CHAPTER ONE

Labor and Antitrust Law

LABOR LAW

Antitrust laws prohibit agreements or practices that restrict business competition to the detriment of consumers. These laws ban abusive behavior by businesses that dominate markets. Most antitrust laws are federal in nature so the federal government is given jurisdiction when the businesses participate in interstate commerce. Antitrust laws and regulations help insure competition which goes to the essence of a free economy.

Under antitrust law, workers are able to organize unions to bargain collectively on behalf of individual workers to achieve a Collective Bargaining Agreement that deals with working conditions. While such collective bargaining limits the rights of individual workers, it increases the overall bargaining power of workers through bargaining as a collective unit.

ANTITRUST LAWS

The first antitrust law was the Sherman Antitrust Act of 1890 which prohibited monopolies that harmed consumers. The law prohibited agreements or practices that unduly restricted free competition between businesses. This legislation was followed by the Clayton Act of 1914 which exempted labor unions from being considered monopolies even though they regulated working conditions. Later,

the Norris LaGuardia Act of 1932 permitted employees to organize as a collective bargaining unit without violating the law. This law represented a balancing of the rights of individual employees with the best interests of all the employees of a particular employer and while for most companies the bargaining power of individual employees is not very strong when contrasted with the bargaining power of a union representing all of the workers, in the realm of professional athletics, the bargaining power of the superstars of the respective sports would exceed that of the union representing all of the players, however, for the betterment of all of the athletes in a particular sport, collective bargaining is how all of the major professional team sports operate.

THE PER SE RULE AND THE RULE OF REASON

Under the *per se* rule, a labor practice is considered a violation of antitrust law if it is an inherently unreasonable restraint of trade. As was stated in the NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984), "Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." This is both a flexible and vague standard.

The other primary rule for determining violations of antitrust law is the rule of reason. It too is a vague and flexible standard by which the anti-competitive aspects of a particular practice are balanced against the pro-competitive benefits. In the Mackey case discussed later in this chapter, the Rule of Reason was discussed indicating that "The focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary." Mackey v. NFL, 543 F2d 606 (1976).

COLLEGE FOOTBALL ANTITRUST ISSUES

The NCAA's control over college football was challenged on antitrust grounds in 1984 by the University of Oklahoma in a case that ultimately was decided by the Supreme Court. NCAA v. Board of Regents of the University of Oklahoma 468 U.S. 85 (1984). At the time of the lawsuit, the NCAA limited television appearances of schools to no more than four national and six regional televised games over a two year period.

Justice John Paul Stevens wrote on behalf of the Supreme Court, "There can be no doubt that the challenged practices of the NCAA constitute a 'restraint of trade.' " However he went on to explain that not all restraints of trade were necessarily unreasonable restraints of trade and only unreasonable restraints of trade were illegal under antitrust law.

Justice Stevens determined that a central governing body was necessary for proper operation of college sporting events so the per se standard was not appropriate for determining whether a violation of antitrust law existed. The standard that was to be used was the rule of reason standard. Due to the fact that the NCAA plan did plainly restrain trade, it was up to the NCAA to prove that such restraint was reasonable. One of the arguments presented by the NCAA to justify its television restrictions was that it was necessary to enhance the competitiveness of college football, however, Justice Stevens in essence ruled that if it ain't broke don't fix it, indicating that there was no need to protect the market against non-existent competitors. He further dismissed the NCAA's arguments that the television restrictions were necessary in order to protect the live attendance at games saying, "The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove

sufficiently attractive to draw life attendance when faced with competition from televised games."

The vote in favor of the University of Oklahoma was 7–2 and it is interesting to note that among the two dissenters was Justice Byron White who during his college football playing days was known as Whizzer White. Justice White also has the distinction of being the only Supreme Court Justice ever to lead the National Football League in scoring which he did as a running back for the Pittsburgh Pirates (now Steelers) in 1938. While White acknowledged in his dissent that superficially collegiate athletic competitions were similar to professional sporting competitions, he emphasized that the purpose of professional sports were to earn profits while the objective of college sports was to incorporate them into an educational goal in which he believed the restrictions placed by the NCAA were reasonable.

Perhaps unknowingly, White may have correctly predicted the state of college football today in which huge television contracts from networks such as ESPN are driving forces of the game even dictating when a game will be played.

In 2015 the college football playoffs alone brought in 400 million dollars in revenues with the top five conferences having television contacts as follows:

1. ACC television contracts 212 million dollars;
2. Big 12 television contracts 162 million dollars;
3. Pac-12 television contracts 215 million dollars;
4. Big 10 television contracts 279 million dollars
5. SEC television contracts 347 million dollars.[1]

In his dissent, White wrote, "While it would be fanciful to suggest that colleges are not concerned about the profitability of their

[1] "5 College Conferences That Bring in Over $250 Million" Sports Cheat Sheet, Jason Alsher, January 4, 2017.

ventures, it is clear that other, non-commercial goals play a central role in their sports programs. . . . The NCAA's member institutions have designed their competitive athletic programs to be a vital part of the educational system. . . Deviations from this goal produced by a persistent and perhaps inevitable desire to 'win at all costs,' have in the past led, and continue to lead, to a wide range of competitive excesses that prove harmful to students and institutions alike. . . The fundamental policy underlying the NCAA's regulatory program, therefore, is to minimize such deviations and 'to maintain intercollegiate athletics as an integral part of the educational program that the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports. The NCAA, in short exits primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity."

He went on to say, "When these values are factored into the balance, the NCAA's television plan seems eminently reasonable. Most fundamentally, the plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism."

It is, of course, interesting to note that while today's college football can hardly be called an amateur sport, the profits are essentially reaped not by the players, but the colleges themselves.

NCAA v. Board of Regents of Univ. of Okla.

United States Supreme Court
468 U.S. 85 (1984)

Held:

The NCAA's television plan violates 1 of the Sherman Act.

(a) While the plan constitutes horizontal price fixing and output limitation, restraints that ordinarily would be held "illegal per se," it would be inappropriate to apply a per se rule in this case where it

involves an industry in which horizontal restraints on competition are essential if the product is to be available at all. The NCAA and its members market competition itself—contests between competing institutions. Thus, despite the fact that restraints on the ability of NCAA members to compete in terms of price and output are involved, a fair evaluation of their competitive character requires consideration, under the Rule of Reason, of the NCAA's justifications for the restraints. But an analysis under the Rule of Reason does not change the ultimate focus of the inquiry, which is whether or not the challenged restraints enhance competition.

(b) The NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the District Court's findings establish that the plan has operated to raise price and reduce output, both of which are unresponsive to consumer preference. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon the NCAA a heavy burden of establishing an affirmative defense that competitively justifies this apparent deviation from the operations of a free market. The NCAA's argument that its television plan can have no significant anticompetitive effect since it has no market power must be rejected. As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output and, as a factual matter, it is evident from the record that the NCAA does possess market power.

(c) The record does not support the NCAA's proffered justification for its television plan that it constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. The District Court's contrary findings undermine such a justification.

(d) Nor, contrary to the NCAA's assertion, does the television plan protect live attendance, since, under the plan, games are televised during all hours that college football games are played. Moreover, by seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is

insufficiently attractive to draw live attendance when faced with competition from televised games, the NCAA forwards a justification that is inconsistent with the Sherman Act's basic policy. "The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." National Society of Professional Engineers v. United States, 435 U.S. 679, 696.

(e) The interest in maintaining a competitive balance among amateur athletic teams that the NCAA asserts as a further justification for its television plan is not related to any neutral standard or to any readily identifiable group of competitors. The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program or the way the colleges may use their football program revenues, but simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that such restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. Moreover, the District Court's well-supported finding that many more games would be televised in a free market than under the NCAA plan, is a compelling demonstration that the plan's controls do not serve any legitimate procompetitive purpose.

707 F.2d 1147, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 120.

JUSTICE STEVENS delivered the opinion of the Court.

The University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games. After an extended trial, the District Court found that the NCAA had violated 1 of the Sherman Act 1 and granted injunctive relief. 546 F. Supp. 1276

(WD Okla. 1982). The Court of Appeals agreed that the statute had been violated but modified the remedy in some respects. 707 F.2d 1147 (CA10 1983). We granted certiorari, 464 U.S. 913 (1983), and now affirm.

There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.

It is also undeniable that these practices share characteristics of restraints we have previously held unreasonable. The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes. As the District Court found, the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade. Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade.

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20 (1979). In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a per se rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on [468 U.S. 85, 101] our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

As Judge Bork has noted: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, The Antitrust Paradox 278 (1978). What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be

comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the 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. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

Broadcast Music squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive. See 441 U.S., at 18–23. Similarly, as we indicated in Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51–57 (1977), a restraint in a limited aspect of a market may actually enhance marketwide competition. Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions. Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both per se rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978). A conclusion that a restraint of trade is unreasonable may be "based either (1) on 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. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions."

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.

Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects. The findings of the District Court indicate that this potential has been realized. The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights. Moreover, the court found that by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market. And, of course, since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's television controls.

The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.' " Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherma Act was intended to prohibit. See Standard Oil Co. v. United States, 221 U.S. 1, 52–60 (1911). At the same time, the television plan eliminates competitors from the market, since only

those broadcasters able to bid on television rights covering the entire NCAA can compete. Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan.

Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market. We must reject this argument for two reasons, one legal, one factual.

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." Professional Engineers, 435 U.S., at 692. Petitioner does not quarrel with the District Court's [468 U.S. 85, 110] finding that price and output are not responsive to demand. Thus the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference. We have never required proof of market power in such a case. This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

As a factual matter, it is evident that petitioner does possess market power. The District Court employed the correct test for determining whether college football broadcasts constitute a separate market—whether there are other products that are reasonably substitutable for televised NCAA football games. Petitioner's argument that it cannot obtain supracompetitive prices from broadcasters since advertisers, and hence broadcasters, can switch from college football to other types of programming simply ignores the findings of the District Court. It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience.

These findings amply support its conclusion that the NCAA possesses market power. Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics is vivid evidence of the uniqueness of this product. Moreover, the District Court's market analysis is firmly supported by our decision in International Boxing Club of New York, Inc. v. United States, 358 U.S. 242 (1959), that championship boxing events are uniquely attractive to fans and hence constitute a market separate from that for nonchampionship events. Thus, respondents have demonstrated that there is a separate market for telecasts of college football which "rest[s] on generic qualities differentiating" viewers. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613 (1953). It inexorably follows that if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956).

Thus, the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market. See Professional Engineers, 435 U.S., at 692–696. We turn now to the NCAA's proffered justifications.

Throughout the history of its regulation of intercollegiate football telecasts, the NCAA has indicated its concern with protecting live attendance. This concern, it should be noted, is not with protecting live attendance at games which are shown on television; that type of

interest is not at issue in this case. Rather, the concern is that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television.

Although the NORC studies in the 1950's provided some support for the thesis that live attendance would suffer if unlimited television were permitted, the District Court found that there was no evidence to support that theory in today's market. Moreover, as the District Court found, the television plan has evolved in a manner inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events.

There is, however, a more fundamental reason for rejecting this defense. The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." Professional Engineers, 435 U.S., at 696.

Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree with the first part of the argument but not the second.

Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any one league. The plan is nationwide in scope and there is no single league or tournament in which all college football teams compete. There is no evidence of any intent to equalize the strength of teams in Division I-A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools. The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors. [468 U.S. 85, 119]

The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising. The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or

any other revenue-producing activity. At the same time, as the District Court found, the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are "clearly sufficient" to preserve competitive balance to the extent it is within the NCAA's power to do so. And much more than speculation supported the District Court's findings on this score. No other NCAA sport employs a similar plan, and in particular the court found that in the most closely analogous sport, college basketball, competitive balance has been maintained without resort to a restrictive television plan.

Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product. The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate

athletics in the Nation's life. Accordingly, the judgment of the Court of Appeals is

Affirmed.

COLLECTIVE BARGAINING

Collective bargaining requires management and unions to negotiate in good faith on matters of compensation and working conditions. If an agreement cannot be worked out by management and the union, both sides have options. The owners have the right to lock out the players while the players have the right to strike. In both instances, the result is the same in professional sports, namely the games do not go on and it becomes a matter of which side is better able to weather the loss of income that comes about as a result of a work stoppage. However, unique to professional sports is another option of the players which they have exercised periodically although rarely to a conclusive result and that is to decertify their union and accuse the respective sports league, be it the NFL, MLB, NBA, or NHL of being in violation of antitrust laws. This is not an option that is available to a union, so in order to exercise this option, players' unions have had to be decertified in order for individual players to pursue this option.

The combination of short careers and little opportunity for alternative employment by professional athletes in the event of a strike or a lockout generally tilts the balance of power disproportionately in favor of the team owners rather than the players.

QUESTION

1. Why is the option of players' unions to decertify such a significant option for players during a labor dispute?

PROFESSIONAL SPORTS LEAGUES AS MONOPOLIES

Professional sports will always be susceptible to claims that they are in violation of antitrust laws because they are generally monopolies. However, not all monopolies are necessarily violations of antitrust laws. As Steve Balmer of Microsoft proclaimed, "We don't have a monopoly. We have market share. There's a difference." And indeed there is a difference. A company that has a monopoly and whose actions do not harm consumers is not violating antitrust law. Today the major professional sports in the United States, professional football, professional basketball, professional baseball and professional hockey are all essentially monopolies although in the latter half of the 20th century, the NFL, NBA and NHL all faced challenges from new professional leagues that challenged the monopolies of the established professional leagues. In the case of the American Football League (AFL) it merged with the NFL as did the American Basketball Association (ABA) with the NBA and the World Hockey League (WHL) with the NHL.

With the exception of baseball, the courts have specifically ruled that the other professional sports are specifically subject to the antitrust laws. Radovich v. National Football League, 352 U.S. 445 (1957) and Boston Professional Hockey Association v. Cheevers, 348 F. Supp. 261 (D. Mass. 1972) and Washington Professional Basketball Corp. v. NBA, 147 F. Supp. 154 (S.D.N.Y. 1956).

However, the courts have recognized that professional sport leagues are not typical businesses and that there is a need for the individual teams to work jointly through a central league administration in order to achieve success. As the Supreme Court said in American Needle, Inc. v. NFL, 560 U.S. 183 (2010) "The fact that the NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions."

PROFESSIONAL BASEBALL

Baseball was ruled to be exempt from antitrust laws by the Supreme Court in the landmark case of Federal Base Ball Club of Baltimore, Inc. vs. National League of Professional Base Ball Clubs et al., 259 U.S. 200 (1922). This was a case brought by the owner of the Baltimore Terrapins, a professional baseball team from the Federal League which was disbanded in 1915. While the owners of most of the other Federal League teams were bought out by the owners of other professional baseball teams, the Terrapins were not and the owner sued the National League and the American League, accusing them of conspiring to destroy the Federal League and monopolize baseball in violation of federal antitrust law. At trial the defendants were found liable and assessed damages (the legal term for the money ordered by a court in a civil action) in the amount of $80,000. However, the Clayton Antitrust Act provided for triple damages so the total amount awarded to the plaintiff was $240,000, which to put it into perspective would be 19.6 million dollars in today's money. However, on appeal the decision of the lower court was overturned whereupon the plaintiff appealed to the Supreme Court which upheld the overturning of the district court verdict. The basis for this unanimous Supreme Court decision was that federal antitrust laws such as the Sherman Act and the Clayton Act required that the businesses be involved with interstate commerce for the laws to apply.

Writing for the unanimous Supreme Court, Justice Oliver Wendell Holmes, Jr. said, "the business is giving exhibitions in base ball, which are purely state affairs." Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs, et al, 259 U.S. 200 (1922) Justice Holmes reasoned that although the scheduling and playing of games included travel across state lines, such travel was incidental to the business of baseball and that the games were essentially intrastate events. In truth, in 1922, the National League and American League were primarily umbrella organizations that arranged

schedules and established the rules of the game, however, the business was entirely local with no revenue sharing between teams, no national radio and television contracts, no national sponsors and no national licensing contracts. Baseball, or as it was referred to then "base ball," was considered more a game than a business. This exemption from antitrust laws still exists today for baseball although no other professional sport has this status which is a remnant from another era.

TOOLSON V. NEW YORK YANKEES

Baseball returned to the Supreme Court in 1953 in the case of Toolson v. New York Yankees, 346 U.S. 356 (1953). George Toolson was a minor league pitcher in the New York Yankees farm system. The Yankees were loaded with talent, which made it difficult for a minor leaguer to make the major league roster, however, even after his contract had expired, a standard provision of MLB since its inception was the "reserve clause" which prevented a player from negotiating a contract with another professional baseball team even after his contract had expired. Frustrated with his situation, Toolson sued the Yankees arguing that the reserve clause was an illegal restraint of trade that violated federal antitrust laws. He lost in both the initial District Court and Court of Appeals, following which he appealed to the U.S. Supreme Court.

The business of baseball had changed considerably since the Supreme Court's 1922 decision in which the Supreme Court ruled that antitrust laws did not apply to professional baseball. An interstate highway system enabled fans to readily cross state borders to attend games and radio and early television broadcasts of games brought new revenues to the "game" of baseball. Despite the significant changes in how Major League Baseball operated in 1953 as compared to how it was operated in 1922, by a vote of 7–2 the Supreme Court ruled against Toolson in a decision written in a single paragraph:

"In Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration, but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that, if there are evils in this field which now warrant application to it of the antitrust laws, it should be by legislation. Without reexamination of the underlying issues, the judgments below are affirmed on the authority of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."

The longer and eloquent dissent by Justice Burton clearly pointed out the problems with the majority's ruling when he wrote:

"Whatever may have been the situation when the Federal Baseball Club case was decided in 1922, I am not able to join today's decision, which, in effect, announces that organized baseball in 1953 still is not engaged in interstate trade or commerce. In the light of organized baseball's well known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipt and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized 'farm system' of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues

playing for profit throughout the united States and even in Canada, Mexico, and Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act." 346 U.S. 358.

"Conceding the major asset which baseball is to our Nation, the high place it enjoys in the hearts of our people and the possible justification of special treatment for organized sports which are engaged in interstate trade or commerce, the authorization of such treatment is a matter within the discretion of Congress. Congress, however, has enacted no express exemption of organized baseball from the Sherman Act, and no court has demonstrated the existence of an implied exemption from that Act of any sport that is so highly organized as to amount to an interstate monopoly or which restrains interstate trade or commerce. In the absence of such an exemption, the present popularity of organized baseball increases, rather than diminishes, the importance of its compliance with standards of reasonableness comparable with those now required by law of interstate trade or commerce. It is interstate trade or commerce, and, as such, it is subject to the Sherman Act until exempted." 346 U.S. 364.

FLOOD V. KUHN

The next major case involving baseball's antitrust status came in 1969 in the case of Flood v. Kuhn, 407 U.S. 258 (1972). Curt Flood was an All Star outfielder for the St. Louis Cardinals when late in his career, he was traded to the Philadelphia Phillies following the 1969 baseball season. Then Flood did the unthinkable. For both personal and business reasons he refused to be traded and challenged the reserve clause found in all MLB contracts which prevented him from negotiating with another team. The reserve clause permitted teams to renew a contract for a period of one year following the end of the previous contract. Therefore if a team and a player could not agree on

a contract, the team could bind the player to continue to play for the same salary for year after year.

The reserve clause had a long and storied history in professional baseball and was found in the earliest of professional baseball contracts as team owners feared players being able to negotiate with other teams at the expiration of their contracts would drive up team payrolls and reduce team profits. This type of collusion had been ruled to be an illegal restraint of trade and a violation of antitrust laws in other industries.

Because it takes years for a case to weave its way through the court system, Flood sought an injunction to allow him to negotiate with any team while the lawsuit was pending. His requests for an injunction were denied and rather than report to the Phillies, Flood sat out a full year losing considerable salary before signing with the Washington Senators in 1971 who had bought his rights from the Phillies, however his return to baseball after a year off at an advanced age for a baseball player was not successful and he retired less than a month into the season.

The Supreme Court's 5–3 decision in Flood v. Kuhn upholding the legality of the reserve clause and leaving intact baseball's exemption from antitrust laws is indeed an odd one. Justice Harry Blackman, writing for the majority even admitted that major league baseball at that time was engaged in interstate commerce. By the time of the Flood decision, the Supreme Court had already ruled that the NFL and the NBA were subject to antitrust laws in the case of Radovich v. National Football League, 352 U.S. 445 (1957) and Haywood v. National Basketball Association, 401 U.S. 1204 (1971).

In the Court's opinion, Justice Blackmun indicated in bullet points:

"1. Professional baseball is a business and it is engaged in interstate commerce." Thus the Court recognized that the basis for its decisions in Federal Baseball and Toolson no longer applied.

"2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. Federal Baseball and Toolson have become an aberration confined to baseball." Here the Court specifically recognized its own inconsistencies in applying the law differently to other professional sports without providing a logical reason for so doing.

"3. Even though others might regard this as 'unrealistic, inconsistent or illogical,' see Radovich, 352 U.S. at 452, the aberration is an established one, and one that has been recognized not only in Federal Baseball and Toolson, but in Shubert, International Boxing, and Radovich, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

4. Other professional sports operating interstate—football, boxing, basketball and presumably, hockey and golf are not so exempt." Here the Court actually states the well-founded criticism of its decision as being unrealistic, inconsistent and illogical, but does little to defend its position other than to say that this is an aberration, which is merely to say that this is a mistake without correcting the mistake. To reference the Federal Baseball case as a ruling that deserves to be relied upon merely because it is an old case is to miss the point that the Federal Baseball case, being fact specific, dealt with professional baseball at a time when, at least arguably, it did not involve interstate commerce, which was the key element of the decision while the court in Flood specifically recognized that baseball in 1972 was certainly engaged in interstate commerce and therefore should have been subject to antitrust laws. Justice Blackmun's opinion compounds the confusion when he gives absolutely no reason for treating other professional sports as subject to antitrust laws while exempting baseball.

Ultimately, Blackmun concluded by saying:

"Accordingly, we adhere once again to Federal Baseball and Toolson and to their application to professional baseball. We adhere also to International Boxing and Radovich and to their respective applications to professional baseball and professional football. If there is any inconsistency or illogic in all of this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in Toolson and from the concerns as to retrospectivity therein expressed. Under these circumstances, there is merit in consistency, even though some might claim that beneath that consistency is a layer of inconsistency."

"And what the Court said in Federal Baseball in 1922 and what it said in Toolson in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial action."

Thus despite admitting to inconsistencies in its positions in recognizing that baseball does business in interstate commerce and that the Court specifically chose to treat all other professional sports differently by applying the antitrust rules to them, the Court still decided that action in regard to baseball should be deferred to Congress.

The dissenting opinion of Justice Douglas clearly pointed out what he believed were errors in the decision of the Court:

"This Court's decision in Federal Baseball Club v. National League made in 1922 is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream."

"Baseball is today big business that is packaged with beer, with broadcasting, and with other industries. The beneficiaries of the Federal Baseball Club decision are not the Babe Ruths, Ty Cobbs and Lou Gehrigs. The owners, whose records many say reveal a proclivity

for predatory practices do not come to us with equities. The equities are with the victims of the reserve clause. I use the word 'victims' in the Sherman Act sense, since a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade."

"There can be no doubt 'that were we considering the question of baseball for the first time upon a clean slate' we would hold it to be subject to federal antitrust regulation. Radovich v. National Football League, 352 U.S. 445, 452. The unbroken silence of Congress should not prevent us from correcting our own mistakes."

In his dissent Justice Marshall said:

"This is a difficult case because we are torn between the principle of stare decisis and the knowledge that the decisions in Federal Baseball Club v. National League, 259 U.S. 200 (1922) and Toolson v. New York Yankees Inc., 346 U.S. 356 (1953) are totally at odds with more recent and better reasoned cases."

ANDY MESSERSMITH

Andy Messersmith was an outstanding pitcher for the Los Angeles Dodgers who in 1975 demanded a no-trade provision in the contract he was negotiating with the Dodgers. Both sides would not budge during their negotiations so the Dodgers exercised their rights under the reserve clause and renewed Messersmith's contract. At the end of the season, Messersmith took the position that he was a free agent and could sign a contract with any team that he wished. The Dodgers' position was that pursuant to the reserve clause, he was legally bound to the Dodgers. The Major League Baseball Players Association (MPBA) filed a grievance on behalf of Messersmith which, in accordance with the CBA, was to be heard by Peter Seitz, the Impartial Arbitrator designated exclusively by the owners. Actually, the arbitration board that heard grievances was composed of three arbitrators, however one arbitrator was a union representative who always ruled in favor of the player, one representative was the owners'

representative who always ruled on behalf of the owners and the remaining arbitrator was the Chairman and Impartial Arbitrator, Peter Seitz. Like most arbitrators, Seitz tried to convince the parties to settle the matter themselves, but was unsuccessful in this instance.

The argument of the Dodgers was that when Messersmith's contract was renewed in 1975 pursuant to the reserve clause, every term of the contract was renewed including the right of the club to choose to extend the contract the next year, which was the essence of the reserve clause as it had been operating since the 1880s. Seitz, however, interpreted the contract differently. His interpretation was that the contract only allowed for a single one year extension and that to interpret the contract otherwise was to make the option perpetual. For this to be the case, Seitz reasoned, the intention to do so would have to be clearly and unmistakably stated in the contract. Therefore, by playing pursuant to the one year contract extension without signing a new contract, Messersmith was free of any further obligation to the Dodgers and ruled to be the first free agent in MLB history.

While Seitz position is legally sound, it is interesting to note that it reflects an evolution of recognition of rights because under Seitz' interpretation, one would have thought that other players in all the years since the earliest application of the reserve clause would have played out their one year option year and become free agents the next year.

The reaction of MLB to the ruling was swift. Commissioner Bowie Kuhn immediately fired Peter Seitz as the permanent neutral arbitrator. MLB also appealed the decision of Seitz to federal court. As with other appeals of administrative hearing decisions, the appeals court in this case was not primarily concerned with evaluating the evidence, but merely focused its attention on evaluating the process for fundamental fairness. In this case, the owners were appealing the decision of Peter Seitz in interpreting the contract which is exactly what he was supposed to do. Being displeased with his interpretation

was not a viable basis for appeal. After the Eighth Circuit Court of Appeals upheld Seitz's ruling (Kansas City Royals Baseball Corporation et al. v. Major League Baseball Players Association, 532 F.2d 615 (1976), and following a lockout of the players during the 1976 Spring Training, the owners and the players negotiated a free agency policy as part of the new CBA by which players became eligible for free agency after six years in the major leagues.

KANSAS CITY ROYALS BASEBALL CORPORATION V. MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION

United States Court of Appeals, Eighth Circuit
532 F.2d 615 (1976)

Before GIBSON, CHIEF JUDGE, and HEANEY and STEPHENSON, CIRCUIT JUDGES.

HEANEY, CIRCUIT JUDGE.

The owners of the twenty-four Major League Baseball Clubs seek reversal of a judgment of the District Court for the Western District of Missouri. The court refused to set aside and ordered enforced an arbitration panel's award rendered in favor of the Major League Baseball Players Association. The arbitration panel was established pursuant to a collective bargaining agreement between the Club Owners and the Players Association. The award relieved pitcher Andy Messersmith of any contractual obligation to the Los Angeles Dodgers, and pitcher Dave McNally of any similar obligation to the Montreal Expos. It directed the Dodgers and Expos to remove Messersmith and McNally, respectively, from their reserve or disqualified lists. It ordered the American and National Leagues to inform and instruct their member clubs that the provisions of Major League Rule 4–A (reserve list rule) and Rule 3(g) (no-tampering rule) do not inhibit, prohibit or prevent such clubs from negotiating or dealing with Messersmith and McNally with respect to employment.

We hold that the arbitration panel had jurisdiction to resolve the dispute, that its award drew its essence from the collective bargaining

agreement, and that the relief fashioned by the District Court was appropriate. Accordingly, we affirm the judgment of the District Court.

The Supreme court articulated the legal principles applicable to the arbitration of labor disputes in the *Steelworkers* trilogy, and recently reaffirmed them in *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974).

A party may be compelled to arbitrate a grievance only if it has agreed to do so. Gateway Coal Co. v. United Mine Workers of America, supra*; United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *International Union, Etc. v. I.T. & T.,* 508 F.2d 1309 (8th Cir. 1975); *Laundry, Dry Cleaning & Dye House Workers International Union, Local 93 v. Mahoney,* 491 F.2d 1029 (8th Cir.), *cert. denied,* 419 U.S. 825, 95 S.Ct. 42, 42 L.Ed.2d 49 (1974). The question of arbitrability is thus one of contract construction and is for the courts to decide. *See, e. g., Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); *General Drivers & Helpers Union, Local No. 554 v. Young & Hay Transportation Co.,* 522 F.2d 562 (8th Cir. 1975).

In resolving questions of arbitrability, the courts are guided by Congress's declaration of policy that arbitration is the desirable method for settling labor disputes. *See* § 203 of the Labor-Management Relations Act, 29 U.S.C. § 173(d). Accordingly, a grievance arising under a collective bargaining agreement providing for arbitration must be deemed arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 582–583, 80 S.Ct. at 1353, 4 L.Ed.2d at 1417, *cited with approval in Gateway Coal Co. v. United Mine Workers of America, supra*, 414 U.S. at 377–388, 94 S.Ct. at 636–637, 38 L.Ed.2d at 592 and *Laundry, Dry Cleaning & Dye House Workers International Union, Local 93 v. Mahoney, supra,* 491 F.2d at 1032.

Consistent with these principles, a broad arbitration provision may be deemed to exclude a particular grievance in only two instances: (1) where the collective bargaining agreement contains an express provision clearly excluding the grievance involved from arbitration; or (2) where the agreement contains an ambiguous exclusionary provision and the record evinces the most forceful evidence of a purpose to exclude the grievance from arbitration. *See United Steelworkers of America v. Warrior & Gulf Navigation Co., supra; Gateway Coal Co. v. United Mine Workers of America, supra; Laundry, Dry Cleaning & Dye House Workers International Union, Local 93 v. Mahoney, supra.*

If it is determined that the arbitrator had jurisdiction, judicial review of his award is limited to the question of whether it "draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424, 1428 (1960), *cited with approval in General Drivers & Helpers Union, Local No. 554 v. Young & Hay Transportation Co., supra,* 522 F.2d 567–568 *and International Union, Etc. v. White Motor Corp.,* 505 F.2d 1193, 1197 (8th Cir. 1974), *cert. denied,* 421 U.S. 921, 95 S.Ct. 1588, 43 L.Ed.2d 789 (1975). We do not sit as an appellate tribunal to review the merits of the arbitrator's decision.

We turn first to the question of the jurisdiction of the panel to arbitrate the Messersmith-McNally grievances.

We begin with the proposition that the language of Article X of the 1973 agreement is sufficiently broad to require arbitration of the Messersmith-McNally grievances. We think this clear because the disputes involve the interpretation of the provisions of agreements between a player or the Players Association and a club or the Club Owners. The grievances require the construction of agreements manifested in paragraphs 9(a) and 10(a) of the Uniform Player's Contract.

9.(a) The Club and the Player agree to accept, abide by and comply with all provisions of the Major League Agreement, the Major League Rules, the Rules or Regulations of the League of which the Club is a

member, and the Professional Baseball Rules, in effect on the date of this Uniform Player's Contract, which are not inconsistent with the provisions of this contract or the provisions of any agreement between the Major League Clubs and the Major League Baseball Players Association, provided that the Club, together with the other Clubs of the American and National Leagues and the National Association, reserves the right to modify, supplement or repeal any provision of said Agreement, Rules and/or Regulations in a manner not inconsistent with this contract or the provisions of any then existing agreement between the Major League Clubs and the Major League Baseball Players Asociation [sic].

10.(a) On or before December 20 (or if a Sunday, then the next preceding business day) in the year of the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the next preceding year and at a rate not less than 70% of the rate stipulated for the year immediately prior to the next preceding year.

Although we find that the grievances are arbitrable under Article X standing alone, we cannot ignore the existence of Article XV, which provides, *inter alia,* that the agreement "does not deal with the reserve system."

The provisions of the Uniform Player's Contract and the Major League Rules cited above are among the many contract provisions

and rules which together constitute the reserve system. In fact, the Club Owners maintain that they are the very "core" or "heart" of the reserve system. The Club Owners argue that Article XV removed grievances arising out of the cited clauses from the coverage of Article X, and that when the agreement is read as a whole, as it must be, the Messersmith-McNally grievances are not arbitrable.

The District Court rejected this argument. It recognized that the agreement must be construed as a whole, but concluded that Article XV could not be interpreted to exclude any grievances from the procedures set forth in Article X.

We find the question more difficult than did the District Court. We cannot say that Article XV, on its face, constitutes a clear exclusionary provision. First, the precise thrust of the phrase "this Agreement does not deal with the reserve system" is unclear. The agreement incorporates the provisions which comprise the reserve system. Also, the phrase is qualified by the words "except as adjusted or modified hereby." Second, the impact of the language "This Agreement shall in no way prejudice the position * * * of the Parties" is uncertain. Third, the "concerted action" which the parties agree to forego does not clearly include bringing grievances. Fourth, Article XV affords no basis for the Club Owners' distinction between the "core" and the periphery of the reserve system. Finally, Article X(A)(1), which declares certain disputes non-grievable, is silent as to the reserve system. We find, however, that Article XV creates an ambiguity as to whether the grievances here involved are arbitrable. Accordingly, we must look beyond the face of the agreement and determine whether the record as a whole evinces the most forceful evidence of a purpose to exclude these grievances from arbitration. *See United Steelworkers of America v. Warrior & Gulf Navigation Co., supra.*

We cannot say, on the basis of the evidence discussed above, that the record evinces the most forceful evidence of a purpose to exclude the grievances here involved from arbitration.

(a) The 1968 agreement clearly permitted the arbitration of grievances relating to the reserve system. It, therefore, cannot be said that the Club Owners never consented to the arbitration of such grievances. The Club Owners might have argued that they agreed to arbitrate such grievances because the Commissioner of Baseball was designated as the arbitrator, and that he, recognizing the importance of the reserve system to baseball, would interpret the disputed provisions to allow perpetual control by a Club Owner over its players. That argument, however, was not advanced before either the arbitration panel, the District Court or this Court. Moreover, the argument would not be particularly flattering to any Commissioner of Baseball.

(b) Article XIV, the predecessor to Article XV, was suggested by the Players Association for rather specific purposes and the Club Owners clearly did what they could to preserve their right to argue that the reserve system remained a part of the collective bargaining agreement. Indeed, if the Club Owners' counterproposals with respect to Article XIV had been accepted, the reserve system would clearly have remained subject to arbitration.

Article XV was clearly designed to accomplish the same purposes as Article XIV. If in accomplishing these purposes the players had clearly agreed to exclude disputes arising out of the operation of the reserve system from arbitration, the Messersmith-McNally grievances would not be arbitrable For the reasons discussed in this opinion, however, no such agreement can be found.

(c) From 1970 to 1973, a number of grievances concerning the reserve system were submitted to arbitration. The Club Owners raised no jurisdictional objections. While this fact alone is not of controlling significance, because the grievances submitted did not go to what the Club Owners regard as the "core" or "heart" of the reserve system, the submission of grievances relating to the reserve system is certainly a fact that detracts from the Club Owners' contention that the parties

clearly understood Article XIV to mean that grievances relating to the reserve system would not be subject to arbitration.

(d) The fact that Marvin Miller may have given assurances, during the 1970 negotiations, that the players would not grieve over house rules cannot be viewed as the most forceful evidence of a purpose to exclude the Messersmith-McNally grievances from arbitration. First, there is some dispute in the record as to whether Miller made such a statement. Second, assuming he did, the term "house rules" is ambiguous. Third, and we think most important, the weight of the evidence, when viewed as a whole, does not support the conclusion that Article XV was intended to preclude arbitration of any grievances otherwise arbitrable.

(e) The essence of the Club Owners' arguments on the question of arbitrability was perhaps best articulated in the testimony of Larry McPhail, President of the American League, in which he stated: "Isn't it fair to say that our strong feelings on the importance of the core of the reserve system would indicate that we wouldn't permit the reserve system to be within the jurisdiction of the arbitration procedure?" The weaknesses in this argument have been previously discussed in paragraphs (a), (b) and (c) above. We add only that what a reasonable party might be expected to do cannot take precedence over what the parties actually provided for in their collective bargaining agreement.

The Club Owners contend that even if the arbitration panel had jurisdiction, the award must be vacated. They argue that the award exceeded the scope of the panel's authority by "fundamentally altering and destroying the Reserve System as it historically existed and had been acquiesced in by the Association."

As we have previously noted, our review of the merits of an arbitration panel's award is limited. The award must be sustained so long as it "draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597, 80 S.Ct. at 1361, 4 L.Ed.2d at 1428; *cited with approval in General Drivers & Helpers Union, Local No. 554 v. Young*

& Hay Transportation Co., supra, 522 F.2d at 567–568 *and International Union, Etc. v. White Motor Corp., supra, 505 F.2d at 1197*.

The nub of the Club Owners' argument is that both they and the Players Association understood the reserve system to enable a club to perpetually control a player, that this understanding was reflected in the 1973 agreement, and that the arbitration panel was without authority to alter the agreed upon operation of the reserve system.

We cannot agree that the 1973 collective bargaining agreement embodied an understanding by the parties that the reserve system enabled a club to perpetually control a player. First, the agreement contained no express provision to that effect. Second, while there is evidence that the reserve system operated in such a manner in recent years, the record discloses that various Players Association representatives viewed the system as allowing a player to become a free agent by playing under a renewed contract for one year.

Moreover, it can be argued that the arbitration panel's award did not "alter" the reserve system. To the extent that the reserve system did enable a club to perpetually control a player, it was not necessarily by virtue of successive invocations of the renewal clause, or application of the reserve list and no-tampering rules in the absence of a contractual obligation. Other provisions operate to deter a player from "playing out his option," as is evidenced by the fact that few players have done so. On this basis, it may be said that the arbitration panel's decision did not change the reserve system, but merely interpreted various elements thereof under circumstances which had not previously arisen.

The 1973 agreement empowered the arbitration panel to "interpret, apply or determine compliance with the provisions of agreements" between the players and the clubs. We find that the arbitration panel did nothing more than to interpret certain provisions of the Uniform Player's Contract and the Major League Rules. We cannot say that those provisions are not susceptible of the construction given them by the panel. Accordingly, the award must be sustained.

CONCLUSION

We hold that the arbitration panel had jurisdiction to hear and decide the Messersmith-McNally grievances, that the panel's award drew its essence from the collective bargaining agreement, and that the relief fashioned by the District Court was appropriate. Accordingly, the award of the arbitration panel must be sustained, and the District Court's judgment affirmed. In so holding, we intimate no views on the merits of the reserve system. We note, however, that Club Owners and the Players Association's representatives agree that some form of a reserve system is needed if the integrity of the game is to be preserved and if public confidence in baseball is to be maintained. The disagreement lies over the degree of control necessary if these goals are to be achieved. Certainly, the parties are in a better position to negotiate their differences than to have them decided in a series of arbitrations and court decisions. We commend them to that process and suggest that the time for obfuscation has passed and that the time for plain talk and clear language has arrived. Baseball fans everywhere expect nothing less.

This Court's mandate affirming the judgment of the District Court shall issue seven days from the date this opinion is filed. Our previous order staying enforcement of the District Court's decree shall continue in effect until the issuance of the mandate.

CURT FLOOD ACT

Congress did finally act on this matter and out of deference to the pioneering position taken by Curt Flood called its October 1998 law the Curt Flood Act which made the rules restricting player movement in baseball subject to antitrust laws, however, this issue was now moot as the rules of free agency had already been determined by MLB through collective bargaining spurred by the decision in the case of Andy Messersmith. However, the Curt Flood Act specifically did not apply to minor league players who still could be subjected to the

reserve clause and, quite significantly, did not apply to the ability of teams to relocate without league approval.

RELOCATION OF PROFESSIONAL SPORTS FRANCHISES

It is not just players who have had antitrust disputes with team owners. Team owners have also had antitrust disputes with the leagues themselves, most often over a team owner wanting to move the team to another city. Al Davis the owner of the NFL Oakland Raiders sued the NFL and won an antitrust lawsuit in 1982 after the NFL would not let him move the Raiders from Oakland to Los Angeles. Following his victory in court, Davis moved the team to Los Angeles only to later return to Oakland.

The threats of lawsuits led to more movements, such as the LA Rams to St. Louis, and the Cleveland Browns to Baltimore. Since 1971 seven NFL teams have moved, eight NBA teams have moved and nine NHL teams have moved to new cities.

The ability of a team to relocate at its own discretion came to the forefront again when the Oakland Athletics wanted to move to San Jose and signed an option to build a stadium in San Jose. In 2013, the city of San Jose sued Major League Baseball challenging MLB's antitrust exemption that allowed MLB to prevent the Athletics from moving to San Jose unless three fourths of the other owners agreed. The lawyers for San Jose argued that preventing the Athletics from moving to San Jose was harmful to consumers and only benefited the San Francisco Giants, a competing baseball team. The Ninth Circuit Court of Appeals ruled that "Only Congress and the Supreme Court are empowered to question Flood's continued vitality and with it, the fate of baseball's singular and historic exemption from the antitrust laws" City of San Jose vs. Office of the Commissioner of Baseball, 776 F. 3d (2015). In 2015, the Supreme Court without comment refused to take the case leaving the opinion of the Ninth Circuit Court of Appeals as the controlling decision.

NFL UNION HISTORY

John Mackey was the first president of the NFLPA following the merger of the American Football League (AFL) and the National Football League (NFL). His involvement as a labor leader stemmed from his own experience as he spoke of "What most people don't know is that my commitment stemmed mostly from one incident in which the NFL in which I was handed a piece of paper, a contract and was told to sign it. Of course I didn't, and from that moment of youthful pique evolved the fight by NFL players to choose for whom they work."[2]

In 1972 he, as the lead plaintiff and fourteen other present and former NFL players filed a lawsuit against the NFL challenging the Roselle Rule, named after then NFL commissioner Pete Rozelle. Under the Rozelle Rule, the commissioner was empowered to award compensation to a team that lost a player to free agency if the teams were unable to agree upon compensation. Following a fifty-five day trial, the judge ruled that the Rozelle Rule was a per se violation of antitrust laws and an improper restriction on free agency. The Per se rule in antitrust law is that if an action is inherently unreasonable and anticompetitive, it is a violation of antitrust law. Mackey's lawyers argued that the requirement that a team losing a player to free agency had to provide "fair and equitable" compensation as determined by the commissioner rendered free agency meaningless because teams were dissuaded from bidding for free agents due to the cost of having to provide compensation to the player's former team. While the Appeals Court failed to agree that the Rozelle Rule violated the Per se rule, it did conclude that the Rozelle Rule violated the Rule of Reason and therefore constituted a violation of antitrust law.

Following the final decision of the Appeals Court, the players settled with the league, however, a year after the court's decision in the Mackey case, the NFLPA and the owners entered into a CBA which

[2] "John Mackey Dies at 69: Helped Revolutionize N.F.L." New York Times, Richard Goldstein, July 7, 2011.

included a modified version of the Rozelle Rule. True free agency did not come to the NFL until the 1990s.

MACKEY V. NATIONAL FOOTBALL LEAGUE

United States Court of Appeals, Eighth Circuit
543 F.2d 606 (1976)

Mandatory Subject of Bargaining.

Under § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), mandatory subjects of bargaining pertain to "wages, hours, and other terms and conditions of employment. . . ." *See NLRB v. Borg-Warner Corp.,* 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958). Whether an agreement concerns a mandatory subject depends not on its form but on its practical effect. *See Federation of Musicians v. Carroll,* 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460 (1968). Thus, in *Meat Cutters v. Jewel Tea, supra,* the Court held that an agreement limiting retail marketing hours concerned a mandatory subject because it affected the particular hours of the day which the employees would be required to work. In *Teamsters Union v. Oliver,* 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312 (1959), an agreement fixing minimum equipment rental rates paid to truck owner-drivers was held to concern a mandatory bargaining subject because it directly affected the driver wage scale.

In this case the district court held that, in view of the illegality of the Rozelle Rule under the Sherman Act, it was "a nonmandatory, illegal subject of bargaining." We disagree. The labor exemption presupposes a violation of the antitrust laws. To hold that a subject relating to wages, hours and working conditions becomes nonmandatory by virtue of its illegality under the antitrust laws obviates the labor exemption. We conclude that whether the agreements here in question relate to a mandatory subject of collective bargaining should be determined solely under federal labor law. *Cf. Meat Cutters v. Jewel Tea, supra.*

On its face, the Rozelle Rule does not deal with "wages, hours and other terms or conditions of employment" but with inter-team

compensation when a player's contractual obligation to one team expires and he is signed by another. Viewed as such, it would not constitute a mandatory subject of collective bargaining. The district court found, however, that the 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.

Bona Fide Bargaining.

The district court found that the parties' collective bargaining history reflected nothing which could be legitimately characterized as bargaining over the Rozelle Rule; that, in part due to its recent formation and inadequate finances, the NFLPA, at least prior to 1974, stood in a relatively weak bargaining position vis-a-vis the clubs; and that "the Rozelle Rule was unilaterally imposed by the NFL and member club defendants upon the players in 1963 and has been imposed on the players from 1963 through the present date."

On the basis of our independent review of the record, including the parties' bargaining history as set forth above, we find substantial evidence to support the finding that there was no bona fide arm's-length bargaining over the Rozelle Rule preceding the execution of the 1968 and 1970 agreements. The Rule imposes significant restrictions on players, and its form has remained unchanged since it was unilaterally promulgated by the clubs in 1963. The provisions of the collective bargaining agreements which operated to continue the Rozelle Rule do not in and of themselves inure to the benefit of the players or their union. Defendants contend that the players derive indirect benefit from the Rozelle Rule, claiming that the union's agreement to the Rozelle Rule was a *quid pro quo* for increased pension benefits and the right of players to individually negotiate their salaries. The district court found, however, that there was no such *quid pro quo,*

and we cannot say, on the basis of our review of the record, that this finding is clearly erroneous.

In view of the foregoing, we hold that the agreements between the clubs and the players embodying the Rozelle Rule do not qualify for the labor exemption. 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.

ANTITRUST ISSUES.

We turn, then, to the question of whether the Rozelle Rule, as implemented, violates § 1 of the Sherman Act, which declares illegal "every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The district court found the Rozelle Rule to be a *per se* violation of the Act. Alternatively, the court held the Rule to be violative of the Rule of Reason standard.

Rule of Reason.

The focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary. *See Chicago Board of Trade v. United States, supra; Worthen Bank & Trust Co. v. National BankAmericard Inc., supra.*

In defining the restraint on competition for players' services, the district court found that the Rozelle Rule significantly deters clubs from negotiating with and signing free agents; that it acts as a substantial deterrent to players playing out their options and becoming free agents; that it significantly decreases players' bargaining power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; that as a result, the salaries paid by each club are lower than if competitive bidding were allowed to prevail; and that absent the Rozelle Rule, there would be

increased movement in interstate commerce of players from one club to another.

We find substantial evidence in the record to support these findings. Witnesses for both sides testified that there would be increased player movement absent the Rozelle Rule. Two economists testified that elimination of the Rozelle Rule would lead to a substantial increase in player salaries. Carroll Rosenbloom, owner of the Los Angeles Rams, indicated that the Rams would have signed quite a few of the star players from other teams who had played out their options, absent the Rozelle Rule. Charles De Keado, an agent who represented Dick Gordon after he played out his option with the Chicago Bears, testified that the New Orleans Saints were interested in signing Gordon but did not do so because the Bears were demanding unreasonable compensation and the Saints were unwilling to risk an unknown award of compensation by the Commissioner. Jim McFarland, an end who played out his option with the St. Louis Cardinals, testified that he had endeavored to join the Kansas City Chiefs but was unable to do so because of the compensation asked by the Cardinals. Hank Stram, then coach and general manager of the Chiefs, stated that he probably would have given McFarland an opportunity to make his squad had he not been required to give St. Louis anything in return.

In support of their contention that the restraints effected by the Rozelle Rule are not unreasonable, the defendants asserted a number of justifications. First, they argued that without the Rozelle Rule, star players would flock to cities having natural advantages such as larger economic bases, winning teams, warmer climates, and greater media opportunities; that competitive balance throughout the League would thus be destroyed; and that the destruction of competitive balance would ultimately lead to diminished spectator interest, franchise failures, and perhaps the demise of the NFL, at least as it operates today. Second, the defendants contended that the Rozelle Rule is necessary to protect the clubs' investment in scouting expenses and player developments costs. Third, they asserted that players must

work together for a substantial period of time in order to function effectively as a team; that elimination of the Rozelle Rule would lead to increased player movement and a concomitant reduction in player continuity; and that the quality of play in the NFL would thus suffer, leading to reduced spectator interest, and financial detriment both to the clubs and the players. Conflicting evidence was adduced at trial by both sides with respect to the validity of these asserted justifications.

The district court held the defendants' asserted justifications unavailing. As to the clubs' investment in player development costs, Judge Larson found that these expenses are similar to those incurred by other businesses, and that there is no right to compensation for this type of investment. With respect to player continuity, the court found that elimination of the Rozelle Rule would affect all teams equally in that regard; that it would not lead to a reduction in the quality of play; and that even assuming that it would, that fact would not justify the Rozelle Rule's anticompetitive effects. As to competitive balance and the consequences which would flow from abolition of the Rozelle Rule, Judge Larson found that the existence of the Rozelle Rule has had no material effect on competitive balance in the NFL. Even assuming that the Rule did foster competitive balance, the court found that there were other legal means available to achieve that end—e. g., the competition committee, multiple year contracts, and special incentives. The court further concluded that elimination of the Rozelle Rule would have no significant disruptive effects, either immediate or long term, on professional football. In conclusion the court held that the Rozelle Rule was unreasonable in that it was overly broad, unlimited in duration, unaccompanied by procedural safeguards, and employed in conjunction with other anticompetitive practices such as the draft, Standard Player Contract, option clause, and the no-tampering rules.

We agree that the asserted need to recoup player development costs cannot justify the restraints of the Rozelle Rule. That expense is an ordinary cost of doing business and is not peculiar to professional

football. Moreover, because of its unlimited duration, the Rozelle Rule is far more restrictive than necessary to fulfill that need.

We agree, in view of the evidence adduced at trial with respect to existing players turnover by way of trades, retirements and new players entering the League, that the club owners' arguments respecting player continuity cannot justify the Rozelle Rule. We concur in the district court's conclusion that the possibility of resulting decline in the quality of play would not justify the Rozelle Rule. We do recognize, as did the district court, that the NFL has a strong and unique interest in maintaining competitive balance among its teams. The key issue is thus whether the Rozelle Rule is essential to the maintenance of competitive balance, and is no more restrictive than necessary. The district court answered both of these questions in the negative.

We need not decide whether a system of inter-team compensation for free agents moving to other teams is essential to the maintenance of competitive balance in the NFL. Even if it is, we agree with the district court's conclusion that the Rozelle Rule is significantly more restrictive than necessary to serve any legitimate purposes it might have in this regard. First, little concern was manifested at trial over the free movement of average or below average players. Only the movement of the better players was urged as being detrimental to football. Yet the Rozelle Rule applies to every NFL player regardless of his status or ability. Second, the Rozelle Rule is unlimited in duration. It operates as a perpetual restriction on a player's ability to sell his services in an open market throughout his career. Third, the enforcement of the Rozelle Rule is unaccompanied by procedural safeguards. A player has no input into the process by which fair compensation is determined. Moreover, the player may be unaware of the precise compensation demanded by his former team, and that other teams might be interested in him but for the degree of compensation sought.

Judge Frank emphasized the harshness of a rule in the field of professional baseball similar to the Rozelle Rule:

As one court, perhaps a bit exaggeratedly, has put it, "While the services of these baseball players are ostensibly secured by voluntary contracts a study of the system as * * * practiced under the plan of the National Agreement, reveals the involuntary character of the servitude which is imposed upon players by the strength of the combination controlling the labor of practically all of the players in the country. * * *" [I]f the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery.

In sum, we hold that the Rozelle Rule, as enforced, unreasonably restrains trade in violation of § 1 of the Sherman Act.

CONCLUSION.

In conclusion, although we find that non-labor parties may potentially avail themselves of the nonstatutory labor exemption where they are parties to collective bargaining agreements pertaining to mandatory subjects of bargaining, the exemption cannot be invoked where, as here, the agreement was not the product of bona fide arm's-length negotiations. Thus, the defendants' enforcement of the Rozelle Rule is not exempt from the coverage of the antitrust laws. Although we disagree with the district court's determination that the Rozelle Rule is a *per se* violation of the antitrust laws, we do find that the Rule, as implemented, contravenes the Rule of Reason and thus constitutes an unreasonable restraint of trade in violation of § 1 of the Sherman Act.

We note that our disposition of the antitrust issue does not mean that every restraint on competition for players' services would necessarily violate the antitrust laws. Also, since the Rozelle Rule, as implemented, concerns a mandatory subject of collective bargaining, any agreement as to inter-team compensation for free agents moving to other teams, reached through good faith collective bargaining, might very well be immune from antitrust liability under the nonstatutory labor exemption.

It may be that some reasonable restrictions relating to player transfers are necessary for the successful operation of the NFL. The protection of mutual interests of both the players and the clubs may indeed require this. We encourage the parties to resolve this question through collective bargaining. The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts. *See Kansas City Royals v. Major League Baseball Players*, 532 F.2d 615, 632 (8th Cir. 1976). However, no mutual resolution of this issue appears within the present record. Therefore, the Rozelle Rule, as it is presently implemented, must be set aside as an unreasonable restraint of trade.

With the exception of the district court's finding that implementation of the Rozelle Rule constitutes a *per se* violation of § 1 of the Sherman Act and except as it is otherwise modified herein, the judgment of the district court is AFFIRMED. The cause is remanded to the district court for further proceedings consistent with this opinion."

John Mackey went on to a Hall of Fame career, however, he died at age 69 having suffered from CTE and dementia for many years prior to his death that his family believed was caused by concussions suffered while playing football. Following his death in 2011 his brain was donated to the BU Center for the Study of Traumatic Encephalopathy. His family filed a wrongful death lawsuit against the NFL in 2013 related to his brain injuries.

LABOR HISTORY OF THE NBA

The first president of the NBA players' union upon its inception in 1954 was Boston Celtics future Hall of Famer Bob Cousy. The NBPA became the first union to represent players in one of the major professional sports. At the time that the union was formed, the NBA provided no pension, no per diem costs while on the road, no minimum wage and no health benefits. The average annual salary was $8,000. While the union was formed in 1954, the NBA initially

refused to recognize it and summarily dismissed all but one of Cousy's initial demands including abolishment of the $15 whispering foul which NBA referees were permitted to assess for players whispering to each other during the game. In today's NBA where trash talking has been elevated to an art, it is hard to imagine such an infraction. The only demand agreed to was for the payment of two weeks of back salary to six players for the Baltimore franchise which had gone out of business.

It took a threat of a strike and the possibility of the NBPA affiliating with the AFL-CIO in 1957 to induce the NBA to agree to discussions with the now formally recognized NBPA. As a result of their negotiations, the whispering fine was abolished, the players were to receive a $7 per diem payment and a number of other minor concessions were made.

Progress was slow for the NBPA until the 1964 NBA All Star Game which was a momentous occasion as it was to be nationally televised for the first time. The players refused to play unless specific demands were met including most prominently, the establishment of a pension plan, the formal recognition of the NBPA as the exclusive bargaining agent for the players and an increase in the per diem to $8 dollars per day, an increase of one dollar since it was first instituted in 1957. Both sides engaged in a standoff until literally minutes before the game when NBA President Walter Kennedy personally guaranteed that their demands including a pension plan would be met. The tip off of the game ended up being delayed by ten minutes.

Players' salaries rose dramatically with the birth of the American Basketball Association in 1967 and its competition for players. The NBA's response was to consider a merger of the two leagues at which time NBA players, led by then union president Oscar Robertson filed an antitrust lawsuit attempting to block any merger. In addition, the players took the opportunity to include a complaint against the NBA's reserve clause which bound a player to his original team for life with no opportunity for free agency. The NBPA successfully obtained a

restraining order to block any merger which compelled the owners to negotiate with the union over these issues in a new CBA. Bargaining from the superior position provided by their restraining order, the NBPA was able to negotiate the abolishment of the reserve clause and get modified free agency. In return for settling and dismissing their lawsuit the players got benefits including increased salaries averaging $200,000 per year, increased pension benefits, medical and dental coverage, life insurance and a reasonable per diem.

The 1983 CBA instituted the dramatic steps of revenue sharing and a salary cap by which the players received 53% of league revenues. The salary cap instituted, as now, was a soft cap with numerous exceptions.

In February of 1987 the NBPA and the owners began collective bargaining toward a new CBA. The primary concerns of the players at that time were the salary cap, which they wanted eliminated, the college draft and the right of first refusal, which the players believed limited their options in free agency. With the negotiations stalled and the expiration of the old CBA only a week away, a group of nine players including NBPA president Junior Bridgman filed a class action antitrust lawsuit against the NBA and its individual franchises. With little progress being accomplished, the players increased the pressure on the NBA by starting the nuclear option which was a vote to decertify the union thereby enabling the players to bring an action alleging that the structure of the NBA violated antitrust laws. Ultimately, the players and the owners came to an agreement on a new six year CBA on April 26, 1988 which included a reduction of the draft to only two rounds and, most importantly to the players, eliminating the right of first refusal after a player has competed his second contract with unrestricted free agency for veteran players and a reduction of the college draft to three rounds in 1988 and two rounds thereafter.

The year 1995 brought more tension between the players and the owners. Following the completion of the 1995 playoffs, the owners

locked out the players for the first time in league history. The prime concern of the owners at that time was their perceived need to reduce salaries. The players again were ready to go the route of decertification and an antitrust challenge in the courts believing that their legal position challenging the manner in which the league operated was strong. It apparently worked because the threat of the lawsuit was sufficient to bring movement to the negotiations that ended up with something for both sides. The owners got the elimination of many of the myriad of salary cap exceptions that had resulted in team payrolls soaring. The owners also were able to get a rookie wage scale with predetermined salaries. The players kept one of the most important exceptions to the salary cap which has come to be known as the Bird exception, named after Boston Celtics player Larry Bird. Under the Bird exception, a team is allowed to exceed the salary cap without any penalty in order to sign its own free agents. This exception can work for both sides as it increases the chances that a superstar player will be highly paid without any financial incentive to be lured to another team thereby making it easier for teams to keep their own star players who have come to establish the team's identity. The players also were able to negotiate into the new CBA a provision eliminating all restrictions on free agency once a player's initial contract has expired.

Unhappy with the last CBA in regard to the high payrolls, the owners exercised their option in the CBA to terminate the agreement at the conclusion of the 1997–1998 season. When negotiations went nowhere, the owners locked the players out on July 1, 1998. The goal of the owners was to get a hard cap in order to reduce their payroll costs. The negotiations stretched out without a resolution into the new league year and the NBA initially cancelled the pre-season games and later the first two months of the season. Finally as the date was approaching when it was deemed unavoidable to cancel the entire season, the players and the owners came to an agreement in January of 1999 with a reduced fifty game season to start in February.

Although the owners did not get their desired hard cap, a number of other provisions intended to reduce payrolls were adopted.

The year 2011 brought labor unrest again to professional basketball with the owners locking out the players on July 1, 2011 after the expiration of the 2005 CBA. The lockout lasted 161 days and resulted in a shortened 66 game season. The primary issues were the salary cap and the luxury tax. According to the owners, 22 of 30 teams had lost money the previous season and overall the league was losing 300 million dollars per year. The owners wanted to reduce the players' share of total revenues from 57% to 43%, institute a hard salary cap and increase the luxury tax. Following the same pattern of recent years, little progress was made until the pressure was put on the owners by the NBPA dissolving and an antitrust lawsuit against the league being filed by a group of NBA players. Ultimately, the players and owners agreed on the players' share of revenues being reduced to a low of 49% during the term of the new CBA, a flexible salary cap and harsher luxury tax provisions.

AGE RULES IN PROFESSIONAL SPORTS

Although it may seem hard to imagine today, in the earlier years of the NBA, players were not eligible to be drafted into the NBA until after they had graduated college or four years after their class graduated high school. This generally meant that players went to college and played four years before they entered the NBA.

The first change in that rule involved Spencer Haywood, a star on the 1968 U.S. Olympic team (at a time when only amateur basketball players played on the U.S. Olympic team) who left the University of Detroit after his second year to play for the Denver Rockets in the American Basketball Association (ABA) under a hardship exemption provided for in the rules of the upstart ABA to permit such players, whom the NBA would have considered underage, to play professional basketball. Since the ABA and NBA did not merge until 1976, the ABA operated under different rules than the NBA at the

time the Denver Rockets signed Haywood. When he turned 21, Haywood repudiated his ABA contract alleging fraud and signed a contract with the then Seattle Supersonics of the NBA, however, the Supersonics signed Haywood to an NBA player contract within four years of Haywood's high school graduation thereby prompting the NBA to threaten to invalidate the contract and issue sanctions to the Supersonics.

Haywood's response to the threats was to join with the Seattle Supersonics team in a lawsuit against the NBA alleging that the action of the NBA was a per se violation of antitrust law. The NBA's action, Haywood alleged amounted to an illegal group boycott and the NBA draft rules were per se violations of antitrust law. Due to the fact that lawsuits can take years to make their way through the court, Haywood asked for a temporary injunction while the case was in the courts to allow him to play. In order to be successful in his request for such an injunction, Haywood had to prove that he was likely to win his case and that if he were not granted the injunction to allow him to play while the case was pending, he would be irreparably harmed. The federal district court ruled in his favor indicating:

"If Haywood is unable to continue to play professional basketball for Seattle, he will suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and his pride will have been injured and a great injustice will be perpetrated on him."

The NBA appealed the case to the Ninth Circuit of Appeals which issued a stay of the injunction from which was ultimately appealed to the Supreme Court which on March 1, 1971 ruled that the injunction would stand and Haywood could play for the Supersonics. 401 U.S. 1204 (1971).

Soon after the Supreme Court decision, the league and Haywood settled the case permitting him to play in the NBA.

In response to the Haywood lawsuit, the NBA established an exception to its four years from high school graduation rule for players who could show an economic hardship if they had to wait four years from their high school graduation to be eligible to play professional basketball in the NBA. Then in 1976, the hardship rule was replaced by a new standard by which any player could be eligible to play in the NBA, but would, by doing so, lose his eligibility to play college basketball which merely meant that if a player, such as LeBron James chose to go directly to the NBA from high school, he would not be able to compete in college basketball if his NBA career did not work out.

Now we are in the era of the "one and done" whereby players are not eligible for the NBA draft until one year after their high school class graduates. Various proposals to change this are often being considered including one to require players accepting college basketball scholarships to play two years of college basketball before they can enter the NBA.

The present NBA rule setting a minimum age of nineteen years before a player can be drafted into the NBA was made a part of the CBA agreement in 2005 and while not a popular concession by the players, was one that in return for the players received other concessions during the negotiation of the CBA. NBA Commissioner Adam Silver has indicated that he would like to see the minimum age raised to twenty. The NBPA has already stated that they will most likely be making this an issue in the next CBA. The concern on behalf of the players is that their careers are short and taking away a year of a player's career causes significant harm to him. In addition, the risk of a career ending injury during a required one year college basketball career is always hanging over the head of the player.

A study by Ramogi Huma, of the National College Players Association and Ellen Staurowsky a professor of Sports Management at Drexel University concluded that the potential financial cost to a potential top ten draft pick in the NBA is more than 1.6 million

dollars for that lost year not including the money the player could have earned by endorsements.[3]

It has been argued that the reason for the minimum age requirements is to benefit the NCAA and the NBA at the expense of the players. The value to the NCAA is quite apparent. Its largest money maker is March Madness, its annual national championship tournament. Diluting the talent pool of the tournament by permitting the best players to go directly from high school to the NBA could dramatically alter the quality of the tournament play. As for the NBA, it benefits from the minimum age rule by having an extra year for young players to develop and to monitor and evaluate their skills against higher levels of competition. From a strict financial standpoint, having a minimum age also delays by a year the time when an athlete in his prime can become a free agent. The minimum age also protects the NBA from its own talent evaluating mistakes. While many people may focus on the stellar careers of Kevin Garnett, Kobe Bryant and LeBron James who went to the NBA directly from high school, the careers of many players such as Kwame Brown, the only direct from high school player to have been chosen with the first pick in the draft, were often busts. During his thirteen year NBA career Brown averaged 6.6 points per game and 5.5 rebounds per game.

NFL AGE RULES

The rules for declaring oneself eligible for professional sports are regulated by the various professional leagues. The National Football League requires an athlete to have been out of high school for three years in order to be eligible for the NFL draft.

Maurice Clarett was a star freshman running back for Ohio State when it won the national football championship in 2002, however, after being suspended by Ohio State for filing a false police report, he

[3] Huma, R., & Staurowsky, E. J. (2012). The $6 billion heist: Robbing college athletes under the guise of amateurism. A report collaboratively produced by the National College Players Association and Drexel University Sport Management.

declared himself eligible for the NFL draft and sued the NFL challenging the rule requiring him to wait three years from graduating high school to be eligible for the NFL draft. At trial, Judge Shira Scheindlin ruled that the NFL's rules preventing Clarett from being eligible for the NFL draft were invalid as violations of anti-trust law, however, her decision was later overruled by the Court of Appeals in an opinion written by now Supreme Court Justice Sonia Sotomayor. Meanwhile, Mike Williams, a USC sophomore football player upon hearing of Clarett's initial court victory also declared himself eligible for the NFL draft and hired an agent. Following the appeals court decision, both Clarett and Williams were banned from playing college football for declaring themselves draft eligible and hiring agents. Although Clarett, never played in an NFL game, Williams waited out his one year before he would be eligible for the NFL draft, was chosen as a number one draft pick in the 2005 NFL draft and played five years in the NFL.

CLARETT V. NATIONAL FOOTBALL LEAGUE

United States Court of Appeals, Second Circuit
369 F.3d 124 (2004)

"Because the major source of the parties' factual disputes is the relationship between the challenged eligibility rules and the current collective bargaining agreement governing the terms and conditions of employment for NFL players, some elaboration on both the collective bargaining agreement and the eligibility rules is warranted. The current collective bargaining agreement between the NFL and its players union was negotiated between the NFL Management Council ("NFLMC"), which is the NFL member clubs' multi-employer bargaining unit, and the NFL Players Association ("NFLPA"), the NFL players' exclusive bargaining representative. This agreement became effective in 1993 and governs through 2007. Despite the collective bargaining agreement's comprehensiveness with respect to, inter alia, the manner in which the NFL clubs select rookies through the draft and the scheme by which rookie compensation is

determined, the eligibility rules for the draft do not appear in the agreement.

At the time the collective bargaining agreement became effective, the eligibility rules appeared in the NFL Constitution and Bylaws, which had last been amended in 1992. Specifically, Article XII of the Bylaws ("Article XII"), entitled "Eligibility of Players," prohibited member clubs from selecting any college football player through the draft process who had not first exhausted all college football eligibility, graduated from college, or been out of high school for five football seasons. Clubs were further barred from drafting any person who either did not attend college, or attended college but did not play football, unless that person had been out of high school for four football seasons. Article XII, however, also included an exception that permitted clubs to draft players who had received "Special Eligibility" from the NFL Commissioner. In order to qualify for such special eligibility, a player was required to submit an application before January 6 of the year that he wished to enter the draft and "at least three NFL seasons must have elapsed since the player was graduated from high school." The Commissioner's practice apparently was, and still is, to grant such an application so long as three full football seasons have passed since a player's high school graduation. Appellant's Brief, at 7 n. 3."

". . . on the merits of Clarett's antitrust claim, the district court found that the eligibility rules were so "blatantly anticompetitive" that only a "quick look" at the NFL's procompetitive justifications was necessary to reach the conclusion that the eligibility rules were unlawful under the antitrust laws. Id. at 408. The NFL had argued that because the eligibility rules prevent less physically and emotionally mature players from entering the league, they justify any incidental anticompetitive effect on the market for NFL players. Id. In so doing, according to the NFL, the eligibility rules guard against less-prepared and younger players entering the League and risking injury to themselves, prevent the sport from being devalued by the higher number of injuries to those young players, protect its member clubs from having to bear

the costs of such injuries, and discourage aspiring amateur football players from enhancing their physical condition through unhealthy methods. Id. at 408–09. The district court held that all of these justifications were inadequate as a matter of law, concluding that the NFL's purported concerns could be addressed through less restrictive but equally effective means. Id. at 410. Finding that the eligibility rules violated the antitrust laws, the district court entered judgment in favor of Clarett, and, recognizing that this year's draft was then just over two months away, issued an order deeming Clarett eligible to participate in the draft."

"Our decisions in Caldwell, Williams, and Wood all involved players' claims that the concerted action of a professional sports league imposed a restraint upon the labor market for players' services and thus violated the antitrust laws. In each case, however, we held that the non-statutory labor exemption defeated the players' claims. Our analysis in each case was rooted in the observation that the relationships among the defendant sports leagues and their players were governed by collective bargaining agreements and thus were subject to the carefully structured regime established by federal labor laws. We reasoned that to permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by these labor laws, including the congressional policy favoring collective bargaining, the bargaining parties' freedom of contract, and the widespread use of multi-employer bargaining units. Subsequent to our decisions in this area, similar reasoning led the Supreme Court in Brown v. Pro Football, Inc., 518 U.S. 231, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996), to hold that the non-statutory exemption protected the NFL's unilateral implementation of new salary caps for developmental squad players after its collective bargaining agreement with the NFL players union had expired and negotiations with the union over that proposal reached an impasse. We need only retrace the path laid down by these prior cases to reach the conclusion that Clarett's antitrust claims must fail."

"Clarett argues that he is physically qualified to play professional football and that the antitrust laws preclude the NFL teams from agreeing amongst themselves that they will refuse to deal with him simply because he is less than three full football seasons out of high school. Such an arbitrary condition, he argues, imposes an unreasonable restraint upon the competitive market for professional football players' services, and, because it excludes him from entering that market altogether, constitutes a per se antitrust violation. The issue we must decide is whether subjecting the NFL's eligibility rules to antitrust scrutiny would "subvert fundamental principles of our federal labor policy." Wood, 809 F.2d at 959. For the reasons that follow, we hold that it would and that the non-statutory exemption therefore applies."

"Although the NFL has maintained draft eligibility rules in one form or another for much of its history, the "inception of a collective bargaining relationship" between the NFL and its players union some thirty years ago "irrevocably alter[ed] the governing legal regime." Caldwell, 66 F.3d at 527. Our prior cases highlight a number of consequences resulting from the advent of this collective bargaining relationship that are relevant to Clarett's litigation. For one, prospective players no longer have the right to negotiate directly with the NFL teams over the terms and conditions of their employment. That responsibility is instead committed to the NFL and the players union to accomplish through the collective bargaining process, and throughout that process the NFL and the players union are to have the freedom to craft creative solutions to their differences in light of the economic imperatives of their industry. Furthermore, the NFL teams are permitted to engage in joint conduct with respect to the terms and conditions of players' employment as a multi-employer bargaining unit without risking antitrust liability. The arguments Clarett advances in support of his antitrust claim, however, run counter to each of these basic principles of federal labor law.

Because the NFL players have unionized and have selected the NFLPA as its exclusive bargaining representative, labor law prohibits

Clarett from negotiating directly the terms and conditions of his employment with any NFL club, see NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967), and an NFL club would commit an unfair labor practice were it to bargain with Clarett individually without the union's consent, see Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683, 64 S.Ct. 830, 88 L.Ed. 1007 (1944). The terms and conditions of Clarett's employment are instead committed to the collective bargaining table and are reserved to the NFL and the players union's selected representative to negotiate. Allis-Chalmers Mfg. Co., 388 U.S. at 180, 87 S.Ct. 2001."

"As a permissible, mandatory subject of bargaining, the conditions under which a prospective player, like Clarett, will be considered for employment as an NFL player are for the union representative and the NFL to determine. Clarett, however, stresses that the eligibility rules are arbitrary and that requiring him to wait another football season has nothing to do with whether he is in fact qualified for professional play. But Clarett is in this respect no different from the typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set. In the context of this collective bargaining relationship, the NFL and its players union can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices, 29 U.S.C. § 201 et seq., or discrimination, 42 U.S.C. § 2000e et seq. See Reliance Ins. Cos. v. NLRB, 415 F.2d 1, 6 (8th Cir.1969) ("[Employer is usually free to] pick and choose his employees and hire those he thinks will best serve his business interests."). Any challenge to those criteria must "be founded on labor rather than antitrust law." Caldwell, 66 F.3d at 530."

"The threat to the operation of federal labor law posed by Clarett's antitrust claims is in no way diminished by Clarett's contention that the rules were not bargained over during the negotiations that preceded the current collective bargaining agreement. The eligibility

rules, along with the host of other NFL rules and policies affecting the terms and conditions of NFL players included in the NFL's Constitution and Bylaws, were well known to the union, and a copy of the Constitution and Bylaws was presented to the union during negotiations. Given that the eligibility rules are a mandatory bargaining subject for the reasons set out above, the union or the NFL could have forced the other to the bargaining table if either felt that a change was warranted. See NLRB v. Katz, 369 U.S. 736, 743, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). Indeed, according to the declaration from the NFLMC's Vice President for Labor Relations, Peter Ruocco, this is exactly what the NFL did."

"The disruptions to federal labor policy that would be occasioned by Clarett's antitrust suit, moreover, would not vindicate any of the antitrust policies that the Supreme Court has said may warrant the withholding of the non-statutory exemption. This is simply not a case in which the NFL is alleged to have conspired with its players union to drive its competitors out of the market for professional football. See Pennington, 381 U.S. at 665, 85 S.Ct. 1585. Nor does Clarett contend that the NFL uses the eligibility rules as an unlawful means of maintaining its dominant position in that market. See Allen Bradley Co., 325 U.S. at 809, 65 S.Ct. 1533 ("The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly."). This lawsuit reflects simply a prospective employee's disagreement with the criteria, established by the employer and the labor union, that he must meet in order to be considered for employment. Any remedies for such a claim are the province of labor law. Allowing Clarett to proceed with his antitrust suit would subvert "principles that have been familiar to, and accepted by, the nation's workers for all of the NLRA's [sixty years] in every industry except professional sports." Caldwell, 66 F.3d at 530. We, however, follow the Supreme Court's lead in declining to "fashion an antitrust exemption [so as to give] additional advantages to professional football players that transport workers, coal miners, or

meat packers would not enjoy." Brown, 518 U.S. at 249, 116 S.Ct. 2116."

QUESTION

1. Should a union be able to negotiate terms of employment on behalf of athletes who are not members of the union and have no vote in the determination of those terms?

NHL AND MLB AGE RULES

The NHL and MLB operate under systems by which players can go directly from high school to professional hockey in the NHL and professional baseball in MLB, however, it is interesting to note that the NCAA makes little money from college hockey and college baseball and therefore does not have the same incentive to keep these athletes in college for a year.

Baseball has its own minor league system for which it covers the cost. However, the minor league system for professional football and basketball is the NCAA which is operated at no cost to the NFL and NBA. They get a minor league system paid for by colleges. The colleges and universities make large amounts of money and the players get only scholarship compensation.

The rules for the age of players are negotiated with the players' unions of the respective sports which is ironic since the young athletes are not members of the unions when their rights are bargained away.

QUESTIONS

1. What are the purposes behind the paternalistic rules in professional sports regarding age?

2. If athletes with short athletic careers do not wish to delay their entrance into professional sports why should they be prevented from doing so?

MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT

In 2016, a new CBA was agreed to by the owners and the players with little animosity. The minimum salary for Major League Baseball players was raised in the 2016 CBA from $507,500 in 2016 to $535,000 in 2017; $545,000 in 2018 and $555,000 in 2019. A cost of living adjustment would be applied to arrive at the minimum salaries in 2020 and 2021.

Among the benefits in the new CBA are provisions for full time chefs and registered dieticians on staff for each team to help improve clubhouse meal nutrition. In addition, all teams are required to provide a sports psychologist available to the players as an indication of the increased recognition of the mental stresses placed on MLB players.

Drug protocols were strengthened with the number of random in-season urine tests increased from 3,400 to 4,800 and the number of off-season tests increasing from 350 to 1,550 to make sure that every player will have at least one random off-season urine test each season. Human Growth Hormone (HGH) testing can only be done by a blood test. The new CBA provides for an increase in the number of random blood tests from 260 to 500 and the number of off-season random blood tests increasing from 140 to 400. Significantly, arbitrators, under the 2016 CBA, have increased authority and discretion in determining suspensions for use of performance enhancing drugs including the ability to reduce the penalties based upon mitigating circumstances in each case.

Chewing tobacco sometimes known as smokeless tobacco was banned in all stadiums where its use was banned by local laws or ordinances. In addition, new players joining MLB teams for the first time will be prevented from using smokeless tobacco on the field at every stadium.

Teams exceeding the Competitive Balance Tax, more commonly known as the Luxury Tax (195 million in 2017), under the 2016 CBA are required to pay an increased amount with the tax rate for first time offenders of the Luxury Tax paying a tax rate of 20%, second time offenders pay a tax rate of 30% and third or more offenders pay a 50% tax rate. In addition, to as an incentive to further reduce spending by the biggest offenders such as the Yankees an additional surcharge for payrolls between 20 and 40 million of 12% is added to the Luxury Tax of the offending team and if a team exceeds the luxury cap threshold by more than 40 million dollars the surcharge rises to 45%. Further disincentive to exceeding the salary cap came in a new provision in the CBA beginning in 2018 where teams will lose positions in the MLB amateur draft if they exceed the Luxury Tax.

During the negotiations, the owners dropped their demand for an International Draft largely as a result of the opposition of Hispanic players. However, in its place is a hard cap for signing of international players, which represents the first hard cap in MLB history through the setting up of a hard cap signing bonus pool. A hard cap represents a firm limitation of the amount of money that can be spent on player contracts.

NBA COLLECTIVE BARGAINING AGREEMENT

The year 2016 also brought a new seven year CBA between the NBA and the National Basketball Players Association (NBPA). The CBA which provides for either party to be able to opt out of the agreement after six years, divides basketball-related income (BRI) 51% to the players and 49% to the owners so long as expected specified levels of BRI are met. The major source of revenue for players and owners is television contracts, most notably the nine year 2.1 billion dollar contract with ESPN and Turner Sports. The definition of BRI includes apparel sales, stadium signs, and other basketball related income. While the percentage of BRI that the players received under

the CBA in 2011 was 57%, the dramatic increase in BRI resulted in the money the players received in 2017 at a lower 51% BRI figure to still be 1.5 billion dollars more than the players received in 2011. The new CBA increased the rookie salary scale, the veteran minimum salaries and specific free agent salary exceptions by approximately 45%. In addition, the owners and the players both agreed to jointly fund a new life long health insurance plan for former players with at least three years of NBA service. The biggest item left unchanged, however, was the rule limiting eligibility for the NBA draft to nineteen year olds at least one year after their high school graduation year.

WORK STOPPAGES

There have been a number of significant work stoppages in professional sports over the years including:

1. In 1979 a strike of MLB umpires went from opening day to May 18th when, under tremendous pressure, in a game where the officials perhaps play a more significant role than in any other professional team sport, MLB agreed to increase the salaries, travel per diem and vacation time for the umpires.

2. The MLB players' strike during the 1981 season resulted in the cancellation of more than 700 games. The key issue was how free agency would be structured with a compromise being reached that included free agency being restricted to players with at least six years of major league experience.

3. In 1982, the NFL players' union went on a strike that shortened the season that year to 9 games and ended with the players receiving increased regular season and playoff pay, however five years later, the NFL players' union went on strike again after the first two games of the 1987 season, causing the cancellation of NFL games for week three of the season, however this time the owners hired replacement players who played the next three regular scheduled games much to the consternation of fans throughout the country. The strike was far

from a unified action by the players with approximately 15% of the players including stars such as Mark Gastineau, Randy White, Joe Montana and Doug Flutie crossing the picket lines to play. Attendance plummeted with the smallest number of people attending a replacement game in Philadelphia where only 4,074 people attended. The strike's main issue was the league's free agency policy.

For five years after the 1987 strike, the players worked without a collective bargaining agreement and instead resorted to the courts. When a collective bargaining agreement was finally obtained it contained the first salary cap.

4. The 1992 NHL players' strike lasted a mere ten days during the 1992 season. Ultimately the strike was settled with a new two year collective bargaining agreement that included increased playoff bonuses and an increase in the length of the season. Just three years later the NHL had another work stoppage, however, this time it was the owners locking out the players from October 1, 1994 to January 11, 1995. The lockout ended with the owners getting a rookie salary cap and free agency restrictions.

5. MLB players struck again on August 12, 1994 in a strike that lasted until April 2, 1995 and actually resulted in no World Series being played. The strike was caused by a disagreement over the owners' proposal for a salary cap and restrictions on free agency. During the strike, the owners suspended free agency and salary arbitration, which action, the players argued successfully in court, was illegal. Federal Judge and now Supreme Court Justice Sonia Sotomayor ordered the owners to reinstate free agency and salary arbitration at which point the strike was settled and the players went back to work (or play).

6. The last of the major professional sports' leagues to have a work stoppage was the NBA when the owners locked out the players during the 1998–1999 season. The lockout which began technically during the summer of 1998 extended until January 20, 1999. The

ultimate settlement of this labor dispute included limits on the maximum salaries for player as well as a rookie wage scale.

7. With NHL teams spending 76% of their income on player salaries, team owners were unhappy with their Collective Bargaining Agreement and wanted to install a hard salary cap limiting the amount that teams could pay their players so in September of 2004 they locked the players out when no agreement on a new CBA could be reached. As the sides continued to be unable to reach any kind of a resolution, NHL Commissioner Gary Bettman cancelled the entire season in February of 2005 which resulted in the only time that one of the American major professional sports leagues lost an entire season due to a labor dispute. The lost season also resulted in the only time since 1919 that the Stanley Cup, one of the most iconic sports trophies in history was not awarded. Ultimately the players union and the owners agreed on a new CBA during the summer of 2005 in which the owners got their much desired salary cap and the players ended up getting little in return.

8. One of the most bitter labor disputes in professional sports was the 2011 lockout of NFL players that went on for four and a half months. At that time the NFL was incredibly profitable. According to Forbes Magazine, the average NFL team was worth 1.04 billion dollars at that time with teams' revenues increasing during the 2010 season by 4% over the previous season to 261 million dollars.[4]

However, the team owners were not happy with a salary cap that required them to pay players 51% of the total revenues and wanted a reduction of that figure. The players were willing to reduce that amount to 50%, but that was not satisfactory to the owners who locked out the players in order to induce the players to accept a lower figure for a new CBA. Eventually, they settled on 47% and 48% for the period of the new CBA. In order to increase revenues, the owners also wanted, but did not get an increase in the length of the season by

[4] "The NFL's Most Valuable Teams," Kurt Badenhausen, Forbes Magazine, September 7, 2011.

two additional games which was strongly objected to by the players due to concerns about the effects on their health and safety brought about by an extended season.

The NFL owners had been planning for a possible lockout or strike for some time prior to 2011 and even negotiated television contract extensions for less money in 2009 and 2010 that would pay the owners 4 billion dollars in 2011 regardless of whether the games were played or not. The NFLPA challenged the validity of the television contracts on the basis that when the NFL negotiated the broadcasting rights contracts in 2009 and 2010 they violated an agreement with the players that required the NFL to make a good faith effort to maximize revenue for the players. The players argued that the contracts were negotiated in a manner to provide the NFL owners with greater leverage in the event of a labor lockout. Initially, pursuant to the CBA, the matter was decided by a special master, however, Federal District Court Judge David Doty ruled that the special master erred in concluding that the NFL can act as a self-interested conglomerate, instead of being required to negotiate contracts for the mutual benefit of the players and the owners. According to Judge Doty, "The record shows that the NFL undertook contract renegotiations to advance its own interests and harm the interests of the players." Judge Doty also wrote in his opinion that the NFL "consistently characterized gaining control over labor as a short-term objective and maximizing revenue as a long-term objective... advancing its negotiating position at the expense of using best efforts to maximize total revenues for the joint benefit of the NFL and the players."[5]

Although the decision of Judge Doty provided some impetus for a new CBA, it did not happen in the days following Judge Doty's decision and on March 11th the NFLPA rejected the owner's latest offer and took the dramatic step of decertifying as a union. The

[5] Order, Reggie White et al. v. NFL et al., U.S. District Court, District of Minnesota Civil No. 4–92–906 (DSD).

lockout began in earnest on March 12th. Immediately following the lockout and no longer prevented from doing so by having a certified union representing the players, a group of players including high profile quarterbacks Tom Brady, Peyton Manning and Drew Brees filed an antitrust lawsuit against the NFL. Because antitrust claims cannot be made against an employer by a union representing the employees, it was necessary to dissolve the union for such a claim to be made in court by the players as individuals and on a class action basis. In their complaint the players asked for an injunction against the lockout. After court ordered negotiations to resolve the case failed, Judge Susan Nelson ruled in favor of the players' and ended the lockout, however, the players' victory was short lived as the owners successfully appealed to the 8th Circuit Court of Appeals where the injunction against the lockout was lifted. Eventually in late July the owners and the players agreed upon the terms of a new CBA thereby saving the season. The new CBA included a hard salary cap with the players receiving 47% of league revenues.

DEFLATEGATE

Ever since the Watergate scandal that brought down the presidency of Richard Nixon in 1974, it appears that almost every scandalous event becomes labeled with "gate" and the labor dispute that has come to be known as "deflategate" is no exception. It was hard for many people unfamiliar with labor law to understand that as the case developed through the courts, the factual issues of whether or not New England Patriots quarterback Tom Brady was involved in some manner with the deflating of footballs used in the AFC championship game against the Indianapolis Colts was of little interest to the federal court judges ruling on this matter. Instead the focus was on the process and whether it was sufficiently fair to comply with established labor law.

The New England Patriots played the Indianapolis Colts at the Patriots' Gillette Stadium in the AFC Championship Game on the evening of January 18, 2015. The game itself was not much of a

contest with the Patriots totally overwhelming the Colts by a score of 45–7, but the controversy that began in that game continued for a year. According to the NFL's investigation known as the Wells report, prior to the beginning of the game, the Colts had indicated to the NFL league office that they suspected that the Patriots were underinflating their game balls.[6]

NFL rules require footballs to be inflated to a pressure between 12.5 and 13.5 pounds per square inch (psi). Some NFL quarterbacks prefer under-inflated balls because they are considered to be easier to grip and throw, particularly in cold or rainy weather. Since 2006, all NFL teams provide their own game balls to use on offense. Just about the only time that an opposing team will handle their opponent's game ball is after a fumble recovery or interception and so it was during the Patriots-Colts game. During the first half of the game, Patriots quarterback Tom Brady threw a ball which was intercepted by Colts linebacker, D'Qwell Jackson who took the ball with him to the sideline to keep as a souvenir. Following the interception, a Colt's equipment manager measured the ball pressure and notified NFL officials that it was under-inflated. The second half of the game was played with balls that met NFL requirements. The Patriots went on to score 28 points in the second half while shutting out the Colts to make the final score 45–7. It is interesting to note, as was done in the Wells report, that Tom Brady's passing improved in the second half while using the higher inflated footballs. When the game ended, the investigation began.

Five days after the game, the NFL hired New York lawyer Ted Wells to investigate the matter. After four months, Wells submitted his 243 page report concluding that the balls had been tampered with and that it was "more probable than not" that Brady was aware that the Patriots equipment staff purposely deflated the game balls. The report also concluded that neither Coach Bill Belichick nor members of his

[6] "Investigative Report Concerning Footballs Used During the AFC Championship Game on January 18, 2015" Paul, Weiss, Rifkind, Wharton & Garrison LLP. Theodore V. Wells, Jr., Brad S. Karp and Lorin L. Reisner, May 6, 2015.

staff were aware of the situation. The two people identified by Wells as the probable culprits were locker-room attendant Jim McNally and equipment manager John Jastremski. Again, using the standard of "more probable than not" Wells determined that they deliberately deflated the footballs used in the game.

The standard of proof, "more probable than not" equates to the "preponderance of the evidence" standard used in civil actions as contrasted with the higher "beyond a reasonable doubt" standard used in criminals cases. It is interesting to note that the NFL's use of the standard of "more probable than not" goes back to 2008 when in response to criticism of the handling of the investigation into the New England Patriots improperly videoing their rivals that came to be known as "Spygate," the NFL changed its standard of proof for competitive violations to the lesser standard of "more probable than not" from a standard of conclusive proof.

Wells relied heavily on a scientific analysis done by the consulting company Exponent which was supported by Princeton Physics professor Daniel Marlow that concluded that no environmental or physical factors could explain the reduced air pressure of the balls used by the Patriots. This scientific analysis came under extreme criticism for being faulty and biased, most notably by Robert F. Young (an admitted Patriots fan) who filed an amicus brief with the federal court when the federal court was reviewing the Commissioner's determination. The amicus brief clearly indicated the flaws in Exponent's analysis and provided scientific explanations for the natural deflation of the balls.[7]

Young's position was supported in an op-ed piece for WBUR-FM by New York Law School Professor Robert Blecker, a self-described Patriots detractor[8].

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[7] NFL Management Council v. NFL Players Association, Case No 15–cv–596 (RMB)(JCF) Robert F. Young's Amicus Curiae in Opposition to the NFL's Motion to Confirm Arbitration Award.

[8] "DeflateGate, And the Patriots' False Appearance of Guild" WBUR Cognoscenti, Robert Blecker, August 31, 2015.

More importantly, MIT professor John Leonard posted a one and a half hour lecture on YouTube in which he debunked the analysis and conclusion of Exponent and concluded "If I had to stake my reputation and my career on it, the Patriots balls match the Ideal Gas Law prediction and I don't why people can't get that."

On May 11, 2015, the response of the Commissioner to the Wells report was to suspend Tom Brady for the first four games of the next NFL season and the Patriots were fined a million dollars and forfeited their first-round pick in the 2016 NFL draft and its fourth round pick in the 2017 draft.

Part of the reason for the harshness of the penalty to Brady was as described by the NFL Executive President Troy Vincent in his letter to Brady, "With respect to your particular involvement, the report established that there is substantial and credible evidence to conclude you were at least generally aware of the actions of the Patriots' employees involved in the deflation of the footballs and that it was unlikely that their actions were done without your knowledge. Moreover, the report documents your failure to cooperate fully and candidly with the investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.), despite being offered extraordinary safeguards by the investigators to protect unrelated personal information and by providing testimony that the report concludes was not plausible and contradicted by other evidence."[9]

Three days after the issuance of the Commissioner's ruling, on behalf of Brady, the NFLPA filed an appeal, pursuant to their rights under the CBA. The NFLPA requested that the appeal be heard by a neutral arbitrator, but the NFL determined that Commissioner Roger Goodell, would preside over the appeal. After the ten hour appeal hearing was concluded, Commissioner Goodell upheld the suspension indicating that a critical factor in his decision was Brady's

[9] "NFL Releases Statement on Patriots' Violations" Press Release, National Football League, May 11, 2015.

destruction of his cell phone. The next day the NFLPA appealed the Commissioner's decision into the federal court.

Tom Brady also responded to Commissioner Goodell's ruling by issuing a statement on his Facebook page:

"I am very disappointed by the NFL's decision to uphold the 4 game suspension against me. I did nothing wrong, and no one in the Patriot's organization did either. Despite submitting to hours of testimony over the past 6 months, it is disappointing that the Commissioner upheld by suspension based upon a standard it was "probable" that I was "generally aware" of misconduct. The fact is that neither I, nor any equipment person, did anything of which we have been accused. I also disagree with yesterday's narrative surrounding my cellphone. I replaced my broken Samsung phone with a new iPhone 6 AFTER my attorneys made it clear to the NFL that my actual phone device would not be subjected to investigation under ANY circumstances. As a member of a union, I was under no obligation to set a new precedent going forward, nor was I made aware at any time during Mr. Wells' investigation, that failing to subject my cell phone to investigation would result in ANY discipline.

Most importantly, I have never written, texted, emailed to anybody at anytime, anything related to football air pressure before this issue as raised at the AFC Championship game in January. To suggest that I destroyed a phone to avoid giving the NFL information it requested is completely wrong. To try and reconcile the record and fully cooperate with the investigation after I was disciplined in May, we turned over detailed pages of cell phone records and all of the emails that Mr. Wells requested. We even contacted the phone company to see if there was any possible way we could retrieve any/all of the actual text messages from my old phone. In sort, we exhausted every possibility to give the NFL everything we could and offered to go thru the identity for every text and phone call during the relevant time."

The NFLPA appealed on Tom Brady's behalf to the Federal District Court. NFL League Mgt. Council v. NFL Players Association, 125 F. Supp. 3d 449—District Court SD New York 2015.

The bases for appeals to court to overturn an arbitration decision are quite limited. Federal law found in 9 USC Section 10(a) lists them:

"1. where the award was procured by corruption, fraud or undue means;

2. where there was evident partiality or corruption in the arbitrators, or either of them;

3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Essentially, courts have the ability to overturn the decision of an arbitrator (referred to in the statutes as the "award") when there is a lack of fundamental fairness or due process.

The NFLPA, on behalf of Brady argued that the due process and fairness procedures established in the CBA and the NFL rules as well as basic "industrial due process" were violated in the commissioner's handling of this case. In addition, the union argued that the NFL violated the established practices followed by the NFL in the past referred to as "the law of the shop."

Although it was not particularly significant for the court's rulings, it is interesting to note that nowhere in the NFL's Wells Report or rulings was there any direct evidence that Tom Brady was involved in any manner in the deflating of footballs. The farthest that the Wells Report went was to say, "it is more probable than not that Tom Brady (the quarterback of the Patriots) was at least generally aware of

the inappropriate activities of McNally and Jastremski involving the release of air from Patriots game balls."

Much had been made about the refusal of Tom Brady to provide his cell phone although in a telephone press conference, Ted Wells said, that Brady "answered every question I put to him. He did not refuse to answer any questions in terms of the back and forth between Mr. Brady and my team. He was totally cooperative." "And I want to be crystal clear. I told Mr. Brady and his agents, I was willing not to take possession of the phone. I said, 'I don't want to see any private information.' I said, 'Keep the phone. You and the agent, Mr. Yee, you can look at the phone. You give me documents that are responsible to this investigation and I will take you at your word that you have given me what's responsive.' And they still refused."[10]

The refusal to provide the phone, upon advice of counsel, was a normal disagreement regarding the extent of the authority of the Commissioner's office to demand the phone. As for the destroying of the phone, it was acknowledged that Brady on a regular basis cycled his phones and for understandable security reasons destroyed the older phones. However, what often went unsaid as this case played out in the media was that Brady's attorneys offered the Commissioner to provide the names of everyone with whom Brady had communicated with on his phone with the Commissioner then able to compel a search of those phones for text messages from Brady. The NFL did not have a right pursuant to league rules and the CBA to the contents of Brady's phone and Brady, under advice of counsel exercised his right to refuse the request for his phone. Ironically when the NFL hired former FBI director Robert Mueller to investigate the league's handling of the Ray Rice domestic abuse case Commissioner Goodell refused to provide his personal cell phone to Mueller.

The basis for the NFLPA arguments against the NFL's actions against Brady included the inappropriateness of punishing Brady

[10] "Transcript of Ted Wells conference call," Boston Herald, Adam Kurkjian, May 12, 2015.

under a new standard of culpability defined as "general awareness" of alleged misconduct of others as a basis for punishing Brady; the inability to suspend Brady since the league's player policy for actions related to tampering with the football would have been limited to a fine; the use of the league's Competitive Integrity Policy as a basis for punishing Brady where that policy only applies to individual teams and not players; and that even if Brady were deemed to have been guilty of non-cooperation, a response to non-cooperation had previously only been fines and not suspensions.

The NFL Players Association's appeal on behalf of Tom Brady was heard initially by Judge Richard Berman in the Federal District Court for the Southern District of New York 15 Civ. 5916 and 15 Civ. 5982 (2015).

On September 3, 2015 Judge Berman overturned the ruling of Commissioner Goodell.

Judge Berman wrote, "The Court is fully aware of the deference afforded to arbitral decisions, but nevertheless, concludes that the Award should be vacated. The award is premised upon several significant legal deficiencies, including (A) inadequate notice to Brady of both his potential discipline (four game suspension) and his alleged misconduct; (B) denial of the opportunity for Brady to examine one of two lead investigators, namely NFL Executive Vice President and General Counsel, Jeff Pash; and (c) denial of equal access to investigative files including witness interview notes."

"The Court finds that Brady had no notice that he could receive a four-game suspension for general awareness of ball deflation by others or participation in any scheme to deflate footballs, and non-cooperation with the ensuing Investigation. Brady also had not notice that his discipline would be the equivalent of the discipline imposed upon a player who used performance enhancing drugs."

Judge Berman noted how "rightly or wrongly, a sharp change in sanctions or discipline can often be seen as arbitrary and as an impediment rather than an instrument of change."

Judge Berman further noted "It is the 'law of the shop' to provide professional football players with (advance) notice of prohibited conduct and of potential discipline." Judge noted as precedent for this position a 1991 case involving Cleveland Brown wide receiver Reggie Langhorne who refused to accept assignment to the team practice squad and, as a result, was heavily fined without any notice that his actions could result in such a fine. Coincidentally, the coach of the Cleveland Browns at that time was Bill Belichick.

Judge Berman concluded "Brady had no notice that such conduct was prohibited, or any reasonable certainty of potential discipline stemming from such conduct."

Additionally, Judge Berman also ruled that the Commissioner's denying of Brady's lawyer the opportunity to question Jeff Pash, the co-lead investigator of the report, which Judge Berman referred to as the Wells-Pash Investigation seriously prejudiced Brady as did the refusal of Commissioner Goodell to have access to the files used in the preparation of the supposedly independent Pash-Wells Investigation while the NFL was given full access to those files. Judge Berman wrote that "Commissioner Goodell had 'the affirmative duty. . . to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party."

Following Judge Berman's decision in favor of Tom Brady, the NFL, in turn, appealed Judge Berman's decision to a three judge panel of the Federal Second Circuit Court of Appeals and its appeal was successful as by a vote of 2–1 the panel voted to reinstate the NFL's punishment of Tom Brady.

The opinion of the court reinforced that arbitration done in accordance with the terms and provisions of the CBA is given extreme deference. NFL Management Council v. NFLPA et al, 820 F. 3d. 527 (2016) As Judge Parker wrote in the majority opinion, "The basic principle driving both our analysis and our conclusion is well established: a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the

most deferential in the law. Our role is not to determine for ourselves whether Brady participated in a scheme to deflate footballs or whether the suspension imposed by the Commissioner should have been for three games or five games or none at all. Nor is it our role to second-guess the arbitrator's procedural rulings. Our obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards established by the Labor Management Relations Act, 29 U.S.C. section 141 et seq. (the 'LMRA'). We must simply ensure that the arbitrator was 'even arguably construing or applying the contract and acting within the scope of his authority' and did not 'ignore the plain language of the contract.' United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987). These standards do not require perfection in arbitration awards. Rather, they dictate that even if an arbitrator makes mistakes of fact or law, we may not disturb an award so long as he acted within the bounds of his bargained-for authority."

The rules for arbitration are generally provided for as a part of the Collective Bargaining Agreement and consequently, the standards to be followed and the respective authority of the parties involved can vary considerably from what may be the standards in other CBAs. In the NFL CBA the powers of the Commissioner in this regard were quite broad. As the Court wrote in its opinion:

"Here the authority was especially broad. The commissioner was authorized to impose discipline for, among other things 'conduct detrimental to the integrity of, or public confidence, in the game of professional football.' In their collective bargaining agreement, the players and the League mutually decided many years ago that the Commissioner should investigate possible rule violations, should impose appropriate sanctions, and may preside at arbitrations challenging his discipline. Although this tripartite regime may appear unorthodox, it is the regime bargained for and agreed upon by the parties, which we can only presume they determined was mutually satisfactory."

The Court went on to say that Article 46 of the Collective Bargaining Agreement "gives the Commissioner broad authority to deal with conduct he believes might undermine the integrity of the game. The Commissioner properly understood that a series of rules relating to uniforms and equipment does to repeal his authority vested in him by the Association to protect professional football from detrimental conduct."

In responding to the Judge Berman's initial decision that the NFL's refusal to allow its General Counsel Jeff Pash to testify at the arbitration concerning his role in the preparation of the Wells Report was reversible error, the judge wrote "It is well settled that procedural questions that arise during arbitration, such as which witnesses to hear and which evidence to receive or exclude, are left to the sound discretion of the arbitrator and should not be second guessed by the courts." This reflects a common position taken by many courts that arbitrators have immense discretion in the determination of the rules of evidence they will follow so long as they are acting consistent with the terms of the arbitration as set out in the CBA.

In the last paragraph of the judges' opinion they dealt with the issue of the alleged lack of impartiality of the Commissioner in ruling in this case and again looked at the case through the provisions of the CBA saying "Here, the parties contracted in the CBA to specifically allow the Commissioner to sit as the arbitrator in all disputes brought pursuant to Article 46, Section 1(a). They did so knowing full well that the Commissioner had the sole power of determining what constitutes 'conduct detrimental,' and thus knowing that the Commissioner would have a stake both in the underlying discipline and in every arbitration brought pursuant to Section 1(a). Had the parties wished to restrict the Commissioner's authority they could have fashioned a different agreement."

Essentially what the judges said to the NFLPA was that you made your bed and now you have to lie in it. It certainly can be expected

that the power of the Commissioner to act in future arbitrations will be an issue that the players' union will want to revisit.

The dissenting judge at the appeals court was Chief Justice Robert Katzmann who wrote:

"Article 46 of the Collective Bargaining Agreement between the NFL Players Association (the 'Association') and the NFL Management Council requires the Commissioner to provide a player with notice of the basis for any disciplinary action and an opportunity to challenge the discipline in an appeal hearing. When the Commissioner, acting in his capacity as an arbitrator, changes the factual basis for the disciplinary action after the appeal hearing concludes, he undermines the fair notice for which the Association bargained, deprives the player of an opportunity to confront the case against him, and, it follows, exceeds his limited authority under the CBA to decide 'appeals' of disciplinary decisions."

"Additionally, on a more fundamental level, I am troubled by the Commissioner's decision to uphold the unprecedented four-game suspension. The Commissioner failed to even consider a highly relevant alternative penalty and relied, instead, on an inapt analogy to the League's steroid policy. This deficiency, especially when viewed in combination with the shifting rationale for Brady's discipline, leaves me to conclude that the Commissioner's decision reflected 'his own brand of industrial justice.' United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960)."

"With regard to the first step, Article 46 of the CBA vests the Commissioner with exceptional discretion to impose discipline for 'conduct detrimental,' but it checks that power by allowing the player to challenge that discipline through an 'appeal.' Joint App. at 345–46. IN deciding the appeal, the arbitrator may decide whether the misconduct charged actually occurred, whether it was actually 'detrimental' to the League, and whether the penalty imposed is permissible under the CBA. But the arbitrator has no authority to base his decision on misconduct different from that originally

charged. When he does so, the arbitrator goes beyond his limited authority, and the award should be vacated."

In particular, Judge Katzmann referred to the Commissioner's consideration of allegations that first appeared in the Commissioner's appeal decision, but not in the Wells report about Brady providing "inducements and rewards" supporting a scheme by Patriots' personnel to tamper with the game balls which he found to be a material change as to the alleged misconduct of Brady. Judge Katzmann indicated in his dissent that he believed the Commissioner exceeded his authority when he based the discipline ordered on facts not included in the Wells report.

Judge Katzmann also went on to deal with the issue of the punishment saying:

"Yet, the Commissioner failed to even mention, let alone explain, a highly analogous penalty, an omission that underscores the peculiar nature of Brady's punishment. The League prohibits the use of stickum, a substance that enhances a player's grip. Under a collectively bargained-for Schedule of Fines, a violation of this prohibition warrants an $8,268 fine in the absence of aggravating circumstances. Given that both the use of stickum and the deflation of footballs involve attempts at improving one's grip and evading the referees' enforcement of the rules, they would seem a natural starting point for assessing Brady's penalty. Indeed, the League's justification for prohibiting stickum—that it 'affects the integrity of the competition and an give a team an unfair advantage,' Joint App. at 384 (League Policies for Players)—is nearly identical to the Commissioner's explanation for what he found problematic about the deflation—that it 'reflects an improper effort to secure a competitive advantage in, and threatens the integrity, of, the game,' Special App. at 57.

Notwithstanding these parallels, the Commissioner ignored the stickum penalty entirely. This oversight leaves a noticeable void in the Commissioner's decision, and in my opinion, the void is indicative of the ward's overall failure to draw its essence from the CBA."

"In sum, the Commissioner's failure to discuss the penalty for violations of the prohibitions on stickum, the Commissioner's strained reliance on the penalty for violations of the League's steroid policy, and the Commissioner's shifting rationale for Brady's discipline, together, leave me with the firm conviction that his decision in the arbitration appeal was based not on his interpretation of the CBA, but on 'his own brad of industrial justice.' Enter. Wheel & Car Corp., 363 U.S. at 597."

In the concluding paragraphs of his dissent, Judge Katzmann wrote:

"The Commissioner's authority is, as the majority emphasizes, broad. But it is not limitless, and its boundaries are defined by the CBA. Here, the CBA grants the Commissioner in his capacity as arbitrator only the authority to decide 'appeals,' that is whether the initial disciplinary decision was erroneous. The Commissioner exceeded that limited authority when he decided instead that Brady could be suspended for four games based on misconduct found for the first time in the Commissioner's decision. This breach of the limits on the Commissioner's authority is exacerbated by the unprecedented and virtually unexplained nature of the penalty imposed. Confirming the arbitral award under such circumstances neither enforces the intent of the parties nor furthers the 'federal policy that federal courts should enforce [arbitration] agreements. . . and that industrial peace can best be obtained only in that way.' Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957).

I end where I began. The Article 46 appeals process is designed to provide a check against the Commissioner's otherwise unfettered authority to impose discipline for 'conduct detrimental.' But the Commissioner's murky explanation of Brady's discipline undercuts the protections for which the NFLPA bargained on Brady's and others' behalf. It is ironic that a process designed to ensure fairness to all players has been used unfairly against one player."

Somewhat ironically, in the Fall of 2016, the New York Giants complained to the NFL offices that balls used by the Pittsburgh Steelers in a game against the Giants on December 4, 2016 were underinflated. In this case, no action was taken by the NFL Commissioner's office ostensibly because control of the balls was done by the referees, however, it also could be considered a tacit admission that indeed, as many scientists had concluded balls naturally deflate in colder temperatures and there was no evidence of wrongdoing by the NE Patriots in general and Tom Brady in particular in regard to the Deflategate game, particularly when there were no pregame measurements of the balls in the Patriots' game against the Colts to compare against the balls deemed to be underinflated during the course of the first half of that game.

SYNOPSIS

1. Antitrust laws prohibit agreements or practices that restrict business competition to the detriment of consumers.

2. The first antitrust law was the Sherman Antitrust Act of 1890 that prohibits monopolies that harm consumers. The law prohibits agreements or practices that unduly restrict free competition between businesses.

3. The Clayton Act of 1914 exempted labor unions from being considered monopolies even though they regulate working conditions.

4. The Norris LaGuardia Act of 1932 permits employees to organize as a collective bargaining unit without violating the law.

5. Under the *per se* rule, a labor practice is considered a violation of antitrust law if it is as inherently unreasonable restraint of trade.

6. The rule of reason is another standard for determining antitrust violations by which the anti-competitive aspects of a particular practice are balanced against the pro-competitive benefits.

7. Collective bargaining requires management and unions to negotiate in good faith on matters of compensation and working conditions.

8. Professional sports will always be susceptible to claims that they are in violation of antitrust laws because they are generally monopolies.

9. Not all monopolies are violations of antitrust law.

10. The Supreme Court ruling that determined that professional baseball was exempt from antitrust laws has never been overturned by the Supreme Court.

11. The Supreme Court upheld the constitutionality of the reserve clause in the 1953 case of Toolson v. New York Yankees.

12. The Reserve Clause was successfully challenged in the arbitration hearing of MLB pitcher Andy Messersmith.

13. The federal court ruling on the dispute commonly known as Deflategate was determined solely on the applicability of the arbitration rules used without any consideration of whether or not balls were tampered with.

14. In the case of NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) the Supreme Court ruled that the NCAA rules limiting televised coverage of football games was a violation of antitrust law.

15. The NFL's Rozelle rule was successfully challenged by NFL players, however, a modified version of the rule was included in the next collective bargaining agreement between the players and NFL owners.

16. Age limits set by professional sports leagues limiting when an athlete may play professional sports have been upheld in litigation against professional sports leagues.