EXHIBIT G

ORIGINAL

FILED

APR 3 1989

ROBERT D. ST. VRAIN
CLERK

In the United States Court of Appeals
FOR THE EIGHTH CIRCUIT

MARVIN POWELL, *et al.*, *Plaintiffs-Appellees,* v. NATIONAL FOOTBALL LEAGUE, *et al.*, *Defendants-Appellants.*	89-5091MN

ON INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF OF DEFENDANTS-APPELLANTS NATIONAL FOOTBALL LEAGUE AND TWENTY-EIGHT NFL MEMBER CLUBS

William T. Egan
Scott K. Goldsmith
RIDER, BENNETT, EGAN & ARUNDEL
2000 Lincoln Center
333 South Seventh Street
Minneapolis, Minnesota 55402
(612) 340-7951

John H. Schafer
Paul J. Tagliabue
Jeffrey Pash
Neil K. Roman
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Defendants-Appellants

In the United States Court of Appeals
FOR THE EIGHTH CIRCUIT

MARVIN POWELL, *et al.*, *Plaintiffs-Appellees,* v. NATIONAL FOOTBALL LEAGUE, *et al.*, *Defendants-Appellants.*	89-5091MN

ON INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF OF DEFENDANTS-APPELLANTS NATIONAL FOOTBALL LEAGUE AND TWENTY-EIGHT NFL MEMBER CLUBS

William T. Egan
Scott K. Goldsmith
RIDER, BENNETT, EGAN & ARUNDEL
2000 Lincoln Center
333 South Seventh Street
Minneapolis, Minnesota 55402
(612) 340-7951

John H. Schafer
Paul J. Tagliabue
Jeffrey Pash
Neil K. Roman
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Defendants-Appellants

Summary And Request For Oral Argument

This suit arises out of a labor dispute in the National Football League ("NFL") between the NFL players union -- the plaintiff NFL Players Association ("Union") -- and the defendant NFL member clubs. The suit was commenced in October 1987 when the Union ended a twenty-four day strike of the NFL clubs. As the District Court noted, both the strike and this suit relate to the Union's efforts to eliminate employment terms for veteran NFL players established by NFL collective bargaining agreements in 1977 and 1982.

In Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977), this Court held that the terms of employment of veteran "free agent" NFL players are mandatory subjects of collective bargaining and that the antitrust laws do not apply to agreements on such subjects when they result from good faith collective bargaining and affect only the parties to the bargaining relationship. The question on this appeal is whether the antitrust laws apply to such employment terms after expiration of a bargaining agreement or to successor employment terms implemented by the member clubs in accord with the labor laws. This question was not considered in Mackey. 543 F.2d at 616 n.18. Defendants contend that the antitrust laws do not apply to such employment terms in the present circumstances.

Defendants request thirty minutes for oral argument.

Table of Contents

Table of Authorities

Preliminary Statement

The decision appealed from was issued by the Honorable David S. Doty, District Judge. Judge Doty's decision holding that the non-statutory labor exemption from the antitrust laws in this case continues beyond expiration of the collective bargaining agreement to the point of "impasse" in negotiations for a new agreement is reported at 678 F. Supp. 777 (D. Minn. 1988) and is an addendum to this brief. On June 17, 1988, Judge Doty, in a ruling from the bench, held on plaintiffs' motion for partial summary judgment that the parties were at an impasse and that the labor exemption from the antitrust laws no longer continued. This ruling was not reported, and appears at Defendants' Appendix E.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1292(b).*/ Defendants' petition for permission to appeal was granted by order dated February 24, 1989. At the Court's direction, this brief is due April 3, 1989.

---

*/ The District Court has original jurisdiction of the action pursuant to 28 U.S.C. § 1331.

Statement of The Issue

Whether, and to what extent, the labor exemption from the antitrust laws protects defendants from antitrust liability after the expiration of a collective bargaining agreement and during a continuing labor dispute that has not yet been resolved by a new collective bargaining agreement.

Apposite cases include:

Amalgamated Meat Cutters v. Wetterau Foods, Inc., 597 F.2d 133 (8th Cir. 1979)

Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975)

Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council, 675 F.2d 881 (7th Cir.), cert. denied, 459 U.S. 860 (1982)

Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987)

Apposite statutes include:

National Labor Relations Act, 29 U.S.C. §§ 151-197 (1982 & Supp. 1986)

Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982 & Supp. 1986)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARVIN POWELL, et al.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	89-5091MN
	)	
NATIONAL FOOTBALL LEAGUE, et al.,	)	
	)	
Defendants-Appellants.	)	
	)	

On Interlocutory Appeal From The United States
District Court For The District Of Minnesota

BRIEF OF DEFENDANTS-APPELLANTS NATIONAL FOOTBALL LEAGUE AND TWENTY-EIGHT NFL MEMBER CLUBS

STATEMENT OF THE CASE

From 1977 until 1987, the employment terms of all players in the NFL were determined under two collective bargaining agreements between the plaintiff NFL Players Association ("Union") and the multi-employer bargaining representative of the 28 NFL clubs, the NFL Management Council ("Management Council"). After the pertinent provisions of the second of these agreements expired in August 1987, the clubs maintained the existing employment terms as the status quo until February 1, 1989, while continuing efforts to bargain a new agreement. At that time, in accord with the labor laws, the clubs implemented modified employment terms.

The employment terms initially challenged in this suit -- the "First Refusal/Compensation" provisions -- were first developed by the plaintiff Union and the NFL clubs in their 1977 Collective Bargaining Agreement, executed shortly after this Court's decision in Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977). See Appendix I To Brief Of Defendants-Appellants (hereafter "D. App.") at 181-97. This First Refusal/Compensation system was substantially modified and again incorporated in the successor Agreement executed in 1982.[1/] These systems were a compromise resolution of the Union's interest in "free agency" -- bidding among NFL member clubs for veteran player services -- and the clubs' concern for maintenance of playing field balance and other club interests.

Both the 1977 and 1982 Agreements expressly confirmed that they were "the product of bona fide, arm's-length collective bargaining" (D. App. I at 182 and 201), and the 1982 Agreement was reached at the end of a 57-day strike that the Union described as demonstrating the

---

1/ Under the 1982 Agreement, a club wishing to obtain first refusal and "compensation" rights with respect to one of its veteran free agents was required to make him a contract offer at a specified salary level, depending on the player's seniority. "Compensation," in the form of future draft choices, was provided if the veteran free agent signed with a different club-employer. See Art. XV of the 1982 Agreement, D. App. I at 206-09.

utility of the collective bargaining process in professional sports. D. App. I at 223.

In 1987, after intermittent negotiations on a successor collective bargaining agreement, the plaintiff Union and the Managment Council differed sharply on a number of matters. D. App. J at 258-86. In September 1987, the Union went on strike over veteran player "free agency" issues and other subjects. D. App. J at 286-89. The strike thereafter collapsed in mid-October 1987 without producing a new agreement, and the Union simultaneously commenced this antitrust suit. D. App. B.

In late November 1987, the Union moved for a preliminary injunction to bar the NFL clubs, as members of a multi-employer bargaining unit, from continuing to abide by the terms of the 1982 Agreement on veteran "free agent" salaries and movement among clubs. D. App. A at 2. The District Court, while not then finding a bargaining impasse, held that, after expiration of a bargaining agreement, the labor exemption from the antitrust laws terminates on a mandatory subject of bargaining only when employers and a union reach an "impasse as to that issue . . .." Powell v. National Football League, 678 F. Supp. 777, 788 (D. Minn. 1988) (emphasis in original) (hereafter "Powell I"). This opinion appears as the addendum to this brief.

In June 1988, Judge Doty found that the parties had by then reached an impasse in their bargaining on the "free agency" issue. D. App. E at 120-29. In mid-July 1988, the District Court denied plaintiffs' renewed motion for a preliminary injunction. The Court recognized that the parties' impasse was an entirely lawful phase of collective bargaining and ruled that the impasse was, by definition, a labor dispute under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982 & Supp. 1986). Accordingly, the District Court held that it lacked jurisdiction to grant injunctive relief. Powell v. National Football League, 690 F. Supp. 812, 815 (D. Minn. 1988) (D. App. F) (hereafter "Powell II").

Judge Doty also found that this suit was distinguishable from Mackey because in Mackey, unlike here, the challenged "player restraints . . . had been imposed by the NFL outside the collective bargaining context before the players had even unionized, and the restraint had 'remained unchanged since it was unilaterally promulgated . . ..'" Id. at 815 n.7 (quoting Mackey). As demonstrated below, this suit is fundamentally different from Mackey in numerous other respects as well.

The District Court, however, erred in holding that the antitrust laws apply to purely labor market "restraints" occurring in the context of mandatory collective bargaining. Because the District Court's decision involved solely a question of law, the decision is subject to de novo review.

E.g., Adams v. Board of Governors of the Federal Reserve Bd., 855 F.2d 1336, 1341 (8th Cir. 1988).

Defendants submit that the Federal labor laws exclusively control where, as here, the challenged "restraint" relates to a mandatory subject of collective bargaining, the "restraint" has been developed and implemented through the lawful observance of the collective bargaining process, the employees are represented by a union vested with collective bargaining authority, and the "restraint" affects only a labor market involving the parties to the collective bargaining relationship. In these circumstances, recourse to the Sherman Act by one of the bargaining parties is inherently incompatible with the purposes and operation of the Federal labor laws, and the Sherman Act therefore has no application to this dispute.

Accordingly, defendants respectfully submit that this Court should vacate the January 29, 1988, order of the District Court and direct that judgment be entered in favor of defendants on the relevant counts (I, II, and VIII) of plaintiffs' amended complaint. D. App. C at 75-79, 90-91.

STATEMENT OF FACTS

A. The Veteran Player Employment Terms Established By The 1977 And 1982 Collective Bargaining Agreements

The 1977 Collective Bargaining Agreement, including the First Refusal/Compensation system, was incorporated in a court-approved settlement of an antitrust class action that

ended five years of NFL labor-management strife. See Alexander v. National Football League, 1977-2 Trade Cas. (CCH) ¶61,730 (D. Minn. 1977), aff'd sub nom., Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978). In affirming the settlement, this Court observed that it was a "near certainty" that the 1977 Agreement was exempt from the antitrust laws under the labor exemption and that "the subject of player movement restrictions is a proper one for resolution in the collective bargaining context." Reynolds, 584 F.2d at 288-89.

In the 1982 Agreement, the Union and the Management Council substantially modified the First Refusal/Compensation system based upon the experience of the preceding five years. The Agreement thus established escalating minimum salaries for veteran players according to seniority, and it raised minimum salary offers required for "free agents" under the system. Art. XX, Sec. 1, D. App. I at 212; Art. XV, D. App. I at 206-09. It was also agreed that, while salaries above the minimums would be negotiated on a player-by-player basis, the Union and the Management Council would play an ongoing central role in all such salary negotiations by representing the players and clubs, respectively, in their dealings. Art. XXII, Sec. 2, D. App. I at 212. In doing so, the parties confirmed that the negotiation of veteran player salaries under the First Refusal/Compensation system was a form of collective wage negotiation, in which both the Union and the

Management Council were exercising their bargaining authority under the labor laws.[2/] Absent agreement on such a unique system tailored to the conditions of professional football, the salaries and other terms of player employment would have to be determined on a common basis, and individual negotiations between players and clubs would not be permitted. See J. I. Case Co. v. NLRB, 321 U.S. 332, 337-38 (1944).

B. The Labor Dispute In 1987: Events After Expiration Of The 1982 Agreement

After the 1982 Agreement expired in August 1987 (with exceptions not relevant here), the defendant clubs maintained the status quo on all mandatory subjects of bargaining covered by the Agreement, including the First Refusal/Compensation system. In doing so, the clubs' conduct was required by the labor laws and entirely lawful under those laws. Powell I, 678 F. Supp. at 784-85.

In collective bargaining in 1987, the Union insisted that the salaries of veteran "free agent" players should be negotiated under new conditions that would guarantee virtually unrestricted competitive bidding among NFL clubs. D. App. J at 274-75, 287-88. When negotiations failed to yield

---

2/ The "collective" negotiation of player salaries as set forth in the 1982 Agreement thus confirmed that the Union had the "exclusive right to represent all players in its bargaining unit in negotiations with NFL clubs" for regular season salaries and related payments. See Art. XII, Sec. 1, D. App. I at 205.

unfettered "freedom of movement," the Union initiated its strike -- evidently persuaded that, as in 1982, a strike would force collective bargaining concessions from management.

After several weeks of the strike, there were intensive pressures from Union representatives and other players for changes in the Union's bargaining position. D. App. M at 348. Thereafter, the Union publicly acknowledged that, "[f]or the first time, real bargaining is going on . . .." D. App. W at 699.[3/] However, following a Union meeting, the strike came to an end in the following week. The Union simultaneously filed this action, with its President (Mr. Powell) and eight other present or former Union officials joining as plaintiffs. D. App. B.[4/] Since then, the Union, through a series of motions for injunctive relief under the Sherman Act, has committed itself to antitrust litigation rather than collective bargaining.

3/ The Union ultimately abandoned its demand for total free agency and presented a proposal that suggested a basis for possible agreement on the First Refusal/Compensation system with "only two changes." D. App. T at 573.

4/ Earlier in October 1987, a similar antitrust suit had been commenced by the players union in the National Basketball Association. See Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987). There, the court held that the labor exemption does not end immediately upon expiration of a collective bargaining agreement, but fashioned an endpoint different from that adopted by the District Court in this case. Id. at 965-67. That suit has since been settled in conjunction with a new collective bargaining agreement.

However, the Union has not at any time charged, under the labor laws or otherwise, that the defendant clubs have failed to engage in good-faith bargaining on the "free agency" or any other issue. It is thus undisputed that the clubs have at all relevant times fully satisfied their labor law obligation of good-faith collective bargaining.

In addition, neither the Union's complaint, nor its amended complaint, nor its submission in support of its initial preliminary injunction motion contended that the parties were at an impasse in collective bargaining. Instead, the Union's initial position was, as stated in Count VIII of its amended complaint (D. App. C at 90-91), that the labor exemption ended as soon as the 1982 Agreement ended. Then, after the decision in Bridgeman v. National Baketball Ass'n, supra, the Union argued that the labor exemption ended when the Union made it "unequivocally clear" that it would no longer agree to the challenged employment terms -- urging that this point may have been passed as early as April 1987, four months before expiration of the 1982 Agreement, when the Union presented its opening 1987 bargaining demands to the Management Council. Powell I, 678 F. Supp. at 786 n.17.

As noted, in late January 1988, the District Court concluded that the antitrust laws would apply to the parties' labor dispute if it could be demonstrated that the parties "have, in fact, reached impasse as to the free agency issues . . .." Powell I, 678 F. Supp. at 789. Noting

substantial indications that the parties were not then at an impasse, id. at 788-89 n.20, the District Court stated that it could not decide the impasse issue because the defendant clubs had previously filed an unfair labor practice charge with the National Labor Relations Board ("NLRB"). In that charge, the clubs alleged that the Union had generally failed to bargain in good faith, and "a finding of good faith must be made as a precondition to determining impasse . . .." Id. at 789.

This decision in effect instructed the Union that it had to create an impasse before its antitrust threat could have real substance. On the first business day after the District Court's decision, the Union -- for the first time -- advised defendants of its newfound belief that the parties had indeed reached impasse on the "free agency" issue, though the Union did not say when an impasse had supposedly been reached. D. App. U at 594. Thereafter, in defending against the NFL clubs' refusal-to-bargain charge filed with the NLRB, the Union asserted that an impasse had occurred in October 1987 and that this impasse had continued into 1988. In April 1988, the NLRB General Counsel, on the basis of a staff analysis, concluded that a refusal-to-bargain charge should not be issued against the Union because the parties had reached an

impasse on the "free agency" issue just before the Union ended its strike in mid-October 1987. D. App. S at 547-68.[5/]

Plaintiffs then renewed their motion for a preliminary injunction, contending that this decision of the General Counsel should be accepted by the District Court on a motion for summary judgment as dispositive of the impasse issue. Defendants opposed this motion, contending, among other things, that there were sharply disputed fact issues concerning whether the asserted impasse was merely a contrived Union refusal to negotiate, motivated by Union efforts to produce the jurisdictional "impasse" required by the District Court's January 1988 ruling. While the District Court granted plaintiffs' motion for summary judgment on June 17, 1988, it held only that the parties had reached an impasse on the free agency issue as of that date. D. App. E at 120-29.

C. The Labor Dispute In 1988-1989: Management's Proposals And A New "Free Agency" System

In the fall of 1988, the Management Council presented two new, alternative collective bargaining proposals

---

5/ As is customary with such prosecutorial judgments, this decision was not based on any hearing record and was not an adjudication in any respect. See NLRB v. United Food & Commercial Workers, 108 S. Ct. 413, 422-23 (1987); see also Local 4, International Brotherhood of Electrical Workers v. Radio Thirteen-Eighty, Inc., 334 F. Supp. 242, 249 (E.D. Mo. 1971) (Webster, J.), (failure of the NLRB to issue an unfair labor practice complaint does not resolve a collateral court issue on the merits), modified on other grounds, 469 F.2d 610 (8th Cir. 1972).

to the Union. The first provided substantially improved benefits in a number of areas and a "free agency" system modeled after the 1982 Agreement, but with substantially revised criteria that would foster player movement among clubs. The second proposal provided for lower levels of benefits and an entirely new approach to the free agency issue that, if adopted, would make several hundred players unconditional free agents every year. It also applied the liberalized system of the first proposal to an additional number of conditional free agents each year. In mid-December 1988, the Union presented a "counterproposal" that was evidently designed to continue the "impasse" for litigation purposes. Three days later, the Union filed its third renewed motion for a preliminary injunction.

Given the District Court's finding of an impasse and the continued stalemate in negotiations, the defendant clubs had become entitled under the labor laws to implement new salary and employment terms consistent with their collective bargaining proposals to the Union. Powell I, 678 F. Supp. at 784-86. Exercising these labor law rights, the clubs, after some further modification of their November 1988 proposals, implemented a new "free agency" system effective February 1, 1989.[6/]

6/ Under this system, each of the NFL clubs must release for (footnote cont'd)

In urging the District Court to enjoin defendants' adherence to these revised employment terms, plaintiffs expressly conceded that defendants' implementation of these terms was entirely lawful under the labor laws. D. App. V at 597. In an order issued on March 24, 1989, the District Court denied plaintiffs' renewed motion for a preliminary injunction to enjoin this new system, or any other system, reaffirming its July 1988 conclusion that the present controversy constitutes a labor dispute under the Norris-LaGuardia Act. D. App. H at 166-72.

SUMMARY OF ARGUMENT

Plaintiffs cannot pursue antitrust claims with respect to either (i) the collectively-bargained First Refusal/Compensation terms that defendants maintained as the status quo after the expiration of the 1982 Agreement in August 1987 or (ii) the new and modified "free agency" terms implemented by defendants in the lawful exercise of their labor law rights as of February 1, 1989.

(footnote cont'd)

unqualified free agency -- and competitive bidding -- all but 37 of the approximately 60 players annually under contract to the average club. Thus, under this feature, more than one-third of all NFL players (i.e., some 600 out of some 1,600) will become unqualified free agents each year. The system described by the District Court in its March 24 opinion (D. App. H) was similar in principal terms to that subsequently offered to and rejected by the Union and later implemented.

These employment terms do not become subject to the antitrust laws simply because the parties' most recent bargaining agreement has expired and a new agreement has not yet been reached. Under the labor laws, employers are obligated after expiration of a bargaining agreement to continue to adhere to existing employment terms, at least until they reach an impasse in their bargaining, and they are entitled after impasse to implement substitute employment terms. There is no basis for subjecting defendants' conduct that was required or authorized by the labor laws to treble damage sanctions under the antitrust laws.

As shown in Part I.A., infra, pp. 19-31, the Sherman Act does not apply to disputes over employment restraints lawfully established as part of the collective bargaining process unless they restrict business competition in a product market. This is so whether or not there is an impasse in collective bargaining. The courts have never applied the antitrust laws to the labor market effects of employment terms lawfully established under the labor laws through the collective bargaining process, such as the terms challenged here.

The Court below properly held that it lacked jurisdiction to enter an injunction in this suit because the suit involves a labor dispute and injunctive relief would subvert the bargaining process. In holding that it nevertheless had jurisdiction to issue a judgment for treble

damages, the District Court attempted a distinction between its injunctive and damages jurisdiction that has no substance: Collective bargaining cannot operate as prescribed in the labor laws if treble damage penalties are superimposed on the bargaining process. In the present labor dispute, both injunctive relief and treble damage claims are foreclosed by the labor laws.

As shown in Part I.B., infra, pp. 31-42, under the labor laws, the Federal courts are not to intervene in the substance of labor disputes, whether before or after the parties have reached an impasse in collective bargaining. The National Labor Relations Act guarantees freedom of contract and permits the courts only to oversee the procedures and process of collective bargaining, leaving the substantive terms of the employer-employee relationship to the relative bargaining strength of the parties. These considerations are particularly compelling here: "The [NFL union and employer] parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts." Mackey, 543 F.2d at 623.

To subject the challenged labor market "restraints" to review under antitrust standards would subvert the federal labor laws by (i) destroying the freedom of contract that is an essential element of collective bargaining; (ii) coercing employers into making concessions on mandatory subjects of

bargaining in violation of a specific provision of the labor laws that entitles parties to decline to make such concessions (29 U.S.C. § 158(d) (1982)); and (iii) subjecting to antitrust scrutiny all sanctioned collective bargaining conduct by multi-employer units that "restrains" salary competition in labor markets, either through wage scales or other limitations on competition for the services of employees.

As shown in Part II, infra, pp. 42-49, the District Court's use of the single-issue "impasse" standard treats a lawful stage of the collective bargaining process as misconduct by defendants. The standard is directly in conflict with Federal labor laws that establish the collective bargaining process as the method for resolution of labor disputes. Under the "impasse" standard, the antitrust laws are inapplicable to labor disputes only for a limited period beyond expiration of a bargaining agreement when employers are obligated by the labor laws to abide by pre-existing employment terms. But that obligation ends at impasse, and the Court's standard then makes the antitrust laws immediately applicable to employer conduct that is authorized by, and entirely lawful under, the labor laws. The standard thus effectively deprives the defendant employers of basic labor law rights.

After impasse, the labor laws continue to govern all aspects of the parties' relationship, and the labor law rights of employers expand in various respects when an impasse is

reached. Under the District Court's ruling, however, instead of expanding at impasse, the labor law rights of employers can only be exercised at the risk of severe antitrust treble damage penalties. As a result, the impasse test obviously motivates unions seeking antitrust leverage not to engage in collective bargaining since the existence of an "impasse" enables them to assert treble damage claims as in this case.

The District Court erred in holding that the labor exemption from the antitrust laws terminates on a mandatory subject of bargaining when an employer and union reach an impasse as to that issue, and this Court should vacate the District Court's January 29, 1988, order and direct that judgment be entered for defendants on the relevant counts of plaintiffs' amended complaint.

ARGUMENT

I. THE ANTITRUST LAWS DO NOT APPLY TO DEFENDANTS' LAWFUL CONDUCT UNDER THE LABOR LAWS IN RESPECT OF A MANDATORY SUBJECT OF COLLECTIVE BARGAINING

The labor exemption question presented on this appeal is a narrow one: whether the Federal labor laws exclusively control and the Sherman Act has no application where, as here, a challenged "restraint" relates to a mandatory subject of collective bargaining, the "restraint" has been developed and implemented through the lawful observance of the collective bargaining process, the affected employees continue to be represented by a union vested with

collective bargaining authority under the labor laws, and the "restraint" affects only a labor market involving the parties to the collective bargaining relationship. Defendants submit that numerous decisions demonstrate that the antitrust laws do not apply in such circumstances.

Defendants do not assert a claim of broad or absolute immunity from the Sherman Act for labor market restraints. First, defendants recognize that agreements among competing employers to impose salary or other restraints in labor markets may be subject to the Sherman Act when they are imposed outside of the collective bargaining process and without regard to the labor laws. This Court noted such decisions in Mackey, 543 F.2d at 617-18. But such decisions turn on the fact that the restraint involved in those cases was not developed in the collective bargaining process and the employment relationship in those cases was not controlled by the labor laws. Second, defendants recognize that the antitrust laws may apply to collectively-bargained restraints when such agreements directly restrict business competition in product markets. E.g., Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975) (discussed in Mackey, 543 F.2d at 614 nn.12-13). But those decisions expressly recognize that the product market effects are the essential predicate for applying the antitrust laws, 421 U.S. at 622, and the

employment terms challenged in the present case do not impose any such product market restraint.

A. The Sherman Act Does Not Apply To "Restraints" Lawfully Established Under The Labor Laws That Affect Only The Parties' Labor Market

The "restraints" challenged here were developed either by union-management agreement in collective bargaining or by management action authorized by the labor laws during the course of collective bargaining. Plaintiffs conceded in the District Court that the "restraint" affects only the parties to the bargaining relationship. Powell I, 678 F. Supp. at 784. The District Court also recognized that the challenged "restraint" is designed to promote the entertainment value of the clubs' professional football product. Powell II (D. App. F), 690 F. Supp. at 816, 818. But as a collectively-bargained salary structure (see pp. 5-7 supra), it is similar to any wage or salary provision established through multi-employer collective bargaining in any industry. In analogous circumstances, this Court and other courts have held that the antitrust laws do not apply to employer conduct affecting only employment terms or conditions and having no impact on business competition in product markets.

The antitrust laws are principally designed to protect and promote competition in the marketing of goods and services in business or product markets, not to regulate labor disputes or collective bargaining matters. As a leading

commentator has put it, "[n]o one seriously suggests that antitrust policy should be concerned with the labor market per se." Cox, Labor and the Antitrust Laws -- A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 254 (1955).

The Supreme Court has often recognized that disputes over employment terms and conditions are not the central focus of the Sherman Act. Recently, for example, in holding that a union did not have standing to assert antitrust claims against a multi-employer bargaining association with which it had a collective bargaining relationship, the Court stated that Congress has developed "a separate body of labor laws specifically designed to protect and encourage the organizational and representational activities of labor unions." Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 539-40 (1983). Under these laws, a union (and the employees it represents) "will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains." Id.

Earlier, in Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), the Court stated that the antitrust laws were limited to "the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . .." Id. at 493. At the same time, labor market

restraints that restrict competition in the setting of wages or other employment terms are not a central concern of the Sherman Act. Id. at 512-13. Equally important, the labor laws and "the congressional policy favoring collective bargaining" have required that the courts recognize the non-statutory labor exemption. Connell Construction, 421 U.S. at 622; see also Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council, 675 F.2d 881, 890 (7th Cir.), cert. denied, 459 U.S. 860 (1982).

This Court addressed such an exemption issue in Amalgamated Meat Cutters v. Wetterau Foods, Inc., 597 F.2d 133 (8th Cir. 1979), where employer agreements in response to a strike had caused the plaintiffs to be denied employment. After first determining that the challenged employer conduct was lawful under the labor laws, id. at 135, the Court affirmed the dismissal of plaintiffs' treble damage claim.

> Since any injury to [plaintiffs] would flow naturally from the replacement of striking workers, which conduct federal labor policy sanctions, see [NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938)] the agreement . . . cannot constitute a violation of the antitrust law . . .. [A]ny restraint of trade or commerce in this case directly follows from the sanctioned conduct. The agreement had no anticompetitive effect unrelated to the collective bargaining negotiations.

Id. at 136.

Other courts of appeals have also recognized that labor market restraints imposed in a collective bargaining context do not raise Sherman Act issues. Thus, in affirming the dismissal of a suit for damages claiming that joint

employer conduct to resist union demands violated the Sherman Act, the Fifth Circuit found that the challenged conduct related solely to conditions of employment and had no effect on any product market. Prepmore Apparel, Inc. v. Amalgamated Clothing Workers, 431 F.2d 1004 (5th Cir. 1970), cert. dismissed, 404 U.S. 801 (1971).

Similarly, the Seventh Circuit, after a comprehensive review of both the statutory and nonstatutory labor exemptions, has held that "a complaint must allege conduct operating as a direct restraint upon the business market in order to avoid application of the nonstatutory exemption . . .." Will County Carpenters, 675 F.2d at 893. The Court further observed that the purpose of this exemption is to protect "the collective bargaining process commanded by the labor laws." Id. at 886 n.14 (emphasis in original). There, following the expiration of a collective bargaining agreement, several plaintiff-employers challenged an agreement between the union and two employers to pay a higher wage scale to their employees. Plaintiffs contended that this agreement "undercut [their] bargaining position . . . [and] forc[ed] them to pay a retroactive wage equal in amount to that" agreed upon by the union and the two employers. 675 F.2d at 883. In holding that the complaint failed to state an antitrust claim, the Seventh Circuit found that the challenged agreement

resulted only in "the elimination of wage competition" and was therefore covered by the labor exemption. 675 F.2d at 889.[7/]

The Second Circuit has also held that concerted employer conduct designed to increase employer bargaining power is not subject to the Sherman Act. Kennedy v. Long Island R.R. Co., 319 F.2d 366, 373 (2d Cir.), cert. denied, 375 U.S. 830 (1963). There the court noted that "it cannot be said that the instant form of railroad cooperation in combating the risks of labor unrest effects an unnatural and antitcompetitve regulation of pricing, supply, or distribution of goods or services. . .."

7/ See also California State Council of Carpenters v. Associated General Contractors of California, Inc., 648 F.2d 527, 544 (9th Cir. 1980), rev'd on other grounds, 459 U.S. 519 (1983) ("an employer agreement falls within the prohibitions of the Sherman Act only if it has an anticompetitive purpose or effect on some aspect of competition other than competition over wages or working conditions"); Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 514 (3d Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980) ("[r]estraints operating on that primary [i.e., labor] market are presumptively outside the scope of the Sherman Act"); Armco Steel Corp. v. United Mine Workers, 505 F.2d 1129, 1134 (4th Cir. 1974) (no evidence that illegal strike "operated to restrain commercial competition in some substantial way"), cert. denied, 423 U.S. 877 (1975); Newspaper Driver's & Handler's v. NLRB, 404 F.2d 1159, 1163 (6th Cir. 1968) ("newspapers' collaboration in their own defense" not unlawful restraint of trade), cert. denied, 395 U.S. 923 (1969); Plumbers & Steamfitters v. Morris, 511 F. Supp. 1298, 1306-07, 1311-12 (E.D. Wash. 1981) (dismissing union challenge to concerted employer action as not having effects that "Congress prohibited by enacting the Sherman Act"); Amalgamated Clothing Workers v. J.P. Stevens, 475 F. Supp. 482, 488-91 (S.D.N.Y. 1979) (restraint upon commercial competition "an essential element of an antitrust claim"), vacated as moot, 638 F.2d 7 (2d Cir. 1980).

The significance of the labor laws to the labor-antitrust accommodation is also made clear in a recent decision that rejected an antitrust challenge to collectively-bargained player restraints in professional basketball. See Wood v. National Basketball Ass'n, 809 F.2d 954, 962-63 (2d Cir. 1987). Like the Seventh Circuit in Will County Carpenters, the Second Circuit sharply distinguished the basketball labor market issue from the issue presented in cases involving restraints that directly limit business competition in product markets, such as Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965). The Second Circuit regarded Jewel Tea and similar cases as essentially irrelevant when a practice only affects the labor market: "[T]hese cases are so clearly distinguishable that they need not detain us. Each of the decisions involved injuries to employers who asserted that they were being excluded from competition in the product market." Wood, 809 F.2d at 963 (emphasis in original).

In addition, while Wood involved an operative bargaining agreement, the Second Circuit's analysis accorded controlling significance to other labor law and collective bargaining considerations: The "collective bargaining relationship" between the NBA employers and the union; the statutory function of the union as the exclusive bargaining representative of the employees in the bargaining unit; and the Federal labor policy promoting freedom of contract in

collective bargaining. 809 F.2d at 959-61 (emphasis added).[8/] As discussed below, these considerations are decisive in the present case because the collective bargaining process as mandated by the labor laws will necessarily be subverted if employment terms established through the lawful observance of that process and affecting only the bargaining parties can be challenged under the antitrust laws.

While the labor exemption is not unqualified or absolute, the limitations on its scope have been defined in two situations not presented here -- namely, (1) employment restraints imposed by employers without regard to the labor laws and entirely outside of an employer-union bargaining relationship and (2) collectively-bargained employment terms that also directly restrain competition in a product market. The first type of issue was presented in Mackey where, as Judge Doty has noted, "the challenged system of player restraints (the Rozelle Rule) had been imposed by the NFL outside the collective bargaining context before the players had been unionized," and this Court had found that the

---

8/ As noted in Wood, 809 F.2d at 958 n.1, the author of the Second Circuit's opinion, Judge Winter, had earlier published an oft-cited article analyzing the application of labor-antitrust principles to employment practices in professional sports. Jacobs & Winter, Antitrust Principles and Collective Bargaining By Athletes: Of Superstars In Peonage, 81 Yale L.J. 1 (1971).

restraint "'remained unchanged since it was unilaterally promulgated by the clubs . . ..'" Powell II (D. App. F), 690 F. Supp. at 815 n.7.[9/]

Similarly, every sports league case relied upon by plaintiffs in the court below involved restraints developed solely by management outside of a collective bargaining relationship and without regard to the labor laws.[10/] Unlike the practices challenged in the cited cases, the First Refusal/Compensation system that forms the basis of this action has twice been set forth in collective bargaining agreements negotiated in good faith and at arm's length; it has been an integral part of comprehensive bargaining agreements resolving a wide range of diverse issues; it has been a quid pro quo for other major features of the agreements benefiting the union and the represented employees; and it has

---

9/ Decisions involving restraints imposed outside of the collective bargaining process make clear that, if the same restraints had been imposed pursuant to collective bargaining, they would have been protected by the labor exemption. See Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 335-37 (7th Cir. 1967); Cordova v. Bache & Co., 321 F. Supp. 600, 606-07 (S.D.N.Y. 1970) (cited in Mackey, 543 F.2d at 617).

10/ See, e.g., Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974) aff'd on other grounds, 586 F.2d 644 (9th Cir. 1978), cert. denied, 441 U.S. 907 (1979); Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261 (D. Mass.), remanded on other grounds, 472 F.2d 127 (1st Cir. 1972).

been negotiated in exchange for major financial guarantees given by management in order to conclude an agreement (after a lengthy strike).

The second type of issue has been presented in a number of cases where collectively-bargained rules have imposed a "direct restraint on the business market [with] substantial anticompetitive effects" in such a market. Connell Construction, 421 U.S. at 625-26; see also United Mine Workers v. Pennington, 381 U.S. 657 (1965); Mackey, 543 F.2d at 613-14; Richards v. Neilsen Freight Lines, 810 F.2d 898, 905 (9th Cir. 1987). Because these cases involved restraints having both labor market and product market effects, they presented difficult problems of reconciling the labor laws and the antitrust laws that are not presented here.

As Wetterau, Will County Carpenters, and other cases demonstrate, a collective bargaining agreement is not always essential to a finding that employment terms are within the labor exemption. See also Jacobs and Winter, 81 Yale L.J. at 14. In Mackey, this Court made this clear in expressly reserving a decision as to the scope of the labor exemption after expiration of a bargaining agreement. 543 F.2d at 616 n.18.[11/] Different considerations are controlling in

---

11/ In Mackey itself, factors other than the existence or non-existence of an agreement were accorded considerable weight in the labor-antitrust inquiry. See 543 F.2d at 615-16.

determining the scope of the labor exemption once collective bargaining is established and the labor laws govern the parties' relationship.

Since at least 1977, collective bargaining has been firmly established in the NFL with respect to all mandatory subjects of bargaining, and labor law considerations therefore now control the labor exemption analysis. As in other industries, collective bargaining in the NFL necessarily involves a series of interrelated issues that must be resolved within a single comprehensive bargaining framework. See, e.g., Wood, 809 F.2d at 961 (collective bargaining involves a "unique bundle of compromises"). The 1982 Agreement confirms this in numerous respects.[12/] Given the complex mix of issues to be resolved in collective bargaining, the isolation of a single, central issue, such as veteran "free agency," for resolution in antitrust litigation will seriously distort the bargaining process.

Equally important, if, as the District Court has done in this case, the labor exemption is arbitrarily limited

---

12/ For example, the Agreement acknowledges that the veteran "free agency" provisions were an essential quid pro quo for other financial benefits. Art. XXXVIII, Sec. 3, D. App. I at 216. As another example, the NFL clubs guaranteed that they would pay or incur total player costs in the amount of $1.28 billion for the final four seasons of the agreement. Appendix G, D. App. I at 220. Thus, whether or not particular provisions operated as anticipated, annual payments to players in excess of $300 million were guaranteed for each of these four seasons.

to protect some lawful phases of the collective bargaining process but not others, union-management relations in professional sports will become chronically fractious and unstable. Through two rounds of negotiations -- in 1977 and 1982 -- the collective bargaining relationship in the NFL expanded and matured. The parties' comprehensive agreements confirm this, and the Union itself recognized this reality in touting the benefits it achieved in the 1982 Agreement. D. App. I at 223. Now, with the prosecution of this antitrust suit, the parties have had to operate for two full seasons without a new bargaining agreement. Unless the collective bargaining process is protected from antitrust review for its duration, the disruptive effects of antitrust litigation on that process will be promoted and experienced on a recurring basis, and the courts will become pawns in labor-management struggles.

In holding that the labor exemption expires with an impasse on a single issue, the District Court acknowledged the lack of authority for its conclusion. Powell I, 678 F. Supp. at 783, 788. In so holding, the District Court evidently did not anticipate that the impasse standard would have a sharply negative impact on the bargaining process. But the District Court's adoption of the standard led the Union -- on the next business day -- to declare for the first time that the parties were at an impasse on the "free agency" issue. D. App. U at 594. When treated as a prerequisite to antitrust

jurisdiction, impasse will motivate union plaintiffs to eschew further serious bargaining.

Perhaps because no collective bargaining had occurred in the wake of its initial decision, the District Court's subsequent opinion recognized that "the pendency of an antitrust suit will undoubtedly have some effect on bargaining" and that the "threat posed by . . . an antitrust suit -- including the potential of treble damage liability -- will surely inspire the owners to consider greater compromise." Powell II (D. App. F), 690 F. Supp. at 817 n.10. The coercive effects of treble damage litigation are severe and punitive. See, e.g., Clark Oil Co. v. Phillips Petroleum, 148 F.2d 580, 582 (8th Cir.), cert. denied, 326 U.S. 734 (1945). Moreover, Judge Doty recognized in his second opinion that courts should not "align" themselves in labor disputes and that "it would be highly destructive to collective bargaining if major issues could be removed from the bargaining table and preliminarily resolved in isolation in antitrust litigation." Powell II (D. App. F), 690 F. Supp. at 817. On this basis the District Court refused to issue injunctive relief. The integrity of the collective bargaining process can be preserved only if treble damages jurisdiction is similarly foreclosed. See Berry & Gould, A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes, 31 Case W. Res. L. Rev. 685, 774 (1981).

As the authorities demonstrate, however, there is no principled basis for a union and the employees it represents to have it both ways -- full-fledged labor law rights and full-reserved antitrust rights if collective bargaining does not promptly produce employment terms to their liking. As the Supreme Court has put it, "a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains." Associated General Contractors, 459 U.S. at 539-40.

B. Fundamental Labor Law Principles Foreclose Application Of The Antitrust Laws To The Present Labor Dispute

The Federal labor laws establish the collective bargaining process as the exclusive mechanism for the resolution of labor disputes. Under the National Labor Relations Act, when employees are represented by a union, employers are obligated to bargain in good faith with the union in an effort to agree on "wages, hours and other terms and conditions of employment[,]" the so-called "mandatory subjects of collective bargaining." See 29 U.S.C. §§ 158(a)(5), 158(d), 159(a) (1982); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958); Mackey, 543 F.2d at 615. These labor law provisions rest "on the premise that by pooling their economic strength and acting through a labor organization" employees "have the most effective means"

of securing attractive employment terms. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

The National Labor Relations Act thus explicitly provides that the selected union "shall be the exclusive representative of all the employees in such a unit for the purposes of collective bargaining." 29 U.S.C. § 159(a) (1982). In requiring that employment terms be established exclusively through the collective bargaining process, Congress acted "in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975) (footnote omitted). As a result, "[t]he 'right' to exercise individual bargaining power without restraint . . . is explicitly denied to employees with a bargaining representative validly recognized under the National Labor Relations Act." Jacobs & Winter, 81 Yale L.J. at 6.

Under the labor laws, employees in a unionized business are not entitled to engage in individual salary negotiations except to the extent that the parties' collective bargain may establish such privileges. "The practice and philosophy of collective bargaining looks with suspicion on such individual advantages." J. I. Case, 321 U.S. at 338. To be sure, a collective agreement may "expressly . . . leave certain areas open to individual bargaining. But except as so provided, advantages to

individuals may prove as disruptive of industrial peace as disadvantages." Id. (emphasis added).

A further basic tenet of the collective bargaining process is freedom of contract between unions and employers in the determination of salary and employment terms. Wood, 809 F.2d at 961. This principle presumes that the terms and conditions of employment ultimately established will reflect the relative bargaining power of the parties and their view of the proper balance of their separate interests with respect to a wide range of issues. See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-89 (1960); Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 150 n.11 (1976).

A critical element of the concept of freedom of contract is that government, through the National Labor Relations Board or the courts, may not dictate or influence the substantive terms of labor-management agreements. See Insurance Agents', 361 U.S. at 483-87. As the Supreme Court has put it, "[t]he object of [the NLRA] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions." H. K. Porter v. NLRB, 397 U.S. 99, 103 (1970). See also Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295 (1959).

Equally important, with respect to mandatory subjects, both sides may lawfully insist on adhering to a position; the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession[.]" 29 U.S.C. § 158(d). Both parties may also resort to lawful economic pressures in support of their position on a mandatory subject, with unions having the right to strike and employers having the corresponding right to lock out. See generally American Ship Building Co. v. NLRB, 380 U.S. 300, 309-310 (1965); 29 U.S.C. § 163 (1982).

Plaintiffs' effort to pursue their treble damage claims is plainly contrary to these basic labor law principles.

1. The Labor Laws Guarantee Freedom Of Contract In Collective Bargaining

First, applying the antitrust laws to labor market "restraints" to identify "reasonable" salary structures is inconsistent with the basic labor law principle of freedom of contract. As the Second Circuit emphasized in Wood, in collective bargaining in professional sports "[f]reedom of contract is particularly important:"

> Such bargaining relationships raise numerous problems with little or no precedent in standard industrial relations. As a result, leagues and player unions may reach seemingly unfamiliar or strange agreements. If courts were to intrude and to outlaw such solutions, leagues and their player unions would have to arrange their affairs in a less efficient way. It would also increase the chances of strikes by reducing the number and quality of possible compromises.

809 F.2d at 961.

This freedom of contract principle entitles both unions and employers to propose and pursue their own preferred solutions on mandatory subjects of bargaining and to shape their own agreements on such matters without NLRB -- or judicial -- determination of substantive terms. H. K. Porter, 397 U.S. at 103-04. Needless to say, such agreements may often involve "restraints," such as wage scales that fix uniform salaries, that would not be available to the parties under the antitrust laws. But the antitrust laws do not apply to such employment terms despite their restraining effect on competition for employee services.

The freedom of contract principle applies here with unique force. For one thing, orders of antitrust courts cannot, as a practical matter, finally resolve collective bargaining disputes.[13/] In addition, in Mackey and Reynolds, this Court confirmed that some restrictions on the movement of veteran NFL players may be entirely proper under the antitrust rule of reason, for some such provisions are essential to

---

13/ In such a situation, the threat, or the imposition, of treble damage penalties serves as a bargaining chip useful to one of the parties in altering the balance of bargaining power. Whatever a court might order, however, the disputed salary or employment terms would continue to be a mandatory subject of bargaining. In this case, for example, even if some particular veteran player salary system were found to be "unreasonable," the defendant clubs would be free to propose it in later bargaining, and the Union would be free to agree to it in exchange for other concessions.

maintain a balanced league and a marketable entertainment product. Reynolds v. National Football League, 584 F.2d 280, 287 (8th Cir. 1978); Mackey, 543 F.2d at 623.

But court and jury analysis of collectively-bargained employment terms, or proposed substitute terms, under the rule of reason would present novel and extraordinary issues. If, for example, a union (and its employee constituency) accepted a labor market "restraint" in collective bargaining because management guaranteed a total financial benefits package for a period of years (as in the NFL), does that fact bear on the "reasonableness" of the challenged restraint if it is thereafter maintained as the status quo during a continuing labor dispute? If so, the antitrust inquiry will cover an unusual range of subjects; if not, the inappropriateness of applying the antitrust laws to collective bargaining matters is made plain. Similarly, by what standard will courts and juries measure the "reasonableness" of an employment restraint when the matters presented for resolution as antitrust issues will only cover limited aspects of the overall employer-employee relationship. Mackey, 543 F.2d at 623; see also Wood, 809 F.2d at 961 ("[c]ourts cannot hope to fashion contract terms more efficient than those arrived at by the parties who are to be governed by them"); Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 632 (8th Cir. 1976). In short, if every solution proposed in collective bargaining to resolve a

disputed employment issue must also periodically satisfy the antitrust rule of reason, freedom of contract in collective bargaining in professional sports will effectively be destroyed.

2. The Labor Laws Prohibit Courts From Forcing Concessions In Collective Bargaining

Second, applying the antitrust laws would force concessions from management in violation of Section 8(d) of the NLRA, which expressly provides that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). As Judge Doty recognized, "plaintiffs are seeking to gain through the courts what they could not win at the bargaining table." Powell I, 678 F. Supp. at 781 n.9. The Union set unrestricted "free agency" as its key bargaining goal, and the defendant clubs declined to acquiesce in that demand while fully satisfying their good faith bargaining obligations under the labor laws.

At all relevant times, defendants' conduct with respect to the "free agency" issue has been admittedly lawful under the labor laws. Until February 1, 1989, defendants properly maintained the status quo of the previously-bargained terms. As of that date, defendants lawfully exercised their labor law rights to implement revised "free agency" terms previously proposed to the Union and designed to take into account Union concerns. Plaintiffs conceded in the District

Court that "there really is not very much question that, under the labor laws," the defendant clubs were entitled to revise the "free agency" provisions in this manner. D. App. V at 597.

To hold that plaintiffs can pursue treble damage claims based upon the clubs' decision not to accede to the Union's demand for concessions on the central issue in the parties' relationship would do violence to Section 8(d) of the NLRA. Defendants' rights under Section 8(d) do not depend on the existence of a bargaining agreement. To the contrary, the very purpose of the Section is to assure that Federal law does not "compel agreement when the parties themselves are unable to agree" and to avoid "any official compulsion over the actual terms of the contract." H. K. Porter, 397 U.S. at 108; see also McCourt v. California Sports, Inc., 600 F.2d 1193, 1200 (6th Cir. 1979) (district court's refusal to extend labor exemption to bargained player restraint ignores "the well established principle that nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position"); NL Industries, Inc. v. NLRB, 536 F.2d 786, 790 (8th Cir. 1976) ("[t]he duty to bargain is not a duty to capitulate").

Solely because this Union happens to be dealing with a multi-employer bargaining unit, it is able to frame its request for judicial assistance in terms of Section 1 of the Sherman Act, claiming that the actions of the defendant clubs

in pursuing their labor law rights are an unlawful "conspiracy." This fortuity should not give the Union an escape from its bargaining obligations. Whether defendants happen to be a single or multiple employer bargaining unit, the labor laws and Federal labor policy do not permit the courts to enter the Union's side of this dispute by threatening antitrust sanctions against the clubs.

Such sanctions would tend inevitably to make multi-employer bargaining impracticable, even though it often serves important purposes. NLRB v. Truck Drivers, 353 U.S. 87, 94-96 (1957). In addition, they would curtail multi-employer groups in the exercise of such labor law rights as the right to implement, after impasse, terms of employment offered in good faith during negotiations. Such sanctions would further tend to cause even the most resolute employers to recast their bargaining positions to make concessions that, without court intrusion, they would not have to make. These impacts of such one-sided court intervention are totally inconsistent with the collective bargaining process.

3. The Labor Laws Require The Collective Determination Of Employment Terms

Finally, the "right" asserted by plaintiffs to negotiate their salaries without any restraint on competition among the clubs is a "right" that does not exist under the labor laws. Under those laws, individuals may separately negotiate their wages only on terms established through collective bargaining. J. I. Case, 321 U.S. at 338. As

stated by then professor (now Judge) Winter, efforts by unionized professional athletes to compel competitive bidding for their services under the antitrust laws run directly counter to the labor laws:

> However much legal merit such claims have in the absence of collective bargaining, it is a first principle of the National Labor Relations Act that employees in a bargaining unit lose their "right" to bargain individually when a majority vote to be represented by a union.

Jacobs and Winter, 81 Yale L.J. at 7. In asserting "rights" to negotitate their salaries without restraint, plaintiffs simply ignore this key element of the labor laws.

In the 1977 and 1982 Bargaining Agreements, the Union and the clubs agreed to individual salary negotiations between the players and the clubs on specified terms and conditions (supra, pp. 5-7). A critical part of the consideration for the clubs' agreement to these individual negotiations was that competition between them be regulated so as to preserve playing field balance within the League. The method for satisfying player interests in individual negotiations, on the one hand, and club interests in balanced teams, on the other, was the First Refusal/Compensation system. The Union's refusal to negotiate a modification of these arrangements in 1987 did not, of course, reflect an interest in eliminating the players' opportunity to negotiate their own contracts. Instead, the Union seeks to retain these contractual privileges, but to scuttle through an antitrust

judgment those aspects of the very same contract that protected the legitimate interests of the clubs.

In Wood, the Second Circuit recognized that similar claims were without merit because the premise of the argument, namely, that a labor market restraint "is illegal because it prevents [a player] from achieving his full free market value, is . . . at odds with, and destructive of, federal labor policy." 809 F.2d at 959. As that court put it, such a legal "theory would allow any employee dissatisfied with his salary relative to those of other workers to insist upon individual bargaining, contrary to explicit federal labor policy." Id. at 960.

Even if there were some basis for giving unionized employees the "right" to negotiate their salaries individually and without restraint, to do so would inevitably be disruptive and force the parties to develop other alternatives less well-suited to their needs. A court decree creating such antitrust "rights" in each player would produce free agency over the long term only if the union ceased to exist. For as long as the union exists as a statutory bargaining representative entitled to insist on collective bargaining on mandatory subjects of bargaining, the clubs are entitled to insist, and undoubtedly would insist, that wages be collectively bargained. This, of course, would eliminate the economic incentive to "free agency" that motivates at least certain players to pursue antitrust claims in the first place.

Alternatively, to avoid collective wage determination the union would be forced to negotiate a new agreement preserving individual negotiating "rights" but including some system for maintaining League balance. In that event, in addition to potential treble damages, a major result of judicial intervention would be to alter the balance of bargaining power between the parties. Instead of reaching a new agreement encompassing individual wage determination free of judicial interference, and in the full exercise of the labor law freedom to contract principle, the parties would at some point settle their differences in light of the antitrust result. Eventually, an agreement would be reached, but its terms would reflect the court decree, contrary to fundamental labor law principles.

II. A LAWFUL STALEMATE IN COLLECTIVE BARGAINING ON A MANDATORY SUBJECT PROVIDES NO BASIS FOR APPLYING THE ANTITRUST LAWS TO A LABOR DISPUTE, AT "IMPASSE" OR OTHERWISE

Only two courts have addressed the survival of the labor exemption upon expiration of a collective bargaining agreement, the Court below and the district court in Bridgeman. Although both acknowledged -- indeed, embraced -- the labor law considerations outlined above, they declined to follow them to a principled conclusion that is consistent with the statutory provisions.

In Bridgeman, the court attempted to fashion a standard that respected "[t]he federal labor policy of

encouraging collective bargaining." 675 F. Supp. at 966. Rejecting impasse as the trigger for antitrust scrutiny on the ground that it "is a concept developed to deal with the problems of labor law," the court ruled that the labor exemption survives expiration of a collective bargaining agreement as long as the employer "reasonably believes that the [challenged] practice or a close variant of it will be incorporated in the next collective bargaining agreement." Id. at 967.

Judge Doty rejected this standard because it "does not give proper regard to the strong labor law policy promoting the collective bargaining process." Powell I, 678 F. Supp. at 787. Judge Doty viewed the Bridgeman standard as giving employees who wanted to add the antitrust laws to their bargaining arsenal "every incentive" to eliminate any basis for a reasonable employers' belief that they would ever agree. Id. Thus, Judge Doty concluded that "the Bridgeman standard would subvert the strong federal labor law interest in promoting the collective bargaining process." Id.

Nevertheless, the impasse standard is -- as the bargaining history in this case shows -- equally destructive of collective bargaining. It, too, fails to recognize that the expiration of a collective bargaining agreement does not

bring an end to the labor law obligations and rights of union and management.[14/]

To the contrary, at expiration of an agreement, a comprehensive array of labor law principles govern union and employer conduct. For both sides, there is a continuing obligation to bargain. After impasse, an employer's continued adherence to the status quo is plainly authorized by the labor laws. Such conduct is often conducive to further collective bargaining and to stable, peaceful labor relations. Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 108 S. Ct. 830, 833 n.6. At the same time, once an impasse in bargaining is established, employers become entitled -- if they choose to exercise such rights -- to implement new or different employment terms that are reasonably comprehended within the scope of their pre-impasse proposals. Id. at n.5. Such conduct is, of course, subject to regulation and review under the labor laws. If employers

---

14/ If anything, the impasse standard creates greater disincentives to bargaining than does the Bridgeman standard. It is certain that the Bridgeman court thought so. In Bridgeman, the court noted that it might not be possible to apply its standard until after the parties had "entered a new collective bargaining agreement." 675 F. Supp. at 967. If this were so, the parties would remain obligated under labor law principles to engage in good-faith collective bargaining and to reach a successor agreement before a union would secure the ability to pursue antitrust relief for leverage purposes. In contrast, under the impasse standard, it is in the union's interest to refuse to move from a position previously taken so as to maintain what would otherwise be a temporary hiatus in bargaining.

exceed their labor law rights in implementing employment terms at impasse, the full range of labor law rights and remedies is available to unions.

Given these labor law provisions, there is no basis for using "impasse" as the basis for transferring labor disputes from the province of the labor laws to the antitrust courts under wholly incompatible standards, as the District Court has done here. On such a standard, as soon as the obligations of employers to maintain the status quo come to an end, the antitrust laws immediately become applicable to the employers' continued adherence to collectively-bargained terms -- even though such conduct is entirely lawful under the labor laws. "It would seem the height of unfairness . . . to penalize employers [with Sherman Act penalties] for the discharge of their statutory duty to bargain on wages, hours, and other terms and conditions of employment . . .." Jewel Tea, 381 U.S. at 730 (Goldberg, J., concurring, joined by Justices Harlan and Stewart).

The District Court's impasse test also misconstrues the concept of impasse and assigns it unwarranted legal significance. The Supreme Court has emphasized that impasse is ordinarily a transient point in bargaining and is not even an "unusual circumstance" that entitles a party to withdraw from multi-employer negotiations, stating:

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is

> eventually broken, through either a change of mind or the application of economic force.'

Charles D. Bonanno Linen Service, Inc., 454 U.S. 404, 412 (quoting earlier proceeding in same case, 243 N.L.R.B. 1093, 1093-94).

Accordingly, impasse does not in any way signal the end of prospects for resolving a labor dispute through the collective bargaining process; it signals at most a suspension -- not the termination -- of the duty to bargain in good faith,[15/] and thus is merely one more step in that process. As the NLRB explained in Bonanno Linen:

> Suspension of the [collective bargaining] process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement.

243 N.L.R.B. 1093, 1094 (1979), enf'd, 630 F.2d 25 (1st Cir. 1980), aff'd, 454 U.S. 404 (1982).

Contrary to the Supreme Court's decision in Bonanno Linen, the Court below mistakenly treated impasse as the end of the labor laws' application to the collective bargaining process. The District Court thus described impasse as meaning that the parties have "exhausted the prospects of concluding an agreement" and that "there appears no realistic possibility

---

15/ See Gulf States Mfg., Inc. v. NLRB, 704 F.2d 1390 (5th Cir. 1983); Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23 (1973), enforcement denied, 500 F.2d 181 (5th Cir. 1974).

that continuing discussions concerning the provision at issue would be fruitful." Powell I, 678 F. Supp. at 788. But this is not the meaning of impasse, and clearly does not describe the situation that would obtain in this case absent this antitrust litigation.16/

In addition, the District Court's decision proceeds from the erroneous premise that, upon the reaching of impasse, employers are somehow forbidden by the labor laws to continue to maintain in effect the terms and conditions of an expired agreement. Powell I, 678 F. Supp. at 788. While an employer surely has the right at impasse to implement new terms and conditions, there is nothing in federal labor law or policy that requires the employer to do so.

In transforming a concept that deals with transient events into a jurisdictional prerequisite, the District Court has fashioned an unworkable standard that creates strong disincentives to collective bargaining by unions. Ever since the plaintiff Union here learned the litigation advantages of "impasse" on the present free agency issue, it has resolutely

---

16/ Inexplicably, Judge Doty also noted that impasse is a temporary and recurring step in the negotiating process, representing no more than a "hiatus" in the negotiations, which "'in almost all cases is eventually broken.'" Powell I, 678 F. Supp. at 788 n.19 (quoting Bonanno Linen, 454 U.S. at 412). As the District Court also noted in its opinion on the Norris-LaGuardia Act, "the Court does not agree that the presence of a bargaining impasse signifies the end of a 'labor dispute.'" Powell II (D. App. F), 690 F. Supp. at 815.

refused to bargain meaningfully. The Union has used "impasse" as a basis for pursuing its Sherman Act claims to pressure management to make concessions not required by the labor laws or ordinary economic considerations. Thus, the "impasse" test has not promoted collective bargaining, but has been a major impediment to it.

Because impasse is supposed to be a temporary condition, dating antitrust recoveries from the date of the first "impasse" is inconsistent with the labor law duty to bargain. Having acquired antitrust "rights" by establishing an impasse, plaintiffs cannot very well resume collective bargaining without confirming that their claims are not, in fact, antitrust claims. Thus, as a prerequisite to antitrust jurisdiction, impasse is transformed into a permanent condition to be maintained by the Union. The impasse standard then obviously demolishes any prospect of further good faith negotiations.

Equally important, while the impasse test undermines the statutory obligation of unions to negotiate on mandatory bargaining subjects by rewarding those who do not, it also effectively deprives employers of their rights under the labor laws after negotiations are stalemated. As previously noted, after impasse, employers may apply economic pressure by shutting down or laying off employees, and may implement new or revised employment terms that are reasonably comprehended within its pre-impasse proposals. However, under the District

Court's impasse standard such conduct would be subject to antitrust attack, at least where the "employer" is a multi-employer unit. The standard is, therefore, clearly inconsistent with those established labor law rights.

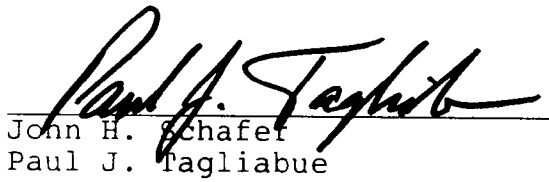
CONCLUSION

The District Court's decision restricts the labor exemption from the antitrust laws in an unwarranted manner that subverts the collective bargaining process. To preserve the integrity of that process, this Court should hold that the Federal labor laws exclusively control and that the Sherman Act has no application where, as here, a challenged "restraint" relates to a mandatory subject of collective bargaining, the "restraint" has been developed and implemented through the lawful observance of the collective bargaining process, the affected employees are represented by a union vested with collective bargaining authority under the labor laws, and the "restraint" affects only a labor market involving the parties to the collective bargaining relationship. Such a ruling is supported by settled labor and antitrust principles and is necessary to permit the collective bargaining process to function as Congress intended.

The District Court's decision holding that the anti-trust laws are applicable in these circumstances is erroneous

as a matter of law. Defendants thus respectfully request this Court to vacate the District Court's order of January 29, 1988, and to direct entry of judgment in defendants' favor on the relevant counts (I, II, and VIII) of plaintiffs' amended complaint.

Respectfully submitted,



John H. Schafer
Paul J. Tagliabue
Jeffrey Pash
Neil K. Roman
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

William T. Egan
Scott K. Goldsmith
RIDER, BENNETT, EGAN & ARUNDEL
2000 Lincoln Center
333 South Seventh Street
Minneapolis, Minnesota 55402
(612) 340-7951

Attorneys for Defendants-Appellants

April 3, 1989

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 1989, I sent by Sonic Air copies of the foregoing Brief of Defendants-Appellants National Football League and Twenty-Eight NFL Member Clubs and the appendix thereto to Carol T. Rieger, Esq., Counsel for Plaintiffs-Appellees, Lindquist & Vennum, 4200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402.

Neil K. Roman