Icing the Competition: The Nonstatutory Labor Exemption and the Conspiracy between the NHL and OHL in NHLPA v. Plymouth Whalers Hockey Club

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ICING THE COMPETITION: THE NONSTATUTORY LABOR EXEMPTION AND THE CONSPIRACY BETWEEN THE NHL AND OHL IN NHLPA v. PLYMOUTH WHALERS HOCKEY CLUB

I. INTRODUCTION: THE PRE-GAME WARM UP SKATE

The New Jersey Devils stressed the team over the individual and won three Stanley Cups in eight years.¹ Resulting in some success, the National Hockey League ("NHL") emphasizes collective bargaining with the National Hockey League Players Association ("NHLPA") over individual bargaining with a player.² Generally,


For N.H.L. teams, the measure of success is winning — in general, of course, but more particularly winning the Stanley Cup, which is most certainly not awarded to the team that makes the most money. The New Jersey Devils franchise, for example, is one of the most "artistically" successful in hockey, having won three Stanley Cups in the last 10 years. Yet their attendance is among the lowest in the league, and a year ago, Forbes magazine estimated that the value of the franchise was actually declining.

Id.

2. See McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1194-95 (6th Cir. 1979) (noting National Hockey League ("NHL") by-laws are applicable to players through Standard Players Contract which both league and NHL Players Association ("NHLPA") expressly approved); see also Helene Elliot, Report: NHL Strikes Deal, Season Could Begin in Early October, SAN JOSE MERCURY NEWS, July 7, 2005, at 1. The author notes:

The NHL and the players’ association have agreed in principle on a new collective bargaining agreement that will feature a hard salary cap linked to 54 percent of league revenue, a 24 percent rollback of existing contracts and qualifying offers, and a provision that will limit the salary of any player to 20 percent of the team cap figure in any year . . .

Id.; see also Joe Lapointe, With Deal Ratified, N.H.L. Becomes a Changed League, N.Y. TIMES, July 23, 2005, at D1 (describing new deal between players and ownership). The author notes:

The owners voted unanimously yesterday to approve the collective bargaining agreement, which will limit salaries to a fluctuating range based on revenue. In the first season, the top team payrolls are tentatively set at $39 million; the minimum will be $21.5 million.

(1)
Although Bettman and others referred to the new agreement as an unprecedented partnership with the players, there was no representation yesterday from the union. Bill Daly, the executive vice president who was promoted to deputy commissioner yesterday, said the union was invited to appear but declined because its leadership was in Toronto to meet with player agents to inform them of details of the new agreement.

Id. But see Jason Diamos, Around the N.H.L.; Analyzing Union’s Agreement, Marvin Miller Drops the Gloves, N.Y. TIMES, Dec. 25, 2005, at A1 (ascribing to idea that NHLPA is nothing more than organ for owners). The author reports:

Since the ratification of a collective bargaining agreement last summer, N.H.L. Commissioner Gary Bettman has often referred to a new partnership between the owners and the players union.

That sort of talk raises the ire of Marvin Miller, the former executive director of the Major League Baseball Players Association.

"It tells me really what I’ve known all along," the 88-year-old Miller said in a telephone interview last week. "And that is that the N.H.L.P.A. has never been a legitimate union at no time. It has always been an offshoot of management."

Id.

3. See, e.g., Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996) (discussing how court created exemption from federal labor statutes, which establish national labor policy in support of collective bargaining between two parties); McCourt, 600 F.2d at 1203 (finding compensation rule that was part of valid agreement between NHL and NHLPA was result of good faith, arm’s-length bargaining).


It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id. The Sherman Act, however, declares illegal every contract or conspiracy in the restraint of trade. See 15 U.S.C. § 1 (2005). Therefore, these two federal laws naturally conflict. Compare id., with 29 U.S.C. § 151. In Brown, the court explains how the judicially created nonstatutory labor exemption (“NLE”) supposedly resolves this conflict:

The implicit (“nonstatutory”) exemption interprets the labor statutes in accordance with this intent, namely, as limiting an antitrust court’s authority to determine, in the area of industrial conflict, what is or is not a ‘reasonable’ practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict.

Brown, 518 U.S. at 236-37 (citing Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 709-10 (1965)). For a further discussion of the NLE and the conflict between federal antitrust law and labor law, see infra notes 66-107 and accompanying text.
This Note examines the inherent conflict between the Sherman Antitrust Act and the NLRA in the context of the NHL’s collective bargaining agreement (“CBA”) and the Ontario Hockey League’s (“OHL”) rules. First, this Note discusses whether the per se rule or rule of reason correctly analyzes antitrust litigation in the professional sports leagues context. Second, this Note looks at Sherman Act cases in the professional sports context, as well as the tumultuous history of the NLE. Third, this Note discusses whether the Sherman Act’s NLE applies to this case; if it does, the NHLPA is out of luck. Finally, this Note explores 1) whether the NHL’s CBA or the OHL’s “Van Ryn Rule,” which limits a certain class of player’s entry into the NHL, causes these alleged injuries; and 2) how the two leagues’ conspiring activities color this discussion.

5. See, e.g., Clarett v. NFL, 369 F.3d 124, 141-42 (2nd Cir. 2004) (Clarett II) (asserting that Plaintiff would damage fundamentals of federal labor policy if he successfully challenged National Football League’s (“NFL”) draft entry rule); 29 U.S.C. § 151 (“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption . . . .”).


7. For a further discussion of the per se rule and the rule of reason, see infra notes 38-53 and accompanying text.

8. For a further discussion of Sherman Act cases in the professional sports context and the history of the NLE, see infra notes 66-107 and accompanying text.

9. See Brown, 518 U.S. at 237 (citing Connell Constr. Co. v. Plumbers, 421 U.S. 616, 622 (1975)) (“[T]he implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.”); see also Clarett II, 369 F.3d at 155 (noting that policy not expressly included in CBA, but merely discussed by players’ union and league, precludes perspective employee from bringing antitrust suit because it would undermine federal labor policy); Mackey v. NFL, 543 F.2d 606, 615-16 (8th Cir. 1976) (espousing three-part test results precluded applying NLE to case involving dispute over NFL rule owners unilaterally imposed on players because it was not result of fair collective bargaining). For a further discussion on the NLE’s applicability to NHLPA v. Plymouth Whalers Hockey Club, see infra notes 108-44 and accompanying text.

10. See NHLPA II, 419 F.3d at 474-75 (denoting NHL’s CBA, not OHL’s “Van Ryn Rule,” caused injury to competition, thus subjecting NHL to NLE). The court further held that, when viewing the facts in a light favorable to the plaintiffs, there were enough facts to show a viable conspiracy between the OHL and NHL. See id. at 475-76 (overruling district court’s holding). For a further discussion of the pa-
II. FACTS: THE OPENING FACE-OFF

The NHLPA is an unincorporated labor union and is the exclusive collective bargaining representative for all NHL players. The NHLPA and plaintiffs Aquino and Caron brought suit in the District Court for the Eastern District of Michigan on March 12, 2001. They alleged that the OHL conspired with the NHL to violate the Sherman Act by illegally barring twenty-year-old United States college hockey players from participating in the OHL. The district court ruled for the plaintiffs and granted a preliminary injunction. The Court of Appeals for the Sixth Circuit reversed and remanded, after which the district court dismissed the action. Plaintiffs appealed the dismissal.

The collective bargaining agreement between the NHL and the NHLPA expired in September 2004, and the two parties did not agree to a new CBA until July 2005.

1. See NHLPA II, 419 F.3d at 468 (describing NHLPA's qualifications). The NHLPA's popularity recently decreased because the recent strike upset fans, and players felt betrayed by the new collective bargaining agreement ("CBA"). See Dave Caldwell, Hockey; N.H.L. and Players Reach Agreement, N.Y. TIMES, July 14, 2005, at D1 (explaining fans' and players' anger over protracted strike).

2. See NHLPA II, 419 F.3d at 468 (noting posture of case). Early issues in the case revolved around whether the province of Ontario was an adequate alternative forum, whether the NHLPA had standing to sue, and whether the court had personal jurisdiction over the league. See Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club (NHLPA III), 166 F. Supp. 2d 1155, 1163-68 (E.D. Mich. 2001) (holding Canada is not adequate alternative forum, NHLPA had standing to sue, and court had personal jurisdiction over league).

3. See NHLPA II, 419 F.3d at 467-69 (stating plaintiffs' cause of action); see also Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club (NHLPA I), 325 F.3d 712, 714-15 (6th Cir. 2003) (noting qualifications of NHLPA in ongoing labor dispute). For a further discussion of the NHLPA's qualifications, see supra note 11 and accompanying text.

4. See NHLPA II, 419 F.3d at 468 (noting case's procedural history and district court's initial rulings). The district court viewed the NHL's activities as per se illegal under the Sherman Act. See id. at 469 (acknowledging that Sixth Circuit applied rule of reason).

5. See id. at 468 (granting defendant's motion to dismiss); NHLPA I, 325 F.3d at 721 (finding irreparable harm would not result from reversal of injunction and plaintiffs failed to establish substantial likelihood of success on merits to warrant preliminary injunction).

6. See NHLPA II, 419 F.3d at 468 (setting forth procedural history of case).

7. See id. at 467 n.1 (denying "suggestion of mootness" based on expiration of CBA and loss of 2004-05 NHL season). There was a great deal of animosity between the NHLPA and the NHL:

The tentative agreement also represented a defeat for the players union, which accepted a hard salary cap after insisting for months it would not agree to one. The proposed cap is widely reported to be $39 million for each of the 30 teams in the league. Players' salaries are not expected to
cultur negotiations for a new CBA, the NHLPA, as a plaintiff in the action, supported Aquino and Caron in their case against the NHL and OHL’s “Van Ryn Rule.”

The OHL has twenty teams, with players between the ages of sixteen and twenty. Each OHL team can carry only three twenty-year-old players. Under OHL Rule 7.4, i.e., the “Van Ryn Rule,” an OHL team cannot sign a twenty-year-old unless the player was a member of a Canadian Hockey Association or had a USA Hockey Player’s Registration the previous season. The National Collegiate Athletic Association (“NCAA”) prohibits hockey players holding either type of registration from playing at an NCAA

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18. See NHLPA II, 419 F.3d at 467-68 (naming plaintiffs NHLPA, Aquino, and Caron in litigation).

19. See id. at 466 (explaining that two OHL teams are based in Michigan, one is in Pennsylvania, and seventeen teams are based in Ontario, Canada). The OHL, the Western Hockey League, and the Quebec Major Junior Hockey League “form the ‘Major Junior Leagues’ of the Canadian Hockey League.” Id. Other major sources include European leagues, American colleges, and American high schools. See id. (listing alternative sources for young players).

20. See id. (announcing that another term for twenty-year-old OHL players is “overage” players).

21. See id. at 466-67 (explaining parameters of “Van Ryn Rule”). The “Van Ryn Rule’s” actual text states, “[i]t should be understood that to sign and register an overage player, such player must have been on a CHA or USA Hockey Player’s Registration Certificate in the previous season.” NHLPA III, 166 F.Supp. 2d at 1157 n.3. Mike Van Ryn was a University of Michigan hockey player when the NHL’s New Jersey Devils drafted him in 1998. See NHLPA II, 419 F.3d at 466. The Devils, according to the NHL’s CBA, would have Van Ryn’s rights for one year. See id. at 466-67. If the Devils did not sign Van Ryn after that period, he would become an unrestricted free agent who could sign with any other NHL team. See id. at 467. Under the CBA, those rights only extended past one year if Van Ryn stayed in NCAA competition or left for a non-affiliated hockey league. See id. Van Ryn remained at the University of Michigan for one year after the draft, thereby extending the Devils’ rights to him for one year. See id. He then signed with an OHL club. See id. Because the OHL is affiliated with the NHL, Van Ryn’s signing with an OHL club did not extend the Devils’ rights to Van Ryn. See id. If Van Ryn had played in an unaffiliated league during that year which Devils had exclusive control over him, he would have had to skip the entire season to become eligible for free agency. See id. The Devils, supported by the NHL, tried to characterize Van Ryn a “defected player” ineligible for free agency. See id. An arbitrator rejected this effort. See id. Van Ryn became an unrestricted free agent in 2000 and signed with the NHL’s St. Louis Blues. See id. The OHL created the “Van Ryn Rule” about two months after the arbitration decision and Van Ryn’s signing with the Blues. See id.
Together, these two rules prevent OHL teams from signing any twenty-year-old NCAA players. 23

Plaintiffs Anthony Aquino and Edward Caron were twenty-year-old NCAA hockey players hoping to compete in the NHL. 24 Both contended that the OHL's "Van Ryn Rule" prevented them from becoming unrestricted NHL free agents and from fully realizing free agency's financial rewards. 25

The OHL's Owen Sound Attack drafted Aquino at age sixteen, but instead of playing for Owen, he played three seasons for Merrimack College. 26 In June 2001, the NHL's Dallas Stars drafted Aquino. 27 Aquino thought he had two options for an NHL career: sign with Dallas and become a restricted free agent for the next eleven years, or join the OHL for one year as an overage player and become an NHL free agent in 2003. 28 The "Van Ryn Rule" prevented him from playing in the OHL. 29 Aquino believed the OHL

22. See NHLPA II, 419 F.3d at 466 (denoting NCAA's ancillary role in this litigation). The plaintiffs did not implicate the NCAA in this suit, despite the fact that their rules, combined with the OHL's and NHL's rules, restrained the plaintiffs from playing in the NHL. See id. For a further discussion of this complex issue, see infra notes 139-44 and accompanying text.

23. See NHLPA II, 419 F.3d at 466-67 (explaining effects of rules). The court explained:

These two rules - the OHL rule requiring overage players to have a [sic] been on a CHA or USA Hockey Registration, and the NCAA rule barring players with either of those registrations - combine to prevent OHL teams from signing any twenty-year-old NCAA players, because such a player would not have been permitted by the NCAA to have obtained the registration required by the OHL of twenty-year-old players.

Id.

24. See id. at 467 (describing two plaintiffs' situations).

25. See id. at 467-68 (explaining injury to competition "Van Ryn Rule" caused).


26. See NHLPA II, 419 F.3d at 467 (espousing Aquino's position).

27. See id. at 467-68 (explaining Aquino's available professional hockey options).

28. See Louis Guth, NERA Economist's Role in National Hockey League Players' Association and Anthony Aquino v. Plymouth Whalers Hockey Club et al., http://www.NERA.com/image/6002.pdf (last visited Sept. 17, 2006) (noting how expert testimony helped defeat player's claims). Aquino believed the OHL was his only route to becoming an unrestricted free agent. See id. If he joined a professional league other than the NHL or the OHL, he would fall into "defected" status, causing Dallas to hold Aquino's rights indefinitely. See id. He ultimately signed with the NHL's Atlanta Thrashers. See NHLPA II, 419 F.3d at 468. Caron argues that he wanted to play in the OHL in 2002-03 and that he would have signed with an OHL team but for the "Van Ryn Rule." See id.

29. See NHLPA II, 419 F.3d at 467-68 (referencing "Van Ryn Rule's" effect).
was his only route to becoming an unrestricted free agent. 30 If he joined a professional league other than the NHL or the CHL, he would fall into "defected" status. 31

The plaintiffs regarded the rule as an attempt to prevent NCAA players from achieving free agency via the route Mike Van Ryn traveled. 32 The defendants argued that the NHL's CBA, not the "Van Ryn Rule," caused these effects. 33 The Court of Appeals ruled for the defendants and dismissed the plaintiffs' case. 34

III. BACKGROUND: POWER PLAY

In antitrust cases, courts analyze a plaintiff's claim with either the rule of reason or the per se rule. 35 The rule of reason analysis requires courts to balance a practice's pro- and anti-competitive effects to determine whether such effects violate the Sherman Act. 36 The court applies the per se rule when the contested practice is so

30. See id. at 467 (discussing plaintiff's desire to play in OHL).
31. See Guth, supra note 28 (denoting "Van Ryn Rule's" effect).
32. See NHLPA II, 419 F.3d at 467 (stating plaintiff's argument that rule restricted amateur hockey players' options). For a further discussion of Mike Van Ryn's actions, see supra note 21 and accompanying text.
33. See NHLPA II, 419 F.3d at 467 (arguing that rule similar to "Van Ryn Rule," "which prevented overage players from playing in OHL if they had not played there as nineteen-year-olds, was in effect from 1992 to 1998 . . .," and that NHL's CBA sets forth rules governing free agent eligibility); see also Guth, supra note 28 (explaining expert's opinion of "Van Ryn Rule"). To determine if the "Van Ryn Rule" represented an unlawful restraint of trade, the OHL's counsel retained Louis Guth, an antitrust and regulation expert. See Guth, supra note 28. Mr. Guth analyzed "data relating to intercollegiate, developmental league and professional ice hockey games and markets." Id. Mr. Guth testified that twenty-year-old U.S. college hockey players have five options other than playing in the NHL, including joining a variety of different professional leagues, playing in one of two Canadian "Major Junior" amateur leagues other than the OHL, or remaining in school. See id. Mr. Guth found the NHLPA's objection to the OHL's Overage Player Rule merely criticized one of the five other options. See id.
34. See NHLPA II, 419 F.3d at 474 (stating that NHL's CBA, not "Van Ryn Rule," caused plaintiff's injury). The court noted:
We would draw this conclusion under even the most lenient proximate cause standard. Ultimately, we draw this conclusion because common sense requires it. Only indefensibly circuitous logic would blame the rules governing who can play in the OHL, and not the rules governing who can become an NHL free agent, for preventing players from achieving free agency in the NHL.
35. See, e.g., id. at 469 (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984)) ("Because every contract could be construed as a restraint of trade, the Supreme Court has held that for a claim to be actionable under the Sherman Act, the restraint challenged must be "unreasonable." ").
anticompetitive that a court's rule of reason analysis would be futile.  

A. The Rule of Reason

The rule of reason asks whether the challenged agreement encourages or stifles competition. It also examines the totality of the circumstances of the alleged agreement. This gives the Sherman Act more power, flexibility, and defined limits.

Under a rule of reason analysis, judges engage in protracted factual examinations and make policy-based, legislative-like decisions. Hence, the rule of reason usually requires six elements: (1) discovery of the facts of the particular business; (2) the business

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37. See, e.g., State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("Per se treatment of trade restraint is appropriate 'if experience with a particular kind of restraint enables the Court to predict with confidence that rule of reason will condemn it.'" (quoting Ariz. v. Maricopa County Med. Soc., 457 U.S. 332, 334 (1982))). The per se rule usually applies to group boycotts or refusals to deal with a specific group. See White Motor Co. v. U.S., 372 U.S. 253, 259-60 (1963). This case is a group boycott because both the NHL and OHL refuse to deal with a certain group. See NHLPA II, 419 F.3d at 469-70. But see Silver v. N.Y. Stock Exch., 373 U.S. 341, 348 (1963) (giving exception to per se illegality of group boycotts by examining whether industry structure requires collective action, whether restraint is reasonably implemented and whether procedural safeguards, namely notice and hearing, are in place to prevent arbitrary application); Bd. of Regents of Univ. of Okla., 468 U.S. at 100-01 (postulating that rule of reason, not per se rule, often applies to professional sports because horizontal restraints are necessary for sporting business to thrive).


39. See William Meade Fletcher, Monopolies and Unfair Competition: Contracts, Combinations and Agreements in Restraint of Trade, 10A Fletcher Cyclopaedia of Private Corp. § 4982 (2006) (adding that proven harm does not necessarily indicate Sherman Act violation). The author writes:

Before the courts will condemn a particular agreement, one of the following must be present: the elements of injury to the public, or monopolistic control of a particular article of commerce, or unreasonable interference with and damage to the business of an individual, or the doing of illegal or unconscionable acts, or specific intent to do injury to someone else, or at least some of those circumstances which would lead a court in good conscience to say that a given set of defendants was overstepping the bounds of reasonable ambition and fair play, and was becoming a nuisance.

Id. (citations omitted).

40. See Altman, supra note 38, at 579 (noting rule of reason analysis depends on both competitive impact and economic analysis of situation).

ness's condition before and after the restraint was imposed; (3) the nature of the restraint and its effect; (4) the restraint's history and the evil thought to exist; (5) the reason behind adopting the particular restraint; and (6) the purpose or end sought to be attained by the restraint. 42 The rule of reason often requires such complex calculations that the cost of doing those computations may outweigh any benefit. 43

B. The Per Se Rule

Courts reserve the per se rule for "naked restraints of trade with no purpose except stifling of competition." 44 The per se treatment is appropriate when an experienced court can predict that the rule of reason will condemn a certain practice. 45 The per se rule paints in broad strokes, while the rule of reason deals with detailed, case sensitive inquiries. 46

Courts historically invoked the per se rule in "group boycott" cases, in which one group refused to deal with another group. 47 More recent precedent, however, has changed that particular trend. 48

reasonableness questions under the Sherman Act involves questions of both relation and degree. See id.


43. See, e.g., N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (noting that in certain circumstances, such as price fixing, per se rule avoids need for long, complicated, and often wholly futile investigation into entire history of industry implicated).


45. See, e.g., Law v. NCAA, 134 F.3d 1010, 1017-18 (10th Cir. 1998) (describing per se rule as judicial shortcut around sometimes cumbersome rule of reason inquiry).

46. See Altman, supra note 38, at 579-80 (noting that courts historically favored using per se rule in antitrust cases dealing with professional sports).

47. See, e.g., Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1063 (C.D. Cal. 1971) (holding that draft rule which precluded certain class of players constituted per se violation). Spencer Haywood successfully challenged professional basketball's rule prohibiting a player from negotiating with a team unless he is four years removed from high school. See id. at 1066-67. The court found this to be a group boycott and a per se violation of the Sherman Act. See id.

48. See NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100-01 (1984) (dictating that per se rule does not apply to horizontal trade restraints in professional sports context but instead must be examined under rule of reason analysis). The Court, in dicta, acknowledges that sports leagues, notably the NCAA, needed horizontal restraints in order to survive. See id. In this sense, the antitrust analysis needed to be premised on unreasonableness, and it is therefore not logical to view it as a per se violation. See id.
C. The Per Se Rule v. The Rule of Reason

In *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court refused to apply the per se approach. The NCAA imposed a horizontal restraint of trade, which traditionally invoked the per se rule. The Court, nevertheless, rejected the per se approach in favor of the rule of reason because college football needs certain trade restraints for the product’s availability.

Thus, courts adopt a rule of reason standard when dealing with trade restraints in the professional sports context because of professional sports’ uniqueness - horizontal restraints are necessary to effectuate successful and organized leagues. Simply because a court adopts the rule of reason standard does not guarantee that there will be no Sherman Act violation.

D. The Sherman Act, NLRA, and NLE

Antitrust law’s theory rests on the idea that monopolizing the product market, thus limiting competition, unfairly injures a capitalist economy. In contrast, labor law strives to have employees

49. See id. at 100-01 (using rule of reason to hold that NCAA television plan was unreasonable because it restricted, rather than enhanced, competition).

50. See id. at 100. The Court defined a horizontal restraint as “an agreement among competitors on the way in which they will compete with one another.” Id. at 99. The group boycott at issue in this case is a type of horizontal restraint. See *NHLPA II*, 419 F.3d at 469.

51. See *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 101-02 (“[T]he NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.”). The Court also espoused the view that these restrictions enhanced, rather than diminished, competition. See id. at 101. For a further discussion of *Bd. of Regents of the Univ. of Okla.*, see supra notes 48-51 and accompanying text.


While there is some support that the per se approach is now a dead letter altogether, at least one scholar has concluded that the reluctance of the courts to apply a per se approach in the antitrust context is simply part of a larger judicial trend away from such out-of-hand rejections. Id. at 160-61; see also Randall Marks, Labor and Antitrust: Striking a Balance Without Balancing, 35 AM. U. L. Rev. 699, 704-05 (1986) (discussing inherent clash between labor and antitrust law). For a further discussion of this issue, see supra notes 47-51 and accompanying text.

53. See *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 132-33 (holding, under rule of reason, NCAA television plan unreasonable because it restricted, rather than enhanced, competition).

54. See Bryan A. Wood, Antitrust Law — Supreme Court Drops the Ball: Brown v. Pro Football, Inc., 116 S.Ct. 2116 (1996), Highlights the Need to Return Labor’s Antitrust Exemption to its Statutory Origin, 70 TEMP. L. REV. 321, 321-22 (1997) (“The inevitable debate has resulted in a confusing body of case law and congressional enactments that have attempted to harmonize the conflicting policies.”).
work together and collectively bargain to eliminate competition in the labor market.\textsuperscript{55} Hence, antitrust law and labor law disputes present courts with an interesting dichotomy.\textsuperscript{56} The NLE attempts to mediate the dispute between these two contrasting bodies of law.\textsuperscript{57}

The Sherman Act prohibits contracts or combinations that unreasonably restrain trade.\textsuperscript{58} Before courts will condemn a particular agreement as violating section one of the Sherman Act, one of the following must be present: (1) injury to the public, unreasonable interference with and damage to an individual's business; (2) the doing of illegal or unconscionable acts and specific intent to do injury to someone else; (3) or at least a circumstance which would lead courts to say that a set of defendants overstepped the bounds of reasonable ambition and fair play.\textsuperscript{59}

\textsuperscript{55} See id. at 331-32. The writer notes:
In 1947, Congress enacted the National Labor Relations Act. Congress intended the Act to aid and encourage the collective bargaining process in order to induce the free flow of commerce. To effectuate this policy, the Act made wages and working conditions a mandatory subject of the collective bargaining process. In light of the well-reasoned parameters of the statutory labor exemption to the Sherman Act, the Supreme Court thereafter began to infer that agreements between employers and employees concerning terms and conditions of employment implicitly were exempt from antitrust liability.

\textsuperscript{56} See Kessler & Feher, supra note 6, at 41 (explaining antitrust and labor laws conflict in professional sports). "[P]rofessional sports has enjoyed long periods of labor stability and peace only when the employees in this industry were able to exercise their rights under both the antitrust laws and the labor laws." Id. at 42.

\textsuperscript{57} See Freedman, supra note 52, at 164-65 (noting NLE is limited exemption that should only be granted when doing so would be in furtherance of policies underlying its application).

\textsuperscript{58} The applicable subsection of the Sherman Act reads:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.


\textsuperscript{59} See Fletcher, supra note 39 (denoting factors necessary to find violation of antitrust laws). "Unreasonableness can be based on either (1) the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices." Id. The rule of reason normally requires looking at: (1) a particular business' facts; (2) its condition before and after the restraint's imposition; (3) the restraint's character and its actual or probable effect; (4) the restraint's history and the evil believed to exist; (5) the reason for adopting the particular restraint; and (6) the purpose sought to be attained by the restraint. See id.
The NLRA’s purpose is to have employees collectively bargain with their employers on mandatory subjects. The mandatory bargaining subjects are “wages, hours, and other terms and conditions of employment.” Moreover, the NLRA defines employees and employers and denotes that employers must bargain in good faith with certified unions.

The NLE is not easily defined. The Supreme Court has never explicitly defined the NLE’s limits. Instead, the Court has primarily used the NLE through a policy-based, loose analysis.


(2) The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [sic], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [sic], as amended from time to time, or by any other person who is not an employer as herein defined.


The Supreme Court has denied the applicability of the non-statutory labor exemption to collectively bargained agreements that involve or impact groups that are not a party to the specific agreement, yet has applied the exemption when the agreement affects only the parties to it and is the result of good-faith, arm’s length bargaining.

Id. at 318-19 (citations omitted).

64. See id. 319-25 (denoting NLE’s checkered history); see also Brown v. Pro Football, 518 U.S. 231, 237 (1996) (reviewing NLE’s scope).

65. See Brown, 518 U.S. at 242-43 (asserting that subjecting unilateral imposition of terms to antitrust law would introduce instability and uncertainty into collective-bargaining process because antitrust often forbids or discourages joint discussions and behavior that collective bargaining requires). But see Mackey v. NFL, 543 F.2d 606, 622 (8th Cir. 1976) (creating test rather than policy to determine whether action deserves antitrust exemption).
E. The Relevant Case Law of the NLE as Applied to the Sherman Act and the NLRA

To effectuate collective bargaining in light of antitrust law's promotion of free marketplace competition, courts allow certain CBAs a limited NLE from antitrust penalties. Because antitrust law aims to promote competition and discourage collective behavior, while labor law aims to use collective activity to protect workers' rights, a fundamental tension exists between antitrust and labor law. The history and precedent set by cases in this area of the law exemplifies the tension that the NLE is meant to alleviate.

1. Jewel Tea and Connell Construction

In Local Union Number 189 v. Jewel Tea Company, Inc., the operator of a chain of retail grocery stores in the Chicago area sued the labor unions and the association of food retailers representing independent food stores. The Jewel Tea Court required that the agreement's subject matter be "intimately related to wages, hours and working conditions." The "intimately related" test provided

66. See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 625 (1975) (espousing "follow naturally" test in its holding that NLE was inapplicable). The Court opined:

The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.

Id. at 622.

67. See Tyras, supra note 63, at 318 (denoting that NLE was created to reconcile differences between two competing doctrines); see also Connell Constr. Co., 421 U.S. at 626 ("The Federal policy favoring collective bargaining . . . can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market."); Local Union No. 189, et al. v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965) (applying NLE because dispute involved nonunion group and included good-faith, arm's-length bargaining); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 665-66 (1965) ("One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."); Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 808 (1945) ("Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.").

68. For a further discussion of the NLE's history, see infra notes 69-100 and accompanying text.

69. See Jewel Tea, 381 U.S. at 679 (setting out factual background of case).

70. Id. at 689. The Court further explained:
that the parties' CBA is exempt from antitrust law if the agreement:
1) concerns a mandatory subject of collective bargaining; 2) affects
only the parties under the agreement; and 3) stems from bona fide,
arm's-length negotiating between the parties.\footnote{71}

In \textit{Connell Construction Company v. Plumbers & Steamfitters Local
Union Number 100}, the Court held that the NLE did not apply to a
union-employer agreement where agreed upon terms unrelated to
the mandatory bargaining subjects acted as market restraints on
parties outside the agreement.\footnote{72} Instead, the agreement was not
exempt from antitrust scrutiny because: (1) the parties negotiated it
outside the collective bargaining context; (2) it directly restrained
trade with substantial anticompetitive effects; and (3) its effects did
not “follow naturally from the elimination of competition over
wages and working conditions.”\footnote{73}

\section*{2. The Mackey Test}

In \textit{Mackey v. NFL}, the Eighth Circuit considered the NFL's uni-
lateral imposition of a trade restraint on its players union.\footnote{74} The
court held this illegally restricted trade because the CBA “was not
the product of bona fide arm's-length negotiations.”\footnote{75} The court
noted a CBA allows parties to restrain trade to a greater degree
than management unilaterally could.\footnote{76} The court also found the

Thus the issue in this case is whether the marketing-hours restriction,
like wages, and unlike prices, is so intimately related to wages, hours
and working conditions that the unions' successful attempt to obtain that
provision through bona fide, arm's-length bargaining in pursuit of their
own labor union policies, and not at the behest of or in combination with
nonlabor groups, falls within the protection of the national labor policy
and is therefore exempt from the Sherman Act. We think that it is.

\footnotesize{\textit{Id.} at 689-90.}

\footnote{71. \textit{See} Tyras, \textit{supra} note 63, at 319 (discussing \textit{Mackey} test). This test encour-
gages collective bargaining by generally exempting those efforts from a court's anti-
trust scrutiny. \textit{See id.} at 315. Nonetheless, the exemption does not shield all
collective bargaining efforts from antitrust scrutiny. \textit{See id.} at 320.}

\footnote{72. \textit{See} \textit{Connell Constr. Co.}, 421 U.S. at 619-21 (denoting facts and Court's holding
in NLE case).}

\footnote{73. \textit{Id.} at 625. This "test attempts to accommodate federal labor policy's need
for a degree of reduced competition by prohibiting only those provisions whose
anticompetitive effects would not follow naturally from allowing for that degree of
reduced competition in negotiating wages, hours, and working conditions." \textit{Freed-
man}, \textit{supra} note 52, at 167 (citing \textit{Connell Constr. Co.}, 421 U.S. at 625).}

\footnote{74. \textit{See} \textit{Mackey v. NFL}, 543 F.2d 606, 622 (8th Cir. 1976) (describing case's parameters).
}

\footnote{75. \textit{Id.} at 623 (explaining reasoning behind complex holding).}

\footnote{76. \textit{See id.} (noting implicit tension between employers and unions). The
"benefits to organized labor cannot be utilized as a cat's-paw to pull employer's
chestnuts out of the antitrust fires." \textit{Id.} at 614 n.12 (quoting \textit{U.S. v. Women's
Sportswear Mfrs. Ass'n}, 336 U.S. 460, 464 (1949)).}
2007] NHLPA v. Plymouth Whalers Hockey Club

Rozelle Rule, the alleged means by which the owners restrained competition, dealt with mandatory subjects of bargaining under the NLRA.\footnote{See id. at 615 (espousing that Rozelle Rule fell within NLRA's definition of mandatory subjects of bargaining). The court explained: The district court found, however, that the [Rozelle] Rule operates to restrict a player's ability to move from one team to another and depresses player salaries. There is substantial evidence in the record to support these findings. Accordingly, we hold that the Rozelle Rule constitutes a mandatory bargaining subject within the meaning of the National Labor Relations Act. Id.}

Hence, if a collectively bargained labor practice can satisfy the three-part \textit{Mackey} test, it is exempt from antitrust scrutiny.\footnote{See id. at 616 (finding no bona fide arm's-length bargaining because rule predated CBA and there was no quid pro quo for its inclusion in CBA).}

The court stated: (1) the restraint must primarily affect only the parties to the collective bargaining relationship; (2) the agreement must concern a mandatory subject of collective bargaining; and (3) the agreement must stem from bona fide, arm's-length collective bargaining.\footnote{See id. ("The union's acceptance of the status quo by the continuance of the Rozelle Rule in the initial collective bargaining agreements under the circumstances of this case cannot serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act."). Nevertheless, only some circuits have applied the \textit{Mackey} test. See, e.g., Clarett II, 369 F.3d 124, 143 (2d Cir. 2004) (refusing to apply \textit{Mackey} test because it was inconsistent with Supreme Court's recent NLE holding).}

\begin{itemize}
\item[a.] \textit{McCourt v. California Sports, Inc.}

\textit{Mackey} produced further precedent in the NLE area.\footnote{For a further discussion of \textit{Mackey} and its precedents, see infra notes 82-92 and accompanying text.} In \textit{McCourt v. California Sports, Inc.}, a player sued to enjoin the NHL from enforcing an arbitration award.\footnote{See McCourt v. Cal. Sports Inc., 600 F.2d 1193, 1196 (6th Cir. 1979) (discussing facts of case). An NHL arbitrator ruled that the Detroit Red Wings had to give up Dale McCourt as compensation for signing goaltender Rogie Vachon of the Los Angeles Kings. See id. The NHL defended its compensation system by claiming immunity from antitrust liability through the NLE. See id. at 1196-97. The district court held the NLE was inapplicable because the agreement did not satisfy the third prong of the \textit{Mackey} test, requiring the agreement to come from bona fide, arm's-length negotiating. See id. at 1197. The evidence proves that the NHL unilaterally imposed the by-law upon the NHLPA and included it in the CBA with the exact language it had when the NHL first implemented it. See id. Merely including the by-law in the CBA did not immunize it from antitrust penalties. See id.}
\end{itemize}
arm’s-length bargaining.\textsuperscript{82} The court, therefore, protected the rule from the antitrust laws.\textsuperscript{83} \textit{McCourt} established that hard-line bargaining will not expose a CBA to antitrust liability, even if the CBA’s terms do not benefit the employees.\textsuperscript{84} The district court held the NLE was inapplicable because the NHL did not satisfy the third prong of the \textit{Mackey} test when it bitterly bargained for a system thrust upon a frail union with limited bargaining power.\textsuperscript{85} The Sixth Circuit reversed, finding the NHL did satisfy the third prong of the \textit{Mackey} test; the players bargained against the system and lost.\textsuperscript{86}

\noindent \textbf{b. Wood v. NBA}

The Second Circuit did not mention the \textit{Mackey} test in \textit{Wood v. NBA}, yet the court nevertheless analyzed the case according to \textit{Mackey’s} three step test.\textsuperscript{87} The Second Circuit held that Leon Wood’s challenge to the NBA’s draft entry rules withstood antitrust scrutiny.\textsuperscript{88} Wood argued the draft was illegal because it affected employees outside the bargaining unit.\textsuperscript{89} The court dismissed this

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{82} See id. at 1201-03 (finding that inclusion of reserve system in CBA was product of good faith, arm’s-length negotiation and implicitly noting that agreements with clearly one-sided terms are not necessarily invalid).
\item \textsuperscript{83} See id. at 1203 (expanding \textit{Mackey} to encompass all parts of CBA, even obvious lop-sided terms). Courts must examine collectively bargained terms “in the larger context of the entire agreement.” \textit{Tyras}, supra note 63, at 320. In \textit{McCourt}, the NHLPA had to concede to By-Law 9A, but in exchange, the union received many concessions from the owners. See \textit{McCourt}, 600 F.2d at 1202-03 (“[T]he NHL conceded that the NHLPA could terminate the entire agreement if the NHL merged with the World Hockey Association.” (quoting \textit{McCourt} v. Cal. Sports, Inc., 460 F. Supp. 904, 911 (D.C. Mich. 1978))).
\item \textsuperscript{84} See \textit{McCourt}, 600 F.2d at 1203 (announcing case’s holding); see also \textit{Tyras}, supra note 63, at 320 (noting significance of \textit{McCourt} as limiting \textit{Mackey’s} application).
\item \textsuperscript{85} See \textit{McCourt}, 600 F.2d at 1196 (documenting previous holding of case); see also 25 Am. Jur. 2d § 333 (2005) (stating that there is no real definition of good faith in labor context, but it should be based on subjective state of mind and peripheral conduct). The court also rejected the NHL’s contention that the players received valid consideration for the inclusion of the system in the CBA. See \textit{McCourt}, 600 F.2d at 1196. Considerable evidence demonstrated that the players did not want this system. See \textit{id.}. Cf. \textit{Diamos}, supra note 2 (explaining how Marvin Miller believes NHLPA is sham really run by NHL management).
\item \textsuperscript{86} See \textit{McCourt}, 600 F.2d at 1200 (dismissing players’ arguments).
\item \textsuperscript{87} See \textit{Wood v. NBA}, 809 F.2d 954, 961-63 (2d Cir. 1987) (explaining holding of case). For of further discussion of the court’s analysis in \textit{Wood}, see infra notes 88-92 and accompanying text (explaining court’s application of NLE to case’s facts).
\item \textsuperscript{88} See \textit{Wood}, 809 F.2d at 960 (noting reasoning for court’s complex holding).
\item \textsuperscript{89} See id. (documenting Wood’s unique argument); see also Robert A. McCormick & Matthew C. McKinnon, \textit{Professional Football’s Draft Eligibility Rule: The Labor
argument as without precedent. The court noted the NLRA's definition of "employee" includes workers outside the bargaining unit. The court also found the entry draft had an intimate relation to the mandatory subjects of bargaining.


The Supreme Court set down a notably relevant precedent in Brown v. Pro Football. In Brown, the NFL and NFL Players Association argued as without precedent. The court noted the NLRA's definition of "employee" includes workers outside the bargaining unit. The court also found the entry draft had an intimate relation to the mandatory subjects of bargaining.

Exemption and the Antitrust Laws, 33 Emory L.J. 375, 402-03 (1984). The article states:

In Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., the Supreme Court addressed the scope of the term "employee." In the Court's view, the legislative history of the Taft-Hartley Act dictated that the definition of the term "employee" should not be stretched beyond its plain meaning, which included only those who worked for another for hire. Further, the Taft-Hartley amendment made it clear that general agency principles were to be looked to for the purpose of distinguishing between "employees" and independent contractors.

Other important considerations support the narrow interpretation of "employee" and the conclusion that college undergraduates, like the retirees in Pittsburgh Plate Glass, are not "employees" within the meaning of the Act.

Id. (citations omitted).

90. See Wood, 809 F.2d at 962-63 (distinguishing support Wood used for his claim by finding support to be converse situation to one facing Wood). "However, that is also a commonplace consequence of collective agreements. Seniority clauses may thus prevent outsiders from bidding for particular jobs, and other provisions may regulate the allocation or subcontracting of work to other groups of workers." Id. at 960 (citing Fireboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210-15 (1964)).

91. See id. at 960 (espousing broad interpretation of NLRA definition); see also 29 U.S.C. § 152(3) (2006) (defining employees). But see Gerba, supra note 41, at 2417. The author explains:

To effectuate the congressional intent for collective bargaining, the NLRA must cover some potential employees to foster incentives for employers to bargain collectively. The NLRA definition, however, imposes limits on who should be considered an employee. Including all future potential employees within this definition would leave the definition of "employees" virtually limitless. If Congress intended such broad coverage it would have used the term "person" instead of "employee" when it wrote the statute.

Id.

92. See Wood, 809 F.2d at 962. The court explained its broad interpretation: Each of them clearly is intimately related to 'wages, hours, and other terms and conditions of employment.' Indeed, it is precisely because of their direct relationship to wages and conditions of employment that such matters are so controversial and so much the focus of bargaining in professional sports. Wood's claim for damages, for example, is based on an allegation of lost wages.

Id.

93. See Brown v. Pro Football, 518 U.S. 231, 239 (1996) (denoting holding where Supreme Court found for professional athletes against professional sports
tion came to a collective bargaining impasse over developmental squad players' salaries. The NFL unilaterally imposed its salary proposal after the two sides could not agree. The Supreme Court in Brown incorporated elements of Jewel Tea and Connell Construction into its decision. It examined which parties the challenged provision primarily affected, as instructed by Jewel Tea. The Court inquired into the anti-competitive nature of the provision, as mandated by Connell Construction. The Court only applied the NLE upon a showing of sufficient collective bargaining efforts between the parties, as per Mackey. Because labor and management tried to agree on a subject unquestionably mandatory to bargaining, the Court declined to step in.

94. See Brown, 518 U.S. at 234-35 (explaining facts of case and stance of parties).
95. See id. at 235 (noting bargaining efforts were made by both sides before unilateral imposition of developmental squad program occurred when league distributed uniform contracts to clubs).
96. See id. at 235, 237, 242-43, 248, 250 (using cases and providing complex holding). The Court explained:

Consequently, the question before us is one of determining the exemption's scope: Does it apply to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer? We assume that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy. On that assumption, we conclude that the exemption applies.

Id. at 238; see also Freedman, supra note 52, at 158-63 (referring to other antitrust litigation cases).
97. See Brown, 518 U.S. at 237 (offering that labor law would be ineffective if parties to antitrust actions were routinely subject to penalties after engaging in collective bargaining).
98. See id. (reasoning that federal labor law could not achieve its goals if anticompetitive results of collective bargaining violate antitrust laws).
100. See Brown, 518 U.S. at 236-37 (finding NLE shielded NFL from antitrust liability). The NLE applied to the unilateral action of the league because "[i]t grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship." Id. at 250. The Brown court concluded that the NLE, which substituted congressional labor determinations for judicial antitrust determinations, was necessary to ensure a meaningful collective bargaining process. See id. at 237.
4. Clarett v. NFL

Perhaps the most famous recent case considering the NLE involved the Ohio State University’s young running back Maurice Clarett. The case focused on his attempt to circumvent the NFL’s draft rules and enter the NFL draft before he was three years removed from high school. Maurice Clarett requested injunctive relief to allow him to enter the NFL draft. The district court granted him relief. The Second Circuit, however, framed the issue as “whether subjecting the NFL’s eligibility rules to antitrust scrutiny would ‘subvert fundamental principles of our federal labor policy.’” The court relied on Caldwell v. American Basketball Ass’n in finding the eligibility rule was a mandatory subject of collective

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102. For a further discussion of Clarett and his struggles, see infra notes 103-07 and accompanying text.

103. See Clarett I, 306 F. Supp. 2d at 386 (explaining relief Clarett sought). The court explained the draft rule’s history: “It was adopted after Illinois’ star running back, Harold ‘Red’ Grange, stunned the sports world by leaving school at the end of the 1925 college season and joining the Chicago Bears of the five-year-old NFL for a reported $50,000.” Id. (quoting Charles Lane, Clarett Lines up Against NFL, Wash. Post, Jan. 23, 2004, at D1). The former version of the rule precluded a player from entering the NFL unless four seasons had passed since his high school graduation; in 1990, the requirement eased to three seasons. See id. at 385.

104. See id. at 379, 382 (noting that he was ready, willing, and able to enter NFL). The court found that Clarett was outside the bargaining unit and that the rule was not a product of bona fide, arm’s-length bargaining. See id. at 395-96. Clarett had antitrust standing because his injury directly resulted from the anticompetitive effects of the rule. See id. at 382. The court then applied the “rule of reason.” See id. at 405-06. The court held the eligibility rule was unreasonable because it was a “naked restraint of trade,” had “no legitimate procompetitive justification,” and there were “less restrictive alternatives” available to the league. Id. at 406-10. Specifically, the district court found that the rules exclude strangers to the bargaining relationship from entering the draft, do not concern wages, hours, or working conditions of current NFL players, and were not the product of bona fide, arm’s-length negotiations. See id. at 391, 395-97.

105. Clarett II, 369 F.3d 124, 138 (2d Cir. 2004) (citing Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987). The court believed that it would damage the fundamentals of federal labor policy to apply antitrust laws. See id.
bargaining. The court ruled in favor of the NFL and against Clarett.

IV. NARRATIVE ANALYSIS: POWER PLAY GOAL

The NHLPA II court wrote the restraint on trade must be unreasonable for an actionable claim under the Sherman Antitrust Act. The court turned to recent horizontal restraint antitrust precedent to determine whether to apply the per se rule or the rule of reason. Citing this recent precedent, the court demonstrated that the rule of reason governed this particular case.

106. See id. at 139 (citing Caldwell v. Am. Basketball Ass’n, 66 F.3d 523, 529 (2d Cir. 1995)) (recognizing that eligibility rules for draft are tailored to unique circumstance of professional sports league). The Clarett II court explained: “We found that as a consequence of the collective bargaining relationship between the ABA and its players union, Caldwell’s claims, insofar as they concerned the ‘circumstances under which an employer may discharge or refuse to hire an employee,’ involved a mandatory bargaining subject.” Id. at 137 (citing Caldwell, 66 F.3d at 529). The district court in Clarett I had a different view. See Clarett I, F. Supp. 2d at 382 (“[T]he [r]ule makes a class of potential players unemployable. Wages, hours, or working conditions affect only those who are employed or eligible for employment.”) (emphasis in original). Thus, the district court found eligibility restrictions were not conditions of employment and therefore could not be classified as mandatory subjects of bargaining. See id; see also Gerba, supra note 41, at 2387 (espousing author’s definition of conditions of employment). The author explains:

Conditions of employment are limited to those conditions under which one has to perform his job. To include eligibility restrictions as a condition of employment would be inconsistent with the NLRA because it extends the coverage of “conditions of employment” beyond just employees, its elimination does nothing to harm collective bargaining, and by its very nature can only apply to ineligible potential employees. In addition, the Second Circuit’s support for its holding is limited and distinguishable.

Id. at 2415-16 (citations omitted).

107. See Clarett II, 369 F.3d at 143 (denoting that Mackey, Eighth Circuit’s precedent, did not control). The court explained: “We, however, have never regarded the Eighth Circuit’s test in Mackey as defining the appropriate limits of the nonstatutory exemption.” Id. at 133. The court drew the distinction that the Mackey test drew on Supreme Court precedent based on injury to employers, not employees like Clarett. See id. at 134.


109. See id. (noting per se analysis is correct when practice lacks any competitive basis (quoting Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir. 1998)); see also Bd. of Regents, 468 U.S. at 99, 101 (holding that, because of unique circumstance of college football, industry with horizontal restraints is not necessarily per se illegal).

110. See id. (citing Law, 134 F.3d at 1016) (explaining that courts consistently examine challenged conduct under rule of reason when dealing with industry in which horizontal restraints are necessary for availability of product); see also NHLPA I, 325 F.3d 712, 719 (6th Cir. 2003) (stating that since Board of Regents,
Next, the court examined the two alleged anti-competitive effects of the "Van Ryn Rule." The court held that harm to athletic competition is not a cognizable harm under the Sherman Act. The plaintiffs argued the "Van Ryn Rule" makes the market for all other young professional hockey players in North America less competitive by reducing the quality of players permitted in the labor pool. The court found this to be an injury to competition under the Sherman Act.

The court then addressed whether the "Van Ryn Rule" caused the anti-competitive injury. While the plaintiffs alleged the "Van Ryn Rule" closed an available avenue to NHL free agency, the courts consistently hold that rule of reason analysis is appropriate for challenges to sport eligibility rules.

111. See NHLPA II, 419 F.3d at 469 (explaining that plaintiffs have burden to prove alleged anti-competitive effects of "Van Ryn Rule").

112. See id. at 473-74 (noting, importantly, that plaintiffs did not allege that lessened level of athletic competition caused economic harm).

113. See id. at 473-75 (arguing that by eliminating one path to NHL free agency, and thereby limiting competition between NHL clubs for players' services and rendering market for NHL players less competitive, affects players' salaries in relative market because some players who may have achieved free agency in NHL are unable to do so because of "Van Ryn Rule").

114. See id. at 474 (recognizing that there was injury to competition yet holding OHL's actions did not violate Sherman Act). The court further explained: In our view, the district court's analysis mischaracterizes Plaintiffs' argument. Plaintiffs contend that the "Van Ryn Rule" eliminates one path to NHL free agency, thereby limiting the competition between NHL clubs for these players' services and rendering the market for NHL players, and, presumably, the market for all other young professional hockey players in North America, less competitive. Such an injury is an injury to competition within the meaning of the Sherman Act. Id.

115. See id. (explaining how court approached causation analysis).

116. See NHLPA II, 419 F.3d at 475 (denoting argument of plaintiffs against "Van Ryn Rule"). Aquino claimed that playing for the OHL's Generals was the only way to become an unrestricted free agent and that, assuming he could join a professional league other than the NHL or the OHL, he would fall into defected status, causing the NHL's Dallas Stars to hold his exclusive rights in perpetuity. See NHLPA I, 325 F.3d 712, 716 (6th Cir. 2003). The "Van Ryn Rule" prevented him from entering the OHL and, in the process, also from becoming a free agent in the NHL, and this, he argued, unlawfully restricted free market competition. See id. at 720; see also CBA Between NHL and NHLPA, 2005, available at http://www.nhlpa.com/CBA/2005CBA.asp [hereinafter NHL CBA]. The CBA defines a defected player as: any Player not unconditionally released: (A) who, having had a SPC [Standard Player's Contract] with a Club, the provisions of which, including the option clauses in a 1995 SPC, have not been completely fulfilled, contracts for a period including any part of the unfulfilled portion of his SPC, with a club in a league not affiliated with the NHL or with any such league (both of which are hereinafter referred to as an "unaffiliated club") or with any other professional hockey club to the exclusion of the said Club or its assignee; or (B) who, never having been under contract to
defendants claimed the NHL’s CBA caused the illegal restraint. 117 The court agreed with the defendants’ analysis. 118

Although this is an injury under the Sherman Act, the court espoused that the NHL’s CBA, not the “Van Ryn Rule,” prevented the players from achieving free agency in the NHL. 119 The court then noted that “[a]ny anti-competitive effect of a properly bargained collective bargaining agreement is excluded from antitrust scrutiny by a non-statutory antitrust exemption.” 120

Last but not least, the court held the NHL and OHL conspired to restrict competition. 121 Nevertheless, because the “Van Ryn Rule” was not the root cause of the restriction, the plaintiffs had no cause of action. 122 The court dismissed the case for failure to state a claim upon which relief may be granted. 123

any Club, but as to who the NHL negotiation rights now or at any time hereafter shall reside in any Club, has contracted or shall contract with such an unaffiliated club.

Id. § 10.2(b).

117. See NHLPA II, 419 F.3d at 475-76 (explaining defendants’ argument against plaintiffs’ causation theory).

118. See id. at 476 (holding in favor of defendants).

119. See id. at 474 (noting that NHL CBA, not OHL’s “Van Ryn Rule,” establishes rules governing free agency eligibility in NHL).

120. Id. The court explained its dismissal of the case:

Therefore, if Defendants are correct that the injury complained of by the NHLPA is actually caused by the CBA, and not the “Van Ryn Rule,” then Plaintiffs have not stated a cause of action under the Sherman Act. (And certainly have not stated one against Defendants, who bear no responsibility for the CBA). We agree with Defendants that any anti-competitive effect caused by a restriction on the means by which players may achieve free agency in the NHL must be ascribed to the CBA and not the “Van Ryn Rule,” and that Plaintiffs have consequently failed to state a claim upon which relief can be granted.

Id.; see also, e.g., Clarett II, 369 F.3d 124, 142-43 (2d Cir. 2004) (holding CBA precludes antitrust liability).

121. See NHLPA II, 419 F.3d at 475-6 (explaining conspiracy and its implications). The court reasoned: “[T]he OHL has admitted that the Van Ryn Rule negatively impacts player quality, because it prevents OHL Clubs from signing talented twenty-year-old NCAA players . . . . We find it not only reasonable but self-evident that better players provide a better product.” Id. at 476. The court found it odd that the OHL would adopt a rule preventing a marquee player from entering its league after the commissioner said the addition of this player would be of great benefit to the league. See id. at 476. The court also found that it was likely the two leagues exchanged information and that the NHL wielded considerable influence over the OHL. See id.

122. See id. (“The Van Ryn Rule, whether adopted by conspiracy between the member clubs of the OHL or by conspiracy between the OHL and the NHL, does not cause the anti-competitive effects alleged by Plaintiffs.”).

123. See id. at 466, 476 (explaining reasons for dismissal and affirming district court).
V. CRITICAL ANALYSIS: SLAP SHOT, WRIST SHOT, OR SLAP ON THE WRIST?

A. The Rule of Reason Prevails

The court correctly applied the rule of reason instead of the per se rule.124 Both recent precedent and the rule of reason's appropriateness in antitrust cases involving professional sports leagues support the rule of reason analysis.125 The per se rule, as adopted by the lower court in NHLPA II, is inapplicable because of the unique circumstances of professional sports.126 In this case, the court was merely following the Supreme Court's holding in NCAA v. Board of Regents of the University of Oklahoma.127 Moreover, the court's determination that the NHL's CBA applies, and that the "Van Ryn Rule" does not, remains at the root of this interesting case.128

B. A New Rule of Reason

Instead of the per se rule, the court applied the rule of reason in NHLPA II.129 The relevant questions in sports draft entry cases are: (1) whether potentially drafted players are employees under the NLRA;130 (2) whether draft entry rules are mandatory subjects

124. See id. at 469 (holding that rule of reason was correct way to analyze case).
125. See id. (applying rule of reason in NHL antitrust case because of recent Supreme Court precedent following NCAA v. Board of Regents of University of Oklahoma).
126. See NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 86, 100-02 (1984) (noting that businesses which can only survive with horizontal restraints must be analyzed under rule of reason because of their peculiar circumstances).
127. See NHLPA II, 419 F.3d at 469 (holding sports leagues' antitrust activity must be analyzed under rule of reason, not per se rule); see also Bd. of Regents, 468 U.S. at 90, 103.
128. See NHLPA II, 419 F.3d at 474 (refusing to determine whether "Van Ryn Rule" harmed competition but notably ignoring that "Van Ryn Rule" effects potential NHL players who were not party to NHL's or OHL's rules and whose interests were not represented by NHLPA).
129. See id. at 469 (noting per se analysis does not comport with recent Supreme Court precedent holding that some industries need horizontal restraints for product availability).
130. See Gerba, supra note 41, at 2417 (positing that all future potential employees within NLRA definition would leave it limitless and asserting that if Congress intended such broad coverage it would have used term "person" instead of "employee" when it espoused statute); see also 42 U.S.C. § 152(3) (1979) (defining "employees" in ambiguous fashion).
of bargaining;\textsuperscript{131} and (3) whether the parties bargained for the draft entry rule in good faith.\textsuperscript{132}

If courts accept the argument that potentially drafted players are not employees under the NLRA, the per se rule applies when analyzing draft entry into professional sports leagues.\textsuperscript{133} If courts accept that draft entry rules are not mandatory subjects of collective bargaining, the rule of reason would condemn this trade restraint.\textsuperscript{134} Therefore, the per se rule should apply in order to save courts' precious time and resources.\textsuperscript{135}

C. A Loophole Filled Without Collective Bargaining

An interesting dynamic exists between the harm to competition the NHL's CBA allegedly caused and the court's later ruling on the conspiracy between the OHL and NHL.\textsuperscript{136} Impliedly, the NHL could have put economic pressure on the OHL to restrict competition using the "Van Ryn Rule."\textsuperscript{137} The court found sufficient evidence to indicate that the NHL and OHL conspired to restrict trade and that the NHL, leading the OHL by the leash, initiated this conspiracy.\textsuperscript{138} Hence, the two

\textsuperscript{131} See Clarett I, 306 F. Supp. 2d 379, 392 (S.D.N.Y. 2004) (holding rule limiting eligibility for NFL draft entry makes potential players unemployable, and wages, hours, or working conditions affect only those who are employed or eligible for employment); see also Gerba, \textit{supra} note 41, at 2417. For a further discussion of mandatory bargaining subjects and how courts inconsistently interpret such, see \textit{supra} notes 92, 106 and accompanying text.

\textsuperscript{132} See generally Gerba, \textit{supra} note 41, at 2417 (eluding to third element in analysis necessary in draft entry litigation).

\textsuperscript{133} See State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (noting that per se treatment of trade restraint is appropriate "once experience with particular kind of restraint enables court to predict that rule of reason will condemn it" (quoting Arizona v. Maricopa County Medical Soc., 457 U.S. 332 (1982))).

\textsuperscript{134} See id. (implying that if there is predetermined precedent that draft entry rules are not mandatory subjects, court would not have to engage in rule of reason analysis because it would be per se invalid to restrict trade in this fashion).

\textsuperscript{135} For a further discussion of fact-sensitive and time-consuming rule of reason inquiries, see \textit{supra} notes 38-43 and accompanying text.

\textsuperscript{136} See NHLPA II, 419 F.3d at 475-76 (6th Cir. 2005) (maintaining likelihood of conspiracy between NHL and OHL to restrict competition because plaintiff plead enough facts to support existence of agreement). The court held the plaintiffs could not prove a conspiracy between the NHL and OHL because the plaintiffs based their reasoning on the already discounted argument that the "Van Ryn Rule" prevents players from achieving free agency. See \textit{id.} at 476.

\textsuperscript{137} See \textit{id.} at 474 (stating OHL's motives to restrict trade in this instance were unnatural, though they clearly favored NHL by diminishing OHL's comparative quality of athletic competition).

\textsuperscript{138} See \textit{NHLPA II}, 419 F.3d at 475-76 (outlining relationship between NHL and OHL). The court explained:

To explain the NHL's ability to influence the OHL, Plaintiff detailed their relationship: the NHL and OHL are affiliates under the CBA be-
interrelated leagues launched a two-pronged assault to restrain trade.\footnote{See NHLPA II, 419 F.3d at 474 (examining relationship between NHL's CBA and OHL's "Van Ryn Rule" and stating that "Van Ryn Rule" is merely secondary cause of trade restraint).}

The first prong, the NHL CBA, defined drafted players' free agency rights.\footnote{See NHL CBA, supra note 116, at Art. 10 (denoting who is free agent in NHL by various rules and procedures).} The second prong, the "Van Ryn Rule," restricted players' options of becoming free agent in the NHL.\footnote{See id. (noting that "Van Ryn Rule" prohibited players from becoming unrestricted free agents by quashing players' abilities to gain free agency when they join leagues affiliated with NHL).} Without the "Van Ryn Rule," the plaintiffs, through a loophole not contemplated by the NHL CBA's drafters and signers, would be unrestricted free agents.\footnote{See id. (describing effects of "Van Ryn Rule"). This, ironically, is why the "Van Ryn Rule" is called the "Van Ryn Rule," because Mike Van Ryn was able to circumvent the system through a loophole. See id. The alleged conspiracy between the NHL and OHL closed the loophole, not the efforts of the NHL and NHLPA through collective bargaining. See id. For a further discussion of the "Van Ryn Rule," see supra note 21 and accompanying text.} With the "Van Ryn Rule," this avenue toward NHL free agency closes.\footnote{See NHLPA II, 419 F.3d at 467 (explaining that NHL's CBA governs league eligibility). The court failed to note the repercussions of the OHL's unilateral modification of the CBA by the "Van Ryn Rule." See id.} As the court holds, the OHL is an ancillary cause of the alleged restraint on trade.\footnote{See id. at 474 (denoting conspiracy between two leagues). This argument may also implicate the NCAA because the "Van Ryn Rule," combined with the NCAA policy of not allowing amateurs to hold professional credentials, is really what makes the NHL's restraint on trade work. See id. at 466. The NCAA, how-
VI. IMPACT: A WIN-WIN-WIN SITUATION: IMPOSE ON NON-EMPLOYEES UNILATERAL RESTRAINTS ON NON-MANDATORY BARGAINING TERMS AND NEGOTIATE IN BAD FAITH

A. Who to Sue?

Despite the court's indications, the plaintiffs may have a cause of action against the NHL under the Sherman Act. The court incorrectly examined the balance between labor law and antitrust law when it noted that the NLE prevents the plaintiffs from having a cause of action against the NHL. The court erred in stating the plaintiffs would have no claim under the Sherman Act because the trade restriction was enacted under the NHL CBA—the NHL and NHLPA did not bargain over this particular aspect of the CBA.

The co-plaintiffs in this case are the NHLPA, Aquino, and Caron. Aquino and Caron, at the time they filed their complaint, were NCAA hockey players and not professionals. Under a broad reading of the NLRA's definition of employee, they were not employees of the NHL. The NLRA definition makes no reference to individuals who are not employees. Therefore, the

ever, was not implicated in the conspiracy suit; additionally, there are no objective facts or facts in the record which support their policy as being motivated by an agreement with the NHL. See id.

145. See Mackey v. NFL, 543 F.2d 606, 623 (8th Cir. 1976) (finding there was not bona-fide, arm's-length bargaining because rule predated CBA and there was no quid pro quo for its inclusion in CBA).

146. See NHLPA II, 419 F.3d at 474-75 (adding that defendant OHL bears no responsibility for NHL CBA). The court wrote rather briefly on the complicated issue of the NLE, citing only Clarett II. See id. at 474. This short writing on the matter of whether the plaintiffs could sue the NHL could be viewed as the court trying to prevent further litigation in the case or simply as an indication of how it would rule in the future. See id.

147. See id. (dictating court's view on complex NLE issue that CBA, not "Van Ryn Rule," caused injury alleged by NHLPA and thus precluding cause of action under Sherman Act); see also Gerba, supra note 41, at 2411-17 (arguing entry rule is not mandatory subject of collective bargaining and potential player in professional sports league is not considered employee, meaning NLE is inapplicable). This case is similar to Clarett II because the two plaintiffs, like Clarett, are potential, and not actual, employees of the NHL. See id. at 2417. Also, the draft entry rules found in the NHL CBA do not deal with mandatory subjects of bargaining under the NLRA, unless interpreted liberally. See id.

148. See NHLPA II, 419 F.3d at 467-68 (identifying plaintiffs and defendants).

149. See id. at 467 (explaining relative positions of plaintiffs at time action commenced).

150. See 29 U.S.C. § 152(3) (2006) (defining “employees”); see also McCormick & McKinnon, supra note 89, at 402-04 (highlighting Supreme Court's analysis of term “employee”); Gerba, supra note 41, at 2416-17 (noting NLRA imposes limits on whom to consider "employee").

151. See Gerba, supra note 41, at 2416 (recognizing limits on whom to consider "employee"). The author notes:
plaintiffs were outside of the bargaining unit and the NHL’s CBA
does not apply to them.152 This fails Mackey’s first prong.153

Nevertheless, a sensitive issue comes to light because the
NHLPA was also a co-plaintiff.154 The NHL may argue the NHLPA,
as the sole bargaining representative for all NHL players, is charged
with bargaining on behalf of the NHL’s employees.155 Thus, as an
alternative, the NHLPA can bargain for a less restrictive CBA when
dealing with draft eligibility rights for potential free agents, rather
than simply suing the NHL.156

In an antitrust case against the NHLPA, however, the NHL’s
argument is irrelevant because the NHL and the NHLPA never spe-
cifically bargained on the “Van Ryn Rule.”157 An arm’s-length, col-
lectively bargained agreement must produce an actual agreement
in order to have the NLE applied.158 Moreover, the NLRA’s pur-

The definition goes on to use the term “any individual,” which applies to
people “whose work has ceased.” This, at least implicitly, requires that
the person must have already been an employee. . . . To effectuate the
congressional intent for collective bargaining, the NLRA must cover
some potential employees to foster incentives for employers to bargain
collectively. The NLRA definition, however, imposes limits on who
should be considered an employee. Including all future potential em-
ployees within this definition would leave the definition of “employees”
virtually limitless.

Id. at 2416-17 (citations omitted).

152. See Mackey v. NFL, 543 F.2d 606, 614 (8th Cir. 1976) (“[T]he labor pol-
icy favoring collective bargaining may potentially be given pre-eminence over the
antitrust laws where the restraint on trade primarily affects only the parties to the
collective bargaining relationship.”).

153. See id. at 615 (espousing first prong of three part test for NLE).

154. See NHLPA II, 419 F.3d 462, 466 (6th Cir. 2005) (noting parties to case).

couraging the practice and procedure of collective bargaining and by protecting
the exercise by workers of full freedom of association, self-organization, and design-
ation of representatives of their own choosing”) (emphasis added); see also Diamos,
supra note 2 (outlining belief that NHLPA is nothing more than organ for NHL).

inapplicable, it would undermine federal labor policy). In this case, federal la-
bor policy would not be undermined because the petitioners did not challenge the
CBA, but rather they challenged a unilateral amendment to the CBA that was con-
spiratorially achieved after the two parties bargained for a system. See NHLPA II,
419 F.3d at 475-76 (“Plaintiffs . . . failed to allege facts sufficient to support the
existence of an agreement . . . . This conclusion is based on our analysis of the
allegations in the complaint relating to each of the factors to be considered in
weighing circumstantial evidence of a conspiracy.”)

157. See NHLPA II, 419 F.3d at 467 (“These factual allegations, if believed,
could support a finding that the NHL and OHL conspired to implement the Van
Ryn Rule.”).

158. See Mackey, 543 F.2d at 616 (espousing standard to determine applicabil-
ity of NLE in litigation).
pose is to encourage labor peace through collective bargaining. Therefore, because the "Van Ryn Rule" did not stem from collective bargaining and unlawfully restricts trade under the Sherman Act when combined with the NHL's CBA, the NHLPA and the players may have a cause of action against the NHL.

Yet, if the court disagrees, as its dicta indicates, the decision confronting the plaintiffs will be difficult. If the plaintiffs sue the NHL, the court will apply the NLE and will likely implicitly hold that the two players are NFL employees. Thus, the first prong of the Mackey test would be satisfied. If Aquino and Caron break off from the NHLPA, the suit will likely be dropped because the two players have moved on in their careers; only the NHLPA has a

159. See 29 U.S.C.A. § 151 (noting purpose of NLRA). The NLRA further announces:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Id. The NHL's actions here did not promote industrial peace because no collective bargaining took place, and as made obvious by the NHLPA's suit, the NHLPA was not happy with the NHL's unilateral restraint imposed through conspiratorial means. See NHLPA II, 419 F.3d at 467 (stating OHL unilaterally adopted "Van Ryn Rule" in response to Mike Van Ryn's ability to achieve free agency).

160. See Mackey, 543 F.2d at 614 (illustrating that agreement must fulfill three part test). Cf. Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996) (holding that employers may unilaterally impose terms on employees, but only after two sides tried to reach good faith agreement on those terms, which did not occur in this case).

161. See NHLPA II, 419 F.3d at 474 ("Any anti-competitive effect of a properly bargained collective bargaining agreement is excluded from antitrust scrutiny by a nonstatutory antitrust exemption.").

162. See id. at 475 (explaining dicta of likely result if plaintiffs sued NHL). The court further elaborated:

However, we must still consider whether the "Van Ryn Rule" can fairly be said to be the cause of this injury. Defendants argue that the alleged effects of the Van Ryn Rule are actually caused not by the Rule but by the NHL's collective bargaining agreement ("CBA"), which sets forth the rules governing eligibility for free agency. Any anti-competitive effect of a properly bargained collective bargaining agreement is excluded from antitrust scrutiny by a non-statutory antitrust exemption.

Id. at 474.

163. See Mackey, 543 F.2d at 614 (holding that plaintiff must be party to collectively bargained agreement in order for NLE to apply).

164. See Guth, supra note 28, at 1 (noting that both co-plaintiffs are current NHL players).
current interest in this case.\textsuperscript{165} In hindsight, the plaintiffs would have a valid argument if they sued the NHL and not the OHL.\textsuperscript{166}

B. Entry to a Professional Sports League is Not a Mandatory Bargaining Subject

It is important to note that an agreement to restrict admission to a profession is not intimately related to wages, hours, and working conditions.\textsuperscript{167} Matters that concern persons outside of the bargaining agreement are permissive, not mandatory, subjects of bargaining.\textsuperscript{168} This case's plaintiffs are not NHL employees.\textsuperscript{169} They are not parties to the agreement, and the CBA affects them as entities outside the agreement.\textsuperscript{170} Hence, entry to a professional

\textsuperscript{165}. See generally NHL CBA, supra note 116, at Art. 10 (discerning implicitly, because of NHLPA's bargaining position, that NHLPA cares more about NHL's rules than Acquino and Caron, who have moved on in their professional careers). If the NHLPA were in fact so against the "Van Ryn Rule," it should not have agreed in the new NHL CBA, ratified in July, 2005, to the same free agency terms. See id.

\textsuperscript{166}. See NHLPA II, 419 F.3d at 475 (stating that NHL, not OHL, is liable to plaintiffs for harm). Cf. Mackey, 543 F.2d at 614 (denoting that all three prongs of test must be met for NLE to apply).

\textsuperscript{167}. For a further discussion on the NLE's constraints, see supra notes 52-65 and accompanying text. The Second Circuit in Clarett II found the eligibility requirement had tangible effects on wages and working conditions. See Clarett II, 369 F.3d 124, 140 (2d Cir. 2004). In support of this, the court stated the "[eligibility rule's] elimination might well alter certain assumptions underlying the collective bargaining agreement between the NFL and its players union." Id. The court continued: "[b]ecause the size of NFL teams is capped, the eligibility rules diminish a veteran player's risk of being replaced by either a drafted rookie or a player who enters the draft and, though not drafted, is then hired as a rookie free agent." Id. An examination of these two assertions shows that neither supports classification as a mandatory subject, and thus they cannot support the application of the NLE to Clarett's case. See id.

\textsuperscript{168}. See McCormick & McKinnon, supra note 89, at 407. The authors explain: The draft eligibility rule concerns the relationship between the employing clubs and persons outside the collective bargaining relationship without vitally affecting active players. In addition, the interests of prospective players and active players regarding the rule conflict. As a result, the draft eligibility rule does not come within the exception to the rule that matters involving persons outside the employment relationship are permissive rather than mandatory subjects of bargaining. Being a non-mandatory subject, the eligibility rule fails the second prong of the Mackey-McCourt standard, and consequently, should not be immunized from antitrust interdiction. Id.

\textsuperscript{169}. For a further discussion of whether the plaintiffs are "employees" under the NLRA, see supra notes 62, 89, 91, and 151.

\textsuperscript{170}. For a further discussion explaining who are considered employees under the NLRA, see supra notes 62, 89, 91, and 151. Further, the NHLPA did not represent the two plaintiffs in negotiations about an entry rule to the NHL because they were not part of the NHLPA at that time. See NHLPA II, 419 F.3d at 475.
sports league is not a mandatory subject of collective bargaining.\textsuperscript{171} Therefore, the Connell Construction test, Jewel Tea test, and the second prong of the Mackey test all fail.\textsuperscript{172}

The policy reasons for upholding a professional sport organization's CBA do not truly shed any light on the players' claims.\textsuperscript{173} Unlike the Supreme Court's most recent holding in Brown, which dealt with wages and employees, this case deals with neither.\textsuperscript{174} Thus, the NLE should be inapplicable.\textsuperscript{175}

C. Was the NHL's New CBA Negotiated in Bad Faith?

Furthermore, as recent history suggests, the bargaining for the new NHL CBA may not have been fair and equal.\textsuperscript{176} The weak

171. For a further discussion of mandatory subjects of collective bargaining, see \textit{supra} notes 68-73, 106 and accompanying text.

172. For a further discussion of the case law pertaining to mandatory subjects of collective bargaining and tests established to determine if the NLE applies, see \textit{supra} notes 70-73 and accompanying text.

173. For a further discussion about how the \textit{Clarett II} court's holding viewed Brown's holding as not openly supporting Mackey but rather as noting the broad need for antitrust law to cooperate with labor law, see \textit{supra} notes 101-07 and accompanying text.


175. \textit{See} Brown, 518 U.S. at 250 (noting workers were employees and restraint dealt with unilateral imposition of mandatory terms). For a further discussion of how the new NHL CBA may be the product of a bad faith negotiation, see \textit{infra} notes 176-78 and accompanying text.


"I don't think the deal that we're going to get would have been ratified last summer. But I just think we've been worn down to the point where at this stage the deal would really have to be incredibly bad for the guys not to vote it in. At least that's the sense I'm getting."

\textit{Id.} (quoting Sean Burke); \textit{see also} Diamos, \textit{supra} note 2, at 82 (quoting Marvin Miller, former executive director of Major League Baseball Players Association, on new NHL CBA). The article reads:

Miller pointed to the players union's eventual willingness to accept a salary cap and to Ted Saskin's controversial ascension to executive director of the union (he replaced Bob Goodenow). Saskin had been the union's senior director of business affairs and licensing. "The whole thing smells bad," Miller said. "It just has a very bad odor. You have a so-called senior adviser who takes the leading role in making one of the worst settlements imaginable and then becomes executive director of the union." Of the salary cap, Miller said: "I don't think it was necessary. All the signs were that the union, having come that far, they had more than a fighter's chance of prevailing. And when the tide turns like that, I get very suspicious of management's role in coercing the membership."

\textit{Id.}
union fired its head negotiator and accepted a deal far below what they had hoped for.\footnote{177} Perhaps as a case in point, the NHLPA allowed the free agency rules to remain the same in the new CBA.\footnote{178}

The NLRB and the courts expounded the necessity to bargain in good faith to enable unions who could not strike to maintain a satisfactory bargaining status.\footnote{179} Nevertheless, it is difficult to prove bad faith on the part of a bargaining entity because the court is not allowed to inquire into the terms of an agreement.\footnote{180} In a recently filed lawsuit that is extremely relevant to the facts of this case, certain members of the NHLPA have asked to remove the NHLPA’s head negotiator and reward them millions of dollars in damages, part of which stem from the alleged misrepresentations made to players during their ratification of the 2005 CBA.\footnote{181}

The NHL may not have bargained in good faith with the NHLPA.\footnote{182} The NHLPA and the NHL bargained for the NHL CBA but did not bargain for the “Van Ryn Rule,” which was part of the two-pronged restraint of trade.\footnote{183} Therefore, the NHL, conspiring with the OHL, unilaterally changed a mandatory bargaining term

\footnote{177. \textit{See generally} Caldwell, supra note 11 (noting players not happy with union head after agreement). “I think the deal is not great for the players . . . . It is definitely an owner-friendly deal.” \textit{Id.} (quoting Philadelphia Flyers center Jeremy Roenick).}

\footnote{178. \textit{See} CBA Frequently Asked Questions, http://www.nhl.com/nhlhq/cba/index.html (last visited Sept. 16, 2006) (noting free agency rules in new CBA are unchanged from previous CBA). This may explain the motive for the NHLPA to sue the OHL, rather than the NHL, in this case. \textit{See id.} Or, perhaps, it shows that the NHLPA was truly weakened by a strike that cost it an entire hockey season. For a further discussion of this issue, see supra notes 140, 176-77 and accompanying text.}


\footnote{180. \textit{See id.} (mentioning Catch-22 in proving bad faith in labor context). For a further discussion about how the \textit{McCourt} case demonstrated the tough standard of proof when dealing with bad faith agreements in the professional sports context, see supra notes 81-86 and accompanying text.}

\footnote{181. \textit{See Ken Campbell, Lawsuit Alleges Goodenow Received $8 Million Buyout,} http://www.21919 (last visited October 28, 2006) (denoting allegations of certain players against NHLPA).}

\footnote{182. For a further discussion of good faith in the context of labor negotiations between a union and an employer, see supra note 179.}

\footnote{183. For a further discussion of the NHL’s and OHL’s two pronged restraint of trade, see supra notes 136-44 and accompanying text.}
and, consequently, acted in bad faith. Even though it is unlikely, this case may fail the third prong of the *Mackey* test.

VII. CONCLUSION: A SHOOT OUT THAT ENDS WITH AN OWNER’S VICTORY

The Supreme Court has never fully developed the NLE. Therefore, in the complex labor world of professional sports, courts can use the NLE as a shield to employees’ interests, or courts can use it incorrectly because of the oftentimes conflicting case law. In this case, the plaintiffs sued the wrong entity. If they sued the NHL, it appears the court would have wrongfully granted the NLE. The new NHL CBA, if analyzed from a player’s point of view, may not have been the product of a fair negotiation. The Supreme Court may have to confront this issue in an antitrust suit in the future. Both the complex issues and the conflicting case law meant to solve the problems present daunting challenges to courts.

Courts can solve their problems with draft entry rules by declaring them per se violations of the Sherman Act. This can be practically accomplished if courts hold that potential draftees are not employees under the NLRA or that draft entry rules are not mandatory bargaining subjects. Recently, however, the courts

184. See *NHLPA II*, 419 F.3d 462, 466-68 (2d Cir. 2005) (noting facts of case). This results only if the court finds that it is a mandatory term of bargaining, which, as this Comment argues, it is not. For a further discussion of why this is not a mandatory subject of bargaining, see *supra* notes 92, 106. See generally Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 v. NLRB., 309 F.3d 578 (9th Cir. 2002) (noting employer violated obligations of good faith if it unilaterally imposes changes in mandatory subjects of bargaining); 29 U.S.C.A. § 158(d) (referencing requirement of good faith in collective bargaining).

185. See *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976) (holding NLE inapplicable if agreement is not part of bona-fide, arm’s-length negotiation).

186. For a further discussion on the Court’s different holdings on antitrust issues involving the NLE, see *supra* notes 66-107 and accompanying text.

187. See *Clarett II*, 369 F.3d 124, 138 (2d Cir. 2004) (using NLE even though Mackey test not fulfilled); see also Kessler & Feher, *supra* note 6, at 45 (“The lesson of history, from both before and after the Brown decision, is that disruptions between players and owners, with less collective bargaining, are more likely to occur now than ever before—undermining the very labor law policies that Justice Breyer indicated he was trying to protect in Brown.”).

188. For a further discussion on whether the NHLPA should have sued the NHL rather than the OHL, see *supra* notes 161-66 and accompanying text.

189. See *NHLPA II*, 318 F.3d 462, 474 (6th Cir. 2005) (“Any anti-competitive effect of a properly bargained collective bargaining agreement is excluded from antitrust scrutiny by a nonstatutory antitrust exemption.”).

190. For a further discussion on the player’s point of view regarding the new CBA, see *supra* notes 176-77 and accompanying text.

191. For a further discussion on why the per se rule should be applied in the context of the draft entry rule, see *supra* notes 179-80.
have put the team concept of a CBA over the individual rights of a player trying to penetrate the impenetrable structure of "free" agency in professional sports. The strategy of placing the collective over the individual has served the New Jersey Devils well in the past, but it remains to be seen whether the courts will continue to stress this ideal.

Thomas Brophy

192. See, e.g., Brown v. Pro Football, 518 U.S. 231, 250 (1995) (holding unilateral imposition of fixed salary fell within scope of NLE); Clarett II, 369 F.3d at 140 (holding NLE applies to agreements unilaterally imposed and not bargained for collectively). In an ironic counterpoint, the New Jersey Devils also put the team above the individual and have had success. For a further discussion on this team concept, see supra note 1 and accompanying text. However, the Devils have had numerous problems with players concerning contracts. This is an interesting parallel to the NLRA's main policy goal of promoting industrial peace: if the Devils' policy causes bickering over player contracts, how will NHL players react to the new NHL CBA? For a further discussion on how the "Van Ryn Rule" came about because of the Devils' hard bargaining position, see supra note 21 and accompanying text.

193. For a further discussion of the Devils' championship teams and how they were built as a metaphor for courts' analysis of labor law and antitrust law, see supra notes 1-5 and accompanying text.