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COLLECTIVE BARGAINING IN THE NATIONAL FOOTBALL LEAGUE: A HISTORICAL AND COMPARATIVE ANALYSIS

C. Peter Goplerud III*

I. INTRODUCTION

Collective bargaining in professional sports is a relatively new concept. It has only been a factor in professional team sports for approximately the last thirty years. During this short time period, a turbulent history ensued with the promise of additional controversy in the future. This article will focus on several aspects of collective bargaining in the National Football League (NFL). First, it will take a historical look at the process within the NFL, analyzing the work stoppages and litigation which have scarred the process over the last three decades. Particular attention will be paid to the interrelationship between labor law and antitrust law in the sports context and its possible demise resulting from the recent Supreme Court ruling in Brown v. Pro Football, Inc.1 Second, this article will draw comparisons to labor relations in the other team sports. Finally, there will be a discussion of the future issues and concerns of the NFL.

II. HISTORY

A. The Early Days

To gain a thorough appreciation of the current issues within the collective bargaining context of the NFL, it is important to understand some history. It is interesting to observe that as this article is being written, the NFL is perhaps the most stable of all professional sports leagues in terms of labor disputes. This is somewhat surprising given the recent history of the league, which will be chronicled below. Throughout the history of professional football there has almost always been labor unrest of sorts. This unrest has come in the form of both individual grievances and group discord.

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During the early years, Red Grange resorted to hiring an agent to negotiate a contract for him and changed teams as a result. More recently, fledgling leagues have arisen, at least in part, because of unhappiness of players with working conditions. During and following every sports labor dispute within the last twenty years, the media and the public have contended that this particular labor problem would be the impetus to a break down of professional football, baseball, basketball or hockey. Suffice it to say all four sports are still alive and apparently doing rather well, albeit not without problems.

The National Football League Players Association (NFLPA) was first formed in 1956, but it was not recognized until two years later when passing reference was made to the union in congressional testimony by Commissioner Bert Bell. Despite the existence and some recognition of the association, there was not actually a collective bargaining agreement between the players and owners until 1968. At approximately this same time, professional baseball and basketball were beginning to organize. Despite the existence and recognition of players associations, none were particularly strong nor well accepted by management. Finally, in 1969, the National Labor Relations Board (NLRB) indicated that it would accept jurisdiction over professional sports.

It is important to understand that basic federal labor policy favors, where appropriate, organized efforts at collective bargaining for terms and conditions of employment. It supports collective bargaining over individual bargaining as a measure of attaining a

4. See Berry et al., supra note 3, at 96.
6. See id.
7. See Wiestart & Lowell, supra note 3, at 778.
8. See 29 U.S.C. § 151 (1994). The National Labor Relations Act (NLRA) encourages "the practice and procedure of collective bargaining." Id. It gives employees the right to organize for collective bargaining purposes. See 29 U.S.C. § 157 (1994). It also gives employers the equivalent right to form multi-employer bargaining units, such as the NFL. See National Basketball Ass'n v. Williams, 45 F.3d 684, 688 (2d Cir. 1995) (stating that relevant legal authority strongly suggests that employers are not prohibited from acting jointly in bargaining with union).
balance of power between the employer and the employee. Labor policy mandates that the two sides engage in “good faith” bargaining with regard to “mandatory” subjects of bargaining. It does not, however, mandate a particular result from this bargaining. These policies provide economic pressure mechanisms for both sides to the collective bargaining, mechanisms which have indeed been used by both sides in the case of the NFL.

Labor law as applied to professional sports presents some unique characteristics. A typical professional athlete is not the typical worker in the context of a labor issue. Clearly, the average salary of a professional football player separates him from the auto worker or the teamster. So too does the very public nature of the business. Very few workers, aside from professional athletes, have detailed accounts of their on the job performances replayed on television networks or in the print media on a daily or weekly basis. The workers in professional football also have extremely short careers, averaging four to five years. Thus, unlike most other union situations, the composition of the union rank and file is constantly changing. There are also several classes of athletes within the union: superstar, rookie, journeyman player and role player. It is a multi-employer bargaining unit, with each team having a player representative to the union. In addition, beyond league minimum salaries and other basic conditions of employment, individual contract negotiations occur within the context of a collective bargaining unit.

Management is also a unique group in professional sports, and the NFL is no exception. Typically, management consists of extremely wealthy individuals or groups of individuals with a minimal knowledge of the game or its history and culture. In many situations the franchise has been purchased not as the individual’s sole business, but as more of a novelty item. Many NFL owners are here today and gone tomorrow, often with large profits. Some today are quite nomadic. Recent moves or threatened moves by the Rams, Raiders, Browns, Oilers and Seahawks are evidence of this trend.

9. See 29 U.S.C. § 158 (1994). Employers and employees are required “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”

10. Once a bargaining representative has been chosen for the employees and the employer unit is selected there is a “soup to nuts array of rules and remedies” provided under the NLRA. Williams, 45 F.3d at 693. See also Caldwell v. American Basketball Ass’n, 66 F.3d 523 (2d Cir. 1995) (holding that NLRB has obligation to enforce collective bargaining agreements).

11. See Berry et al., supra note 3, at 15.

12. See id. at 15.
The make-up of the NFL has proven to be a formula for labor turmoil and rancor.

The early period of the NFLPA did witness some work stoppages and labor unrest. In the late 1960s there was a dispute over pension contributions which management was to have made and did not. A brief work stoppage occurred during training camp in 1968, again centering on the issue of pension contributions, and it was quickly resolved. In the early 1970s the players walked out of training camp again, this time over post season compensation and grievance procedures. This produced a three day strike by the players, and in turn a seventeen day lockout by management.

B. The 1974 Strike and Litigation

The first major strike in professional sports occurred in 1974 in the NFL. It was a catastrophic failure. The strike lasted forty-four days and left the union badly split and seriously underfunded. The key focus of the strike was the Rozelle Rule pertaining to player free agency. The rule allowed a player to change teams at the conclusion of his contract if he could negotiate a new deal with a new club; however, the new club was required to compensate the old club for the loss of the player. Adequate compensation in the form of players or cash was to be negotiated between the two teams. If the teams could not reach an agreement, the compensation was to be set by the Commissioner of the NFL, Pete Rozelle. There were no guidelines for awarding compensation and, ultimately, there was very little player movement. The apparent purpose of the rule was to discourage player movement. Indeed, Rozelle himself said that if players were given total freedom to negotiate their services, the league would be dominated by a few rich teams and would eventually lose both fan interest and revenue.

13. See id. at 97.
14. See id.
15. See id.
16. See BERRY ET AL., supra note 3, at 97.
17. See id. The strike failed due to negative player sentiment and lack of solidarity. See id.
18. See id. at 125. The strike also involved the easing of curfews and other disciplinary rules imposed on players by management.
19. See id.
20. See id. Thus, the players lacked control during the negotiations in fixing their approximate worth. See id.
21. See BERRY ET AL., supra note 3, at 125.
22. See id. (quoting Kennedy, STAR-STRUCK CANTON, SPORTS ILLUSTRATED, Aug. 5, 1974, at 12).
At the same time that the bargaining process was at work regarding, among other items, the Rozelle Rule, there was also litigation actively challenging the validity of the rule under the Sherman Antitrust Act. This was the beginning of the interrelationship between the antitrust laws and the labor laws in the context of employer-employee relations in professional sports. Nearly two decades earlier the Supreme Court had made it clear in *Radovich v. NFL* that all professional sports, except baseball, were subject to the antitrust laws. This sort of pronouncement was necessary only because of the existence of the aberrational cases of *Federal Baseball Club v. National League* and *Toolson v. New York Yankees, Inc.* These cases had established that professional baseball was exempt from the antitrust laws on grounds unique to the times and to the treatment of the sport by Congress and the American public.

The first significant litigation focusing on the NFL collective bargaining process was *Mackey v. NFL*, in which the Eighth Circuit was called upon to evaluate the validity of the Rozelle Rule. Such evaluation was necessary because of the failure of the bargaining process and the strike to effectively represent the players' interests, thus leaving the antitrust laws as the only vehicle for challenging the owners' actions. The basic complaint of the players was that the Rozelle Rule amounted to an "illegal combination and conspiracy in restraint of trade denying professional football players the right to freely contract for their services." The district court had found a per se violation of the Sherman Act in the form of a group boycott, and in the alternative, determined that even using the rule of

23. See Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976) (challenging NFL rule allowing league commissioner to require team acquiring free agent to compensate player's former team).
25. 259 U.S. 200 (1922) (stating that baseball exhibitions are purely intrastate and not interstate affairs that fall outside scope of antitrust laws).
26. 346 U.S. 356 (1953) (following precedent that baseball is exempt from federal antitrust laws as state affair).
27. This paper is not the appropriate forum to discuss, analyze, and lambast the trilogy of baseball opinions of *Federal Baseball,* supra note 25, *Toolson,* supra note 26, and *Flood v. Kuhn,* 407 U.S. 258 (1972). Others have done this quite well in different settings. Suffice it to say the author is in extreme disagreement with the historical and current treatment of baseball under the antitrust laws. It is equally clear, as noted in the text, that other professional sports and amateur sports are subject to the coverage of the Sherman Act. See also Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971); United States v. International Boxing Club, 348 U.S. 236 (1955). The extent of that applicability is somewhat lessened by the recent decision in *Brown v. Pro Football, Inc.*, discussed infra notes 122-33.
28. 543 F.2d 606 (8th Cir. 1976).
29. *Id.* at 609.
reason the Rozelle Rule violated the Sherman Act. It rejected the clubs’ arguments that the rule was necessary to promote competition and that it was immune from attack because it was part of a collective bargaining agreement. The district court entered an injunction against the league prohibiting enforcement of the rule.

On appeal the Eighth Circuit was faced with two issues: does the so-called labor exemption from antitrust laws protect the Rozelle Rule from attack; if not, does the rule violate the Sherman Act? The court began its review of the case by noting that, prior to 1963, players were free to move to another team following the expiration of their contracts, with no compensation paid to the original team. This policy was changed in 1963 when the Baltimore Colts signed R.C. Owens, a star receiver formerly with the San Francisco 49ers. The new policy, essentially the Rozelle Rule, was unilaterally adopted by the member clubs of the NFL. The apparent purpose of the rule was to maintain competitive balance among the NFL teams and protect the clubs’ investments in scouting, selecting and developing players.

In Mackey, the league attempted to claim the protection of the nonstatutory exemption by arguing that the Rozelle Rule emanated from the collective bargaining agreement. The labor exemption from the antitrust laws takes two forms, one statutorily created and the other judicially developed. Various provisions of the Clayton Act and the Norris-LaGuardia Act state that labor unions are not combinations or conspiracies in restraint of trade, and specifically declare that certain types of union activities, such as secondary picketing and group boycotts do not violate the Sherman Act. The

30. See id.
31. See id. For a definition of the rule of reason, see infra note 54 and accompanying text.
32. See id. The owners also attacked the District Court’s findings of fact. See id.
33. See Mackey, 543 F.2d at 610. The court also noted that the NFL’s operations had been unilaterally controlled by the owners. See id.
34. See id.
35. See id. The Rozelle Rule was adopted as an amendment to the NFL’s constitution and by-laws. See id.
36. See id. at 611. It is worthy of note that during the period between the adoption of the rule and the 1974 work stoppage over the validity of the rule, 176 players played out their options (the end point of the standard contract). See id. Thirty-four signed with other teams. See id. In three cases the clubs waived compensation; in 27 cases the clubs mutually agreed upon compensation; and in four cases the Commissioner awarded compensation. See id.
39. See Mackey v. NFL, 543 F.2d 606, 611 (8th Cir. 1976).
basic premise was to protect reasonable, collective activities by employees from the terms of the Sherman Act which might otherwise prohibit the normal activities of a labor union. This protection is consistent with a strong congressional policy favoring the collective and organized efforts of employees to deal with issues of wages and working conditions.

The statutory exemption, however, does not cover agreements between unions and non-labor organizations or groups. The Supreme Court filled in this gap by holding “that in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act . . . certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions.”

In Mackey, the court initially assessed the various factors to be considered in applying the nonstatutory exemption to a particular case. Essentially, the analysis is whether the relevant federal labor policy is deserving of pre-eminence over the federal antitrust policy given the particular circumstances of the case at hand. Three factors must be present for the labor exemption to apply: 1) the restraint on trade must primarily effect only the parties to the collective bargaining agreement; 2) the agreement sought to be protected must concern a mandatory subject of collective bargaining; and 3) the agreement sought to be protected must be the product of bona fide arm’s length bargaining.

Next, the court traced the history of the Rozelle Rule in the labor context. The rule was initially included in the league constitution and by-laws by unilateral action of the member clubs. In 1968 it was incorporated by reference in the collective bargaining agreement. There was no hard evidence of extensive bargaining or negotiating over the rule during the process leading to the 1968

40. See id; see e.g., Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975); United States v. Hutcheson, 312 U.S. 219 (1941).
41. See Mackey, 543 F.2d at 612.
42. Id. (citing Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975); Local Union No. 189, Almagamated Meat Cutters and Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965)).
43. See Mackey, 543 F.2d at 614. The player claimed that the Rozelle Rule was the product of unilateral action on behalf of the owners and that there was no exception available. See id.
44. See id. at 615.
agreement.\textsuperscript{45} There was trial testimony that this may have been due to the weak nature of the union. Prior to the new collective bargaining agreement in 1970, there was little discussion of the rule.\textsuperscript{46} Finally, there was extensive discussion over the issue and still no agreement during the 1974 negotiations.\textsuperscript{47}

The court applied the three part test for the nonstatutory labor exemption to this case and first found that the Rozelle Rule clearly affected only the parties to the agreement.\textsuperscript{48} The court then determined that while the rule did not directly deal with a mandatory subject of bargaining (wages, hours and other terms and conditions of employment), it did have a definite impact on wages and thus the second part of the test was satisfied.\textsuperscript{49} In looking at the third prong of the test, the existence of good faith arm's length bargaining on the issue, the court agreed with the district court that the Rozelle Rule did not stem from such bargaining.\textsuperscript{50} It found a relatively weak union upon which an onerous rule had been unilaterally imposed. The court found neither direct nor indirect benefits for the players under the rule. Accordingly, the court found that the nonstatutory labor exemption did not apply and continued on to analyze the antitrust issues raised by the players association.\textsuperscript{51}

The court easily found that the players raised a valid antitrust question and that “restraints on competition within the market for players' services fall within the ambit of the Sherman Act.”\textsuperscript{52} It then turned to the merits of the claims themselves. The court declined to follow the district court's ruling that the group boycott in this case constituted a per se violation of the Sherman Act. It found that the unusual circumstances surrounding a professional sports league built upon restrictions aimed at promoting competition made this setting inappropriate for use of the per se rule.\textsuperscript{53}

\textsuperscript{45} See id. at 612. The court noted that the players did not seek elimination of the rule but rather maintained that it should be modified. See id. During negotiations, there was little discussion of the Rozelle Rule. See id.

\textsuperscript{46} See id. at 612. The only reference to the rule was that the NFLPA was “disturbed” by the negative consequences of the Rozelle Rule. Id.

\textsuperscript{47} See id. at 613. The court stated that “[t]he NFLPA and the Clubs have engaged in substantial bargaining over the issue but have not reached an accord.” Id.

\textsuperscript{48} See id.

\textsuperscript{49} See id.

\textsuperscript{50} See id. at 616.

\textsuperscript{51} See id. The court held “we need not decide whether the effect of an agreement extends beyond its formal expiration date for purposes of the labor exemption.” Id. n.18.

\textsuperscript{52} Id. at 618.

\textsuperscript{53} See Mackey, 543 F.2d at 617.
The court proceeded to review the district court’s holding that the Rozelle Rule also amounted to a violation under the rule of reason analysis. The court noted that the basic inquiry is “whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary.” The court first considered the district court’s findings regarding the nature of the restraint. It agreed with the lower court that the rule:

Significantly deters clubs from negotiating with and signing free agents; that it acts as a substantial deterrent to players playing out their options and becoming free agents; that it significantly decreases players’ bargaining power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; that as a result, the salaries paid by each club are lower than if competitive bidding were allowed to prevail; and that absent the Rozelle Rule, there would be increased movement in interstate commerce of players from one club to another.55

The NFL’s attempts to justify the restraints imposed by the rule were rejected by the Eighth Circuit. It found no support for the contention that players would flock to cities having natural advantages such as “larger economic bases, winning teams, warmer climates and greater media opportunities.” It further determined that competitive balance would not be adversely impacted by striking down the rule and that continuity of team rosters was not a legitimate concern as it related to competitive balance. The court declined to hold that any system of restraints on player movement would violate the Sherman Act, but did clearly hold that the Rozelle Rule was “significantly more restrictive than necessary to serve any legitimate purpose.”57

54. Id. at 620 (citing Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119 (8th Cir. 1973)).

55. Mackey, 543 F.2d at 620.

56. Id. at 621.

57. Id. at 622. For a contrasting approach to the application of the nonstatutory labor exemption, see McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979).

In McCourt, the Sixth Circuit applied the principles set forth in Mackey with regard to the labor exemption with a different result. See McCourt, 600 F.2d 1193. It specifically found that the union had bargained at length with determination on the issues in question and that the bargaining was in good faith at arms length. See id. This ruling was made despite the general perception that the union and man-
Two other cases were litigated at approximately the same time and are historically significant for both labor and antitrust purposes. The first case, Smith v. Pro Football, Inc.,58 involved a challenge to the validity of the college football draft conducted by the NFL.59 While this was primarily an antitrust case arising outside of the collective bargaining process, it did once again raise the issue of the relationship of labor law with antitrust law. The draft first appeared in 1935 and provided a system of allocation of college players.60 An attempt at balance was maintained by awarding selections to teams in reverse order of the finish in the league standings the previous year.61 In 1968, when Smith was drafted, the process consisted of sixteen rounds in which all twenty-six NFL teams participated. Once drafted, if a college player could not reach agreement on a contract with the team that selected him, he could not play for any other team in the league.62 Smith challenged this process as a violation of the Sherman Act.

The NFL initially claimed the draft was immune from challenge because it was protected by the labor exemption. The district court held that the exemption was inapplicable because the draft did not become part of the collective bargaining agreement until several months after Smith was selected.63 The circuit court found the per se rule did not apply to the antitrust claims but nonetheless found that the draft was anticompetitive under the rule of reason. The draft was found to violate the Sherman Act because the league could not convince the court that the pro-competitive aspects of the process outweighed the anticompetitive aspects.64

The other relevant case concerning an antitrust issue was Kapp v. NFL.65 Kapp, a quarterback in the latter stages of a career that began in the Canadian Football League and later flourished in the NFL,66 brought suit challenging the Rozelle Rule, the draft rule, the anti-tampering rule and the rule requiring the use of the standard form contract. All of the rules were challenged as violations of

agreement occupied a particularly friendly relationship. See Berry et al., supra note 3, at 207.

58. 593 F.2d 1173 (D.C. Cir. 1978).
59. See id.
60. See id. at 1175.
61. See id.
62. See id. at 1176.
64. See Smith, 593 F.2d at 1187.
65. 390 F. Supp. 73 (N.D. Cal. 1974).
66. See id. at 75.
the Sherman Act. The court’s main focus on a motion for summary judgment was the standard form contract. The league attempted to defend the standard form contract on the basis of the labor exemption, but the court correctly noted that it was not a part of the collective bargaining agreement until several months after the claim arose. 67 The court ultimately entered summary judgment in favor of Kapp.

Thus, with the holding in Mackey and the related cases 68 the players finally had free agency at their fingertips. They proceeded to bargain it away, however, as the new collective bargaining agreement took shape in 1977. Instead of unfettered free agency, the two sides agreed to a system whereby a right of first refusal was coupled with compensation for players lost to another team. 69 The compensation scheme continued to operate as a significant deterrent to wholesale movement of players. The compensation came in the form of draft choices and was based upon the salary of the player who was attempting to change teams. 70 The compensation could be as high as two first round draft choices. 71 As a result, only six players actually changed teams under the 1977 collective bargaining agreement. 72 In return for this system, the players obtained the league’s agreement to a closed shop and automatic dues checkoff to insure the stability of an unstable budget situation for the union. There were also improvements to the pension program and changes with regard to the Commissioner’s role in the grievance system. 73 This agreement was probably the beginning of the end for Ed Garvey, the Executive Director of the NFLPA, for the settlement was described as “the biggest sellout by a union in sports history.” 74 It was a deal which in hindsight looks outrageous, but in the context of the time may not have been so disastrous.

67. See id. at 86.
68. See e.g., Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978) (discussing damages phase of Rozelle Rule challenge).
69. See BERRY ET AL., supra note 3, at 127.
70. See id.
71. See id. Compensation in the form of two number-one draft choices in successive years was the amount required for the acquisition of players not earning more than $129,000. See id.
72. See id.
74. Id. at 305. Of course, since the entire history of unions in sports was barely a decade in length, this statement may not be so meaningful. See id.
C. The 1982 Strike and Agreement

Once again in 1982, as the 1977 collective bargaining agreement was coming to a close, the relationship between the owners and the NFLPA was somewhat acrimonious and the threat of a strike loomed as training camp opened that summer. Both sides anticipated a strike and were better prepared financially to deal with one than in previous years. After months of relatively fruitless negotiations, the players went on strike on September 21, 1982, following a Monday night game.

There were several key issues dividing both sides. The most publicized was a demand by the players that the owners set aside fifty-five percent of their gross revenues for the players. The owners responded that such a concept was “alien to American business.” Following a failure to agree on this point the players attempted to gain acceptance of a wage scale based on years of experience. Such a scale assumed a certain amount of revenue would be available for salaries. The owners were opposed to this concept as well, expressing concern that the system would provide no incentive for quality performance and it would leave the league ripe for player raids from another league, such as the United States Football League (USFL).

The other issue which simply would not go away, as much as both sides tried to make it, was free agency. The owners remained opposed to free agency, mindful of what they saw as destructive consequences of the concept in baseball and basketball. As the strike continued so did negotiations to resolve these issues. The players staged a brief series of all-star games during the strike, but

75. See Berry et al., supra note 3, at 128. It is important to note that at the time these negotiations were occurring a new rival league was getting underway with its operations. See id. The United States Football League was to announce its spring format and begin the acquisition of players. See id. There were also intense negotiations underway for a new television contract for the NFL. See Harris, supra note 73, at 625-29.
76. See Berry et al., supra note 3, at 137.
77. See id. at 131.
78. Harris, supra note 73, at 644. A major portion of the media coverage for the negotiations and strike focused on two key personalities: Ed Garvey of the NFLPA and Jack Donlan, the chief negotiator for the NFL Management Council. See id. This period also witnessed the emergence of Gene Upshaw, then the President of the NFLPA, as a key figure. See id. He would later succeed Garvey as Executive Director. See id. The owners viewed Garvey as the villain. See id. The strike was described as “Ed Garvey’s strike” and it was said that “when Mr. Ed Garvey wants a settlement . . . you’ll have a settlement.” Id. at 642.
79. See Berry et al., supra note 3, at 133.
80. See id. at 134.
81. See id.
abandoned the series following poor attendance and threats of litigation. The strike finally ended in November, fifty-seven days after it began, when the two sides agreed to a new collective bargaining agreement.

The new agreement did not include free agency, but rather it merely fine tuned the right of first refusal system. It did include minimum salaries escalating with seniority for the players and a guarantee of the right of the players to use agents. There was also a payment of so-called "money now" bonuses for ending the strike. The college draft was continued through 1992 and there was some severance pay for veterans. Most observers concluded that the owners "won" the strike. Certainly it was the swan song for Ed Garvey, for he left the union the following year and was replaced as Executive Director by Gene Upshaw, who still serves in that position today.

The period between 1982 and 1987 was at once tranquil and volatile. The relationship between the league and the NFLPA was relatively calm. The instability resulted when the USFL owners tried to sign key players from the NFL for enormous salaries. The litigation with the USFL and that league's subsequent demise also kept the players and the owners busy on a variety of fronts.

A case which should be noted because of its analysis with regard to the three part test for application of the labor exemption is Zimmerman v. NFL. The case did not stem from a formalized collective bargaining process at the conclusion of an agreement, but rather from an issue arising from the collapse of the USFL. The NFL had to decide how to handle entry or re-entry into the league of those players formerly in the USFL. Following some brief discussions between union and management, it was decided that a re-entry draft would be held shortly after the annual collegiate draft. The plaintiff in this case, a star offensive lineman in the USFL, challenged his draft by the New York Giants on the grounds that he was not part of the bargaining unit, and even if he was, the process violated the Sherman Act. The court disagreed, finding that the draft was exempt under the labor exemption. The court so held

82. See id.
83. See Harris, supra note 73, at 648-49.
84. See Berry et al., supra note 3, at 145, Table 5-6.
85. See id. at 148.
86. See id.
87. See United States Football League v. NFL, 842 F.2d 1335 (2d Cir. 1988).
89. See id. at 406.
despite the fact that the policy regarding the re-entry draft was not embedded in a collective bargaining agreement. It said:

The labor exemption is based on the policies underlying the labor laws, but the validity of an agreement under those laws is a separate question from the applicability of the labor exemption. Further, to qualify for the exemption, the understanding between the parties need not be contained in a formal collective bargaining agreement.90

With regard to the particular issues raised by Zimmerman in this case the court noted that the union and the owners had negotiated at length on the issue. It appeared to the court that the union had decided that “it was in the best interest of the membership to agree to the draft based on the concessions received from the NFL.”91 The court further stated:

It is not the Court’s function in the context of the labor exemption to evaluate the relative bargaining prowess and strategy of the parties, to determine who secured the better deal or whether there was adequate consideration exchanged. The important question is whether bona fide bargaining took place such that the policies in favor of such bargaining should take precedence over antitrust concerns.92

D. The 1987 Strike and Litigation, *ad nauseam*

In 1987 the stage was set once again for discord between the union and the league. This time around it quickly became clear

90. *Id.* at 404.
91. *Id.* at 406. The court analyzed in great detail the nature of the negotiations, the strengths and weaknesses of both sides in this case and then compared them to the situations in previous cases involving the NFL and NFLPA. *See id.* It determined the two sides were on a much more level playing field in this case than in Mackey, Smith, or Kapp. *See id.* at 406-07.
92. *Id.* at 408. The court stated with regard to the case at hand: Because the owners gave up something they were already prepared to grant does not mean that there was an absence of bargaining or that it was conducted in bad faith. In fact, that the union was convinced that roster size was a significant issue over which they needed to bargain is evidence of the arm’s-length relationship between the parties. Similarly, the Court is convinced that the union felt the various agreements it entered into were in its best interest. It is the union’s honest, albeit subjective, perception that is relevant to the existence of good faith bargaining rather than the Court’s objective determination of the comparative value of the consideration exchanged.

*Id.*
that there was only one issue of significance — FREE AGENCY. Following unsuccessful negotiations, the players once again went on strike early in the 1987 season. The strike lasted for four games, before the players capitulated somewhat and called an end to the work stoppage. During this strike the owners brought in "replacement players" for the four games and attempted to put up the appearance of continuing a normal playing season. The end of the strike did not signal an end to the negotiations or the strife. Indeed it was simply the beginning of nearly six years of negotiation and even more litigation.

In Powell v. NFL, the primary focus of litigation was the labor exemption. The players mainly contended that virtually all action by the owners relating to wages and working conditions following the expiration of the collective bargaining agreement amounted to violations of the antitrust laws. The players’ complaint sought to enjoin the teams from continuing to abide by the expired 1982 agreement, particularly those terms relating to free agency and player movement. Specifically, they sought a ruling that the labor exemption had expired and no longer protected the owners. The district court initially declined to rule on the matter, preferring to wait for a ruling from the NLRB regarding claims by the league that the players were not bargaining in good faith. The NLRB did subsequently rule there had been good faith efforts to bargain and that impasse had formally occurred. The district court held in the union’s favor, ruling that the exemption expired when the two sides to the labor dispute reached impasse.

The Eighth Circuit, however took a different view of the issue. The circuit court held that the nonstatutory labor exemption protected the league even though the collective bargaining had expired and impasse had occurred. The court concluded that this

93. 930 F.2d 1293 (8th Cir. 1989).
94. See id.
95. See id. at 1296.
96. See Powell v. NFL, 678 F. Supp. 777, 789 (D. Minn. 1988). The district court held "because a finding of good faith must be made as a precondition to determining impasse, the Court must await the NLRB's 'good faith' determination." Id.
97. See id. The district court, however, declined to rule on the question of whether impasse had actually occurred here, preferring to wait for the NLRB’s determination as to whether the players had failed to bargain in good faith. See id. When the NLRB subsequently ruled in the players’ favor, the district court then granted summary judgment to the players, finding that impasse had occurred. See id. This decision was appealed to the Eighth Circuit. See Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989).
98. See Powell, 930 F.2d at 1293.
holding was necessary in order to give proper accord to federal labor policies. Specifically, it appeared that the court was concerned that without the application of the nonstatutory labor exemption, the players would have an effective weapon otherwise unavailable to them through the collective bargaining process. The court believed that by using "impasse" as the point at which the exemption terminates the players would have an added incentive to speed toward impasse, a practice contrary to the notion of good faith bargaining. It was also concerned that impasse is often a temporary status, used for strategic purposes.\(^9\)

The court further noted that following the expiration of an agreement the labor laws provide a variety of avenues to work out differences. Among other things, as noted above, there is a continuing obligation to bargain in good faith.\(^1\) Prior to impasse the employer is obligated to maintain the status quo as to wages and working conditions. Following impasse, the employer may implement new or different terms so long as they were reasonably contemplated during the bargaining sessions.\(^2\) The court indicated that not every action by an employer is shielded from the antitrust laws, but it gave little guidance as to what might be subject to the Sherman Act. The court also failed to indicate at what point in negotiations or a bargaining relationship the labor exemption would terminate. At bottom, the court seemed quite concerned about maintaining stable labor policy. It did not want to do anything to disturb the level playing field. To emphasize this position the court said:

The labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players accepted this "level playing field" as the basis for their often tempestuous relationship, and we believe that there is substantial justification for requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise.\(^3\)

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99. See id. at 1299 (quoting Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404 (1982)).
100. See id. at 1300.
101. See id. at 1301.
102. Id. at 1303.
Just as football fields themselves are not level, however, the playing field between the NFL and its players has never been level. Even though the union has strengthened, professional sports unions remain unique among unions. As noted earlier, the turnover among players within the union is much higher than among employees in other industries. During that time, job security is almost totally lacking in football, due to the rarity of guaranteed contracts. As noted by one commentator, "[u]nlike industrial employees, professional athletes do not possess homogeneous skills; a wide range of ability and expertise exists among players. Not surprisingly, different union demands affect superstars and marginal players differently."  

It is also clear that the NFL is a relatively strong multi-employer unit. A jury has found it to possess monopoly power. The players have extremely unique skills which do not transfer to another industry. There is only limited alternative opportunity for transfer offered by the Canadian Football League, the World League of American Football and the Arena Football League. All three fail to provide a high level competition like the NFL. Both the Powell court and later the Supreme Court in Brown show a significant lack of understanding of the unique nature of professional sports. Careful treatment of the industry in both the labor and antitrust areas is merited, but it is usually overlooked by the courts as demonstrated by these two cases.

Following the Eighth Circuit's decision in Powell, the only course of action left for the union in view of the stalemate in bargaining was to decertify as a bargaining unit. This course had been hinted at by the majority and grudgingly suggested by the dissent in Powell. This is exactly what the union proceeded to do.

The NFLPA continued to exist, but more as a trade association with no bargaining authority. The players disavowed the union's authority to act as their bargaining unit and subsequently sought

103. Ethan Lock, The Scope of the Labor Exemption in Professional Sports, 1989 DUKE L.J. 339, 354. Professor Lock's article, which has been widely quoted by courts facing these issues, goes on to note:

Because of the brief work-life of its bargaining unit employees, the union has an extremely short institutional memory. The NFLPA experiences approximately twenty-five percent yearly turnover in its bargaining unit, a rate unheard of in industrial unions. . . . [T]he brief work-life guarantees that few players will remain in the League long enough to benefit from the elimination of certain restraints.

Id. at 355-56.

104. See United States Football League v. NFL, 842 F.2d 1335, 1341 (2d Cir. 1988).

105. See Powell v. NFL, 930 F.2d 1293, 1310 (8th Cir. 1989).
the court's endorsement of this action as well as a ruling that the nonstatutory labor exemption had ended. The court ruled favorably on the players' motion for summary judgment on the issue of the termination of the labor exemption. The court found that the NFLPA was no longer engaged in any collective bargaining and was not representing players in grievances. It also found that the players had paid a price for the decertification of the union in that the League had unilaterally, without notice, changed insurance benefits and lengthened the playing season. The court held that no formal decertification proceeding before the NLRB was necessary to bring down the curtain on the union. It also held that with the demise of the union as a bargaining unit, the nonstatutory labor exemption was no longer available and the players' antitrust action could proceed on the merits.

In McNeil v. NFL, the players prevailed on a special verdict: the Right of First Refusal/Compensation Rules in Plan B did have a substantially harmful effect of competition in the relevant market for the services of professional football players. The jury concluded that the rules were more restrictive than reasonably necessary to achieve the objective of establishing or maintaining competitive balance in the NFL. Finally, the jury found that the rules caused economic harm to the plaintiffs.

Shortly after the verdict was handed down in McNeil, White v. NFL, a class action covering the remaining issues and additional players, was initiated. Ultimately the district court approved a settlement of the case. Approximately one week later, the NFLPA and the NFL entered into a new collective bargaining agreement which contained all of the terms of the settlement in White. The class action settlement was then modified to reflect the additional procedural and organizational matters included within the collective bargaining agreement.

107. See id. at 1358.
108. See id. at 1359.
110. See id. at *1.
111. See id.
112. See id.
115. See id. There were several prominent players who challenged the settlement and agreement in this litigation. See id. There was also a challenge from one
The key elements of this new agreement included the free agency sought by the players for over two decades. The deal offered unrestricted free agency to players who had completed five years of service in the league and restricted free agency to players with three years of service. The agreement included a salary cap, which was intended to be a "hard cap," but has not proven to be so. The cap is set at sixty-two percent of projected designated gross revenues of the league, divided by the number of the teams in the league (thirty). The agreement also required that the league pay out a minimum of fifty-eight percent of designated gross revenues in salaries and that each team pay a minimum of fifty percent of its designated gross revenues in salaries. Today each team is allowed to protect one "franchise" player who would otherwise be eligible for free agency, but they must pay him the average of the top five salaried players at his position. In addition, a portion of the salary pool is set aside for first year players, and the agreement sets a maximum to be paid to draft choices. Further, if the entire rookie pool is not used, it is available for signing of veteran play-

owner, but the court upheld and approved the settlement and collective bargaining agreement. See id.

Another event in labor relations occurred at the end of the 1993 season when a majority of the members of the Washington Redskins refused to pay their union dues. National Football League Players Association v. Pro-Football, Inc., 857 F. Supp. 71 (D.D.C. 1994), aff'd 79 F.3d 1215 (D.C. Cir. 1996). The NFLPA requested that the team suspend the players as required by the collective bargaining agreement. See id. The team refused, claiming it would violate Virginia labor laws if it did so. See id. The NFLPA sought an injunction, but was thwarted when the district court found that the team was actually located in Virginia and thus the law of that state, not the District of Columbia, governed. See id.

At one point in the protracted labor rift, the League even went so far as to file an antitrust case against a number of high profile agents, asserting that the sharing of salary information amounted to price fixing. The Five Smiths v. National Football League Players Association, 788 F. Supp. 1042 (D. Minn. 1992). The case was dismissed, however, by the district court. See id.

116. See Will McDonough, Finally, NFL Makes a Deal, BOSTON GLOBE, Jan. 7, 1993 at 37. Under the deal, teams could retain restricted free agents by matching offers received by the players. See id.

117. Numerous teams have discovered methods of structuring contracts which circumvent the intent of the cap and make it more flexible. The most common tactic is to pay large signing bonuses which are prorated for cap purposes over the life of the contract and set base salaries quite low. This approach is likely to cause some teams financial problems which will require them to release high salaried veteran players during these latter years of the agreement. The agreement now is slated to end in 2001.


119. See id. at Art. XXIV, §§ 3, 5.

120. See id. at Art. XX, §§ 1, 2.
The agreement also included improvements to the pension plan and damages to the players. Finally, the college draft was reduced to seven rounds, plus one round for compensating teams that lose free agents.

The one remaining piece from the last round of bargaining and litigation was the developmental squad case, *Brown v. Pro-Football, Inc.* This case stemmed from the NFL's unilateral imposition of a salary scale for players on the developmental squads during the height of negotiations. The players challenged this as price fixing, and the League predictably claimed that the labor exemption protected it from antitrust claims. The district court held in favor of the players and ultimately entered a damages award. The court of appeals reversed and the case has now concluded with the first significant antitrust loss for the players.

The Supreme Court handed down its decision in the case on June 20, 1996. In an eight to one decision, the Court upheld the circuit court's decision, effectively eliminating the antitrust avenue for the players within the context of the labor world. The Supreme Court did not interpret the labor exemption as broadly as had the court of appeals. The Court placed heavy emphasis on the importance of labor harmony and the national policy favoring free and private collective bargaining. The Court indicated it was simply carrying out what it saw as the preference of Congress to curtail judicial use of the antitrust laws to resolve labor disputes. In looking at the question of what the appropriate course should be following impasse, the Court believed that the antitrust laws confused the issue, creating a dilemma for employers. If employers impose terms similar to their last offer, then antitrust charges will appear. If they impose some other terms, unfair labor charges will follow. The Court found this to be untenable, doubting that "non-
expert antitrust judges" would be capable of dealing with such labor problems.  

The Court also refused to end the exemption at the point of impasse. It stated, "[labor law permits employers, after impasse, to engage in considerable joint behavior," including joint lockouts and replacement hiring. It also noted that impasse is often temporary, merely a ploy in the general course of bargaining by the various sides, or a blip on the screen of a long bargaining process. It could well occur several times during the course of negotiation of a collective bargaining agreement.

The Court further refused to label professional sports as some sort of special category of industry for labor and antitrust analysis. It said:

We also concede that football players often have special individual talents, and, unlike many unionized workers, they often negotiate their pay individually with their employers. . . . But this characteristic seems simply a feature, like so many others, that might give employees (or employers) more (or less) bargaining power, that might lead some (or all) of them to favor a particular kind of bargaining, or that might lead to certain demands at the bargaining table. We do not see how it could make a critical legal difference in determining the underlying framework in which bargaining is to take place.

The Court's decision will require the players in all professional sports to take a new approach to labor relations. Players unions may have to give significant consideration to decertifying as bargaining agents in times of trouble. The owners still have the only game in town for team sports because alternative opportunities do not exist for most of the employees in this industry. Players in football, basketball and hockey must now look to baseball's experience with labor law as the only arena, and this experience has not been a good one.

132. Id. at 2118. As noted above the courts have not had a great deal of difficulty dealing with labor matters in the past. Courts are faced with issues arising across a broad spectrum of subject matter on a daily basis in which they are not "experts." There is nothing unique about labor law in this regard.

133. Id.


135. See id. The Court clearly indicated that its decision impacted all of professional sports and indeed, all of organized labor. See id. It sent a further message by denying review of National Basketball Ass'n v. Williams. See National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995).
III. Comparative Analysis and a Look to the Future

This article began by noting that, ironically, the NFL is probably the most stable of the four major professional sports leagues at the present time. Historically, that has not necessarily been the case. As the preceding section documents, the NFL has suffered through numerous work stoppages, unfair labor practice charges and lawsuits on its way to the present "stability." The National Basketball Association (NBA), Major League Baseball (MLB) and National Hockey League (NHL) have been somewhat more stable, although not perfectly tranquil.

The past three or four years, however, have shifted the focus from football to the other three sports due to the somewhat tranquil nature of the NFL. The NBA only had one brief work stoppage: a three month lockout in 1995 which did not interrupt any regular season games. 136 It has been in and out of court, but usually with more productive results than the NFL. The first significant litigation was Robertson v. National Basketball Association, 137 which stemmed from the players' disagreements with restraints on player movement. 138 A free agency system resulted from the settlement of the litigation. The league and the players were scrutinized by the court for a number of years following this litigation.

In 1983, following protracted negotiations, a new labor agreement produced the first salary cap. It limited what the teams could spend on player salaries, but committed a guaranteed percentage of league revenues to the players. 139 The agreement, particularly the portion containing the salary cap, has been credited with saving the NBA from self destruction, because at the time of its inception, there were several teams on the verge of collapse. 140 After this

136. See Tim Povtak, No Lockout—and No Signings; A Deal to Accept the NBA's Collective Bargaining Agreement Puts Off Free-Agent Signings Until July 9, ORLANDO SENTINEL, June 29, 1996, at C1 (containing history of labor relations in NBA since salary cap was instituted in 1983).

137. 72 F.R.D. 64 (S.D.N.Y. 1976), aff'd, 556 F.2d 682 (2d Cir. 1977).

138. See id. Prior to this case the NBA had unsuccessfully litigated the restrictions on player eligibility for the draft prior to the completion of their collegiate eligibility. Denver Rockets v. All-Pro Management, 325 F. Supp. 1049 (C.D. Cal. 1971).

139. See BERRY ET AL., supra note 3, at 181-83. This cap has been characterized as a "soft cap," meaning it can, and has been, manipulated because of countless exceptions which were incorporated into the collective bargaining agreement. See id.

140. See MARTIN J. GREENBERG, SPORTS LAW PRACTICE 210-12 (1993). It is also interesting to note that at about this same time, 1984 to be exact, David Stern became Commissioner of the NBA. His tenure as Commissioner, until the last 12 months, has been marked with prosperity and relatively stable labor relations.
agreement was reached, the league enjoyed about ten years of prosperity and tranquility, continuing through a collective bargaining agreement which expired with the conclusion of the 1993-94 season. Negotiations began on a new contract and only as this article is going to print has the NBA finalized its collective bargaining agreement; something everyone thought was completed twelve months ago.\textsuperscript{141} The league does have a strong and relatively well respected commissioner in David Stern. Personalities have played a role in the history of the players association, particularly that of the late Larry Fleisher. The key personalities at this point appear to be several of the prominent player agents. The future will reveal what the results of the latest series of events in the NBA will be.

Major League Baseball continues to be a bad joke. Baseball, of course, enjoys its antitrust exemption and thus has been relatively free of litigation. That is not to say it has enjoyed labor peace. There have been numerous strikes and lockouts over the last twenty years and the league and players’ association have spent much of their time before the NLRB.\textsuperscript{142} The players were able to obtain free agency in 1975 through an arbitrator’s decision.\textsuperscript{143} As with the other sports there has been a significant increase in player salaries and a corresponding decrease in franchise values. The gains the players have made over the years may be attributed to a lack of unity among the owners. This may also explain in part why there has not been a labor agreement for three years. Negotiations have been on and off since the disastrous strike in the summer of 1994.

\textsuperscript{141} The two sides agreed to a no strike-no lockout position for the 1994-95 season in order to work on a new agreement. Unfortunately this failed to produce a new collective bargaining agreement. During this time the Executive Director of the players association resigned under pressure and agents for several superstars began to be a significant influence on the negotiations. Indeed, several of the players led a move to decertify the union which went to a formal vote of the players in the summer of 1995. Prior to this the league had announced a lockout, suspending all league operations and player transactions. The decertification vote failed and a tentative agreement was reached and ultimately approved in September of 1995. All that remained, supposedly, was to work out details in the language.

This final fine tuning has taken ten months. See Povtak, \textit{supra} note 134. All the while the players and the league have continued to litigate the labor exemption question in \textit{Williams}. This was ultimately settled by the \textit{Brown} case. Brown v. Pro Football Inc., 116 S. Ct. 2116 (1996).

\textsuperscript{142} See \textit{Berry et al.}, \textit{supra} note 3, at 59-74.

\textsuperscript{143} See Kansas City Royals v. Major League Baseball Players Association, 532 F.2d 615 (8th Cir. 1976) (upholding arbitrator’s decision effectively eliminating reserve clause in standard baseball contract, thus opening door to free agency at end of contract). The free agency concept was subsequently locked into baseball through the 1976 collective bargaining agreement. See \textit{id}. Contrary to predictions at the time it has not caused the demise of the game.
As this article goes to press there are rumors that a settlement is near.  

Baseball has not had a commissioner since 1992, and as a result, has been unable to make major decisions. Again, rumors indicate that once a labor agreement is reached, then a concerted search for a commissioner will commence. Leadership is badly needed in order for the owners to put up a united front. Some critics on the outside have also been calling for the resignation of Don Fehr, the Executive Director of the Players Association, although he, like his predecessor Marvin Miller, is a strong leader who has provided continuity and consistency during his tenure.

The NHL and its players association have been experiencing difficulties as well. Only recently has the NHL entered the world of work stoppages and unfair labor practice charges. This is partly due to the fact that the enormous strength of management has faded in the last decade. The National Hockey League Players Association was formed in 1957, but did not really become any kind of a factor until 1967. During the 1970s and 1980s, the players' association was led by Alan Eagleson who was liked by the players, but was viewed by others as far too close to management. In addition, in a classic conflict of interest, he represented individual players in contract negotiations. Ultimately, he was indicted on fraud and racketeering charges and replaced as Executive Director by Bob Goodenow, who has taken a much tougher approach to relations between the union and management.

During the early 1990s, the NHL has enjoyed unprecedented success. It almost lost all of this momentum, however, as a result of a disastrous lockout during the first half of the 1994-95 season. Most of the problems have been worked out and the league is now enjoying the benefits of a lucrative television contract. Expansion discussions are underway as well. Comparatively, the NHL is the closest professional league to the NFL in terms of stability. The NHL has the opportunity to be the boom sport of the decade, but must remain quiet on the labor front to do so.


145. See Berry et al., supra note 3, at 206. During the 1950s and early 1960s there were only six teams in the league. See id. Two of them were owned by the same family and this same family also controlled the arena of a third team. See id.

146. See id.

It is uncertain as to what lies ahead for the NFL. Franchise free agency, the almost whimsical movement of franchises from city to city, has major labor implications. Licensing also has labor impact. The future of the salary cap and the current shape of the collective bargaining agreement have enormous ramifications. The 1993 collective bargaining agreement eliminated the middle class, but has worked much better than many of the players had originally thought. What happens with the next television contract will in large part dictate the parameters of the next collective bargaining contract. There continue to be pension and safety concerns. The most critical thing for both management and labor to understand is that they share related needs and concerns. They must work together to put their product on the field. They benefit from each other and need each other. They must not let corporate concerns, individual greed or any other outside factors destroy the tradition and integrity of the game. This responsibility lies equally with the owners and the players' association and can be dealt with in a labor law context.