none of which were selected here.

And third and most important, the union can return to the bargaining table. Once negotiations resume, the employers remain obligated to negotiate in good faith. They remain obligated, for example, to provide employees financial information that can be used for the collective bargaining process. They remain obligated to bargain collectively as a multiemployer unit.

This Court recognized in Bonanno Linen that in almost every situation such steps are appropriate and effective in breaking a bargaining impasse. The same would have happened here, I submit, if instead of filing an antitrust suit the players had returned to the bargaining table with the National Football League.

I appreciate the Court's attention.

QUESTION: Thank you, Mr. Levy.

Mr. Starr, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONERS

MR. STARR: Yes. We --

QUESTION: Mr. Starr, before you -- I have a very quick question. I won't take much of your time.

If, as you say, the employers cannot continue to bargain as a unit once there's been impasse, and each one has to bargain on his own, are they -- is each one, in bargaining on his own, limited to the last offer that had been made in the bargaining process?

MR. STARR: Your Honor, the premise is incorrect. Our premise is not that there cannot be bargaining after impasse. What there cannot be is the unilateral implementation of terms as substituted, if I may, enforced by the cartel.

QUESTION: Oh, I understand, but presumably each individual employer can then impose his own terms.

MR. STARR: Absolutely.

QUESTION: Now, may those terms --

MR. STARR: An individual employer --

QUESTION: Must those terms be the terms that had been bargained collectively? Can they only impose --

MR. STARR: That is a substantive issue under labor law that does not admit of a ready answer. That is

to say, it may be that if you depart from that last term, and you unilaterally impose -- it's complicated, Your Honor, but I'm being very brief on this.

That is, if you depart from your last offer that may -- may -- be evidence of bad faith bargaining on the part of the -- but if I may, what is at issue -- I have about 2 minutes.

What is at issue here is this stark choice that has been -- that I think Justice O'Connor has captured, an unappetizing choice that I think Mr. Levy has been very clear about, that the real remedy is, in fact, to decertify, and that is a stark choice that this Court has held in a number of its backdrop posit -- backdrop opinions, Metropolitan Life, Fort Halifax, and Livadas.

QUESTION: That is the real remedy absent a charge before the board.

MR. STARR: Well, that is a real -- the broad point that I think those cases stand for, Your Honor, and I cite the Court's language in Fort Halifax that both employers and employees come to the bargaining table with a backdrop, and that is to say that this does not repeal the Fair Labor Standards Act, does not repeal OSHA and the like.

Those are backdrop rights that the parties can bargain about, but Fort Halifax makes it enormously clear

that there is, in fact, an ability on the part of an employee, a union, to in fact invoke those backdrop rights, and that is a very critical part of the understanding of the structure of the labor laws.

And, in fact, in terms of national labor policy, let us remember what this case is about: an effort to secure an implied exemption from the antitrust laws when -- and I don't think this is obscure at all -- the National Labor Relations Board has concluded that this is wrong. The D.C. Circuit's decision is wrong as a matter of law and may do serious harm to labor policy, and why is that the stark choice.

I thank the Court.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Starr. The case is submitted.

(Whereupon, at 11:19 a.m., the case in the above-entitled matter was submitted.)