ValpoScholar Valparaiso University Law Review

Volume 11
Number 3 *Spring 1977*

*pp.*373-434

Spring 1977

A Survey of Professional Team Sport Player-Control Mechanisms Under Antitrust and Labor Law Principles: Peace at Last

Brian E. Lee

Follow this and additional works at: https://scholar.valpo.edu/vulr

 Part of the Law Commons

Recommended Citation

Brian E. Lee, *A Survey of Professional Team Sport Player-Control Mechanisms Under Antitrust and Labor Law Principles: Peace at Last*, 11 Val. U. L. Rev. 373 (1977).
Available at: https://scholar.valpo.edu/vulr/vol11/iss3/4

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

Valparaiso University

A SURVEY OF PROFESSIONAL TEAM SPORT PLAYER-CONTROL MECHANISMS UNDER ANTITRUST AND LABOR LAW PRINCIPLES: PEACE AT LAST

BRIAN E. LEE*

INTRODUCTION

During the past decade, the public view of professional athletics has been considerably altered through the media's constant focus on legal disputes between players and their employers. Previously, the sports pages were filled almost exclusively with team scores and standings, season predictions, and special accomplishments of individuals. Today, however, news of legal developments in professional sports often eclipses the performance of athletes on the field. In fact, so many legal matters pervade the sports field that one sports attorney noted: "The average fan has to know not only the difference between the T-formation and the wishbone, but also the difference between a temporary restraining order and a preliminary injunction."[1]

It appears, however, that once again the sanctity of the sports section will be restored. Loyal fans, hopefully, will no longer have to wade through a profusion of legal disputes to find box scores. After numerous court battles, all of the professional sports leagues have settled their basic differences through collective bargaining. This paper will trace the history of these disputes from their origins through the recent collective bargaining agreements.

At the source of an overwhelming majority of the legal disputes in professional sports has been the owners' traditional array of player-control mechanisms. Through these mechanisms the rights to the services of all professional athletes were held exclusively by the one team that drafted or traded for a player. The athlete had no say in the location in which he would play, and salaries were depressed because of the resulting lack of competition for his services. Eventually, players brought legal actions challenging these mechanisms as violating antitrust laws. Suits brought by baseball players on this basis have not been successful because of a

---

*A.B. Colgate University, 1974; J.D. Valparaiso University, 1976.

1. B. WOOLF, BEHIND CLOSED DOORS 268 (1976).

1922 Supreme Court decision that granted baseball an antitrust exemption. Fortunately, this precedent has not been extended to other sports. Outside baseball, challenges against player control mechanisms on antitrust grounds have succeeded.

After nearly a decade of litigation which invariably favored the players, a breakthrough in player-managment relations occurred when Larry O'Brien was named Commissioner of the National Basketball Association (NBA). Mr. O'Brien convinced the NBA owners of the hopelessness of their cause. The Commissioner ruled that a settlement with the athletes would have to be reached through collective bargaining. As a result of the NBA settlement and continued player victories in the courts, other leagues also have settled their differences with the athletes through collective bargaining. Because collective bargaining agreements are not subject to attack on antitrust grounds by the agreeing parties, a decade of law suits that plagued professional sports has ended.

This article will survey the changes in player-control mechanisms that the collective bargaining agreements have wrought. As most of the cases challenging these mechanisms have been brought under the antitrust laws, a necessary starting point is the applicability of these laws to professional sports. It will be seen that all professional athletics except for baseball are subject to these laws. The reasons the Supreme Court gave for granting baseball an exemption in 1922 and the reasons why Congress should act to finally overturn this anomaly will be covered.

The next area to be studied is the specific player-control mechanisms utilized by the major leagues in baseball, basketball, football and hockey. The most widely known of these mechanisms, the reserve and option clauses and the player drafts have been frequently challenged by players under the antitrust laws. Further, the changes that have been made through collective bargaining as a consequence of these cases will be explored.

After showing the application of the antitrust laws to the mechanisms, and the resultant changes made, this survey concludes by exploring the labor law exemption from the antitrust laws. Since the agreements were reached through bona fide collective bargaining, they are not subject to antitrust attack by either the players or owners. Essentially, there will no longer be a profusion of court actions concerning the player control mechanisms simply because the forum no longer is available to the parties. Their sole remedy now lies with the National Labor Relations Board. Since this is the

underlying reason that the area is finally settled, it is presented at the end.

APPLICATION OF ANTITRUST LAWS TO PROFESSIONAL SPORTS

Of the four major professional team sports, only baseball remains exempt from the workings of the antitrust laws. This section examines how baseball received and retained this exemption and why it was not extended to the other sports. In addition, the reasons why Congress should now act to overturn this exclusion will be discussed. Initially, it is important to review the sections of the antitrust laws that are the basis for the player challenges.

The antitrust laws have been the basis for the vast majority of actions that have been brought by professional athletes to strike down restrictive player-control mechanisms. According to these laws: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal."[2] It is also illegal to monopolize or to attempt to monopolize any business or trade engaged in interstate commerce.[3] A successful litigant under the antitrust laws is entitled to recover treble damages plus costs.[4]

The Supreme Court first ruled on the applicability of these regulations to professional sports in 1922. In *Federal Baseball Club of Baltimore v. National League*,[5] the plaintiff alleged that the National League conspired to monopolize the baseball business by purchasing all the member teams of the Federal League except for the plaintiff.[6] In a unanimous decision, the Court held that the business of organized baseball did not constitute interstate commerce and hence could be subject to regulation under the antitrust laws.[7] The Court found the business to be purely a state affair and the transportation of players across state lines merely incidental.[8] Furthermore, the playing of baseball games was held not to be commerce: "personal effort, not related to production, is not a subject of commerce."[9]

2. Sherman Act § 1, 15 U.S.C. 1 (1970).
3. Sherman Act § 2, 15 U.S.C. 2 (1970).
4. Clayton Act § 4, 15 U.S.C. 15 (1970).
5. 259 U.S. 200 (1922).
6. *Id.* at 207.
7. *Id.* at 209.
8. *Id.* at 208-09. The Court relied on Hooper v. California, 155 U.S. 648 (1895), which held that the sending of an insurance policy from one state into another did not constitute interstate commerce.
9. 259 U.S. at 209.

Produced by The Berkeley Electronic Press, 1977

The *Federal Baseball* decision, authored by Mr. Justice Holmes, led to the involuntary servitude of professional ballplayers for over fifty years. Legal sanction was given to the owners to undertake otherwise illegal conduct. The owners were free to deny players the freedom to contract, to engage in restraints of trade and group boycotts and to refuse to deal.

For over twenty-five years, the baseball antitrust exemption remained unchallenged; in 1949, three players were suspended for playing in a rival league. Two cases brought as a result of the suspensions were heard by the Second Circuit Court of Appeals.[10] The decisions were clear: baseball was engaged in interstate commerce and was thus subject to the antitrust laws. A majority of the court clearly felt that the Supreme Court would reverse its previous position on the exemption issue. Judge Frank noted that while *Federal Baseball* had never been explicitly overruled, a major precedent on which it was based had been so overturned.[11] Judge Learned Hand reasoned that the playing of the games in conjunction with radio and television broadcasting clearly constituted interstate commerce.[12] Even though Supreme Court review of the exemption question was avoided when the baseball commissioner opted to settle the cases out of court, it appeared in 1949 that the baseball exemption no longer existed.[13]

Surprisingly, when the Supreme Court did review the exemption issue four years later baseball's exemption status was upheld.[14] The Court noted that Congress had studied the *Federal Baseball* decision but had not acted to bring baseball under the protection of the antitrust laws. This inaction allowed the baseball business to develop for thirty years with the understanding that it was not subject to antitrust legislation. The Court felt that if any evil existed as a result of *Federal Baseball*, it should be corrected by Congress and

---

10. Martin v. National League Baseball Club, 174 F.2d 917 (2d Cir. 1949); Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949).

11. *Id.* at 409 n.1. In United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), the Court had overruled Hooper v. California, 155 U.S. 648 (1895), and held that insurance business conducted in that manner was engaged in interstate commerce.

12. 172 F.2d at 408.

13. Gromley, *Baseball and the Anti-Trust Laws*, 34 NEB. L. REV. 597, 603 (1955).

14. Toolson v. New York Yankees, 346 U.S. 356, *reh. denied*, 346 U.S. 917 (1953). This and companion cases were treble damage actions by two players and an owner alleging that major league baseball was a monopoly. The plaintiffs alleged injury from a variety of baseball's restrictive player-control mechanisms.

not by the courts.[15] A strong two-man dissent argued that baseball was indeed interstate commerce.[16] Contravening the reasoning of the majority, the dissenters felt that baseball, like any other business, should be subject to the antitrust laws until explicitly exempted by Congress.[17] In fact, only two years earlier, Congress had held hearings into the status of baseball and the special exemption.

It is interesting to note that although the majority stressed the inaction of Congress as grounds for upholding the exemption, in 1951 a House subcommittee had put off recommending legislation until the status of *Federal Baseball* was clarified in the courts.[18] This subcommittee, at the conclusion of its hearings, unanimously opposed three bills introduced to give antitrust exemption to all professional sports.[19] Regarding the proposed bills, it concluded that the granting of such a broad exemption could not be accomplished without substantially abrogating the antitrust law.[20]

In spite of its baseball decision, the Supreme Court failed to expand the antitrust exemption to other professional exhibitions. In companion cases in 1955, the Court found the antitrust laws applicable to championship prizefights and to the theater.[21] However,

---

15. 346 U.S. at 357.

16. Mr. Justice Burton stated:

> 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 receipts 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 now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act.

Id. at 357-58.

17. *Id.* at 364-65.

18. SUBCOMM. ON THE STUDY OF MONOPOLY OF THE COMM. ON THE JUDICIARY, ORGANIZED BASEBALL, H.R. Rep. No. 2002, 82d Cong., 2d Sess. 134-36, 231-32 (1952) [hereinafter cited as ORGANIZED BASEBALL]. At this time it appeared that the exemption was dead because of *Gardella* and *Martin*. Therefore, unless *Toolson* upheld *Federal Baseball* there would be no need to legislate away the exemption.

19. H.R. 4229-31 and S. 1526, 82d Cong., 1st Sess. (1951).

20. ORGANIZED BASEBALL, *supra* note 19, at 230.

21. United States v. Int'l Boxing Club, 348 U.S. 236 (1955), United States v. Shubert, 348 U.S. 222 (1955). In *Shubert* the Court noted that "*Toolson* was a narrow application of the rule of stare decisis." *Id.* at 230.

Produced by The Berkeley Electronic Press, 1977

as neither boxing nor the theater could be considered a team sport, it remained to be seen whether football, basketball and other team sports would be held within the exemption.

In 1957, an action for treble damages reached the Supreme Court. The suit was brought by a player who had been blacklisted by the National Football League and its affiliate The Pacific Coast League, for playing in the rival All-America Conference.[22] In *Radovich v. National Football League*,[23] the Supreme Court specifically limited the exemption to baseball. The Sherman Act was held applicable to professional football because of the volume of interstate business involved.[24] The Court went on to say:

> If this ruling is unrealistic, inconsistent or illogical, it is sufficient to answer . . . that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error, if any there be, is by legislation and not by court decision.[25]

Three justices dissented in the *Radovich* decision because they felt that football could not be distinguished from baseball; following the rule of *stare decisis*, they would have included football within the exemption.[26]

By implication, *Radovich* ruled that all professional team sports except baseball were subject to the antitrust laws. This has since been confirmed. Cases involving both basketball[27] and hockey[28] have held that the antitrust laws were applicable. The practical result of this discrepancy became apparent when players began to challenge the player-control mechanisms. In basketball, football and hockey the mechanisms were invariably struck down as violating the antitrust laws. In these sports, the antitrust forum hastened the reali-

---

22. The conference operated from 1946 until 1949, at which time it was disbanded.

23. 352 U.S. 445, *reh. denied*, 353 U.S. 931 (1957).

24. *Id.* at 452.

25. *Id.*

26. *Id.* at 455-56 (Frankfurter, J., dissenting). *Id.* at 456 (Harlan, J., dissenting).

27. Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971) (Douglas, J., as Cir. J.).

28. Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972); Philadelphia World Hockey v. Philadelphia Hockey Club, 351 F. Supp. 462, 517 (E.D. Pa. 1972).

ty of player-management settlements and agreements reached through collective bargaining. A different result, however, was reached in the last baseball case challenging the player-control mechanisms on antitrust grounds.

Congress still had not acted when *Flood v. Kuhn*[29] reached the Supreme Court in 1972. Curt Flood had been traded from the St. Louis Cardinals to the Philadelphia Phillies. He refused to accept the trade, and when Commissioner Bowie Kuhn denied his request to be named a free agent, Flood filed an antitrust suit which challenged the reserve system. In a 5-3 decision, the Court affirmed its original stance and again called for Congressional action to remedy the situation.[30] Mr. Justice Blackmun, writing for the majority, pointed out that baseball was indeed a business engaged in interstate commerce.[31] While this admittedly made the baseball exemption an anomaly, Blackmun reasoned:

> 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 of baseball's unique characteristics and needs.[32]

The Court did not spell out what these unique characteristics and needs were. Moreover, its reasoning was at best dubious in the light of cases which involved professional sports businesses that were operated quite similarly to baseball.

In the *Flood* case, the Court once again emphasized the inaction of Congress.[34] The argument that the Court itself had expressed

---

29. 407 U.S. 258 (1972).

30. In an interesting sidelight to the decision, Part One of Mr. Justice Blackmun's opinion was a nostalgic look at the history of baseball and of its early players. Mr. Chief Justice Burger and Mr. Justice White joined in the judgment of the Court, and in all *but* Part One of the decision. This might have occurred so that it did not appear that they were favoring the side of organized baseball.

In addition, it has been speculated that Chief Justice Burger had originally sided with Flood, and that after Mr. Justice Blackmun penned his decision the Court was split 4-4 on the issue. The trial had attracted much publicity and instead of rendering no decision, which would have been embarrassing to the Court, the Chief Justice changed his vote. 118 CONG. REC. 22282 (1972) (reprint of an article by journalist Tom Dowling).

31. 407 U.S. at 282.

32. *Id.*

33. *See* notes 23 and 27 *supra* and accompanying text.

34. 407 U.S. at 281 n.14.

concern that too much weight was being accorded to Congressional silence in areas outside professional sports was acknowledged.[35] Nevertheless, the Court held that in the case of baseball there was much more than "mere congressional silence and passivity."[36] The exemption remained intact, and the Court reiterated that any remedy would have to come from Congress.[37] Dissenting, Mr. Justice Douglas confessed that although he had previously supported the majority position, he now felt that the Court should correct its own "fundamental" error and should not depend on Congress to do so.[38] Mr. Justice Marshall urged the Court to overrule its previous mistake as a substantive federal right—free competition—was being denied.[39]

To the present time, the Court has not changed its position and Congress has yet to pass a bill which would alter this "aberration." Although the Supreme Court could have overruled its judge-made baseball exemption, the important fact remains that it has declined to do so. Therefore, change must come through the Congress; it has at least come close to considering some change. One such measure was the formation of a Select Committee on Professional Sports in May, 1976. This committee's stated purpose was to study the need for legislation with respect to all professional sports in general.[40] After extensive hearing, the Committee concluded, *inter alia*, "that adequate justification does not exist for baseball's special exemption from the antitrust laws and that its exemption should be removed in the context of overall sports antitrust reform."[41] But the Committee felt that any legislation in that regard should be postponed until a review committee had an opportunity to study the total impact of the antitrust laws on all professional sports.[42] Unfortunately, the

35. In Girouard v. United States, 328 U.S. 61, 69 (1945), the Court stated that "it is at best treacherous to find in Congressional [sic] silence alone the adaptation of a controlling rule of law." Furthermore, in Boy's Mkt., Inc. v. Retail Clerks Union, 398 U.S. 235, 241 (1970), it was said that "nor can we agree that conclusive weight should be accorded to the failure of Congress to respond to . . . a case calling for legislative action on the theory that congressional silence should be accepted as acceptance of the decision."

36. 407 U.S. at 283.

37. *Id.* at 285.

38. *Id.* at 286 (Douglas, J., dissenting).

39. *Id.* at 292-93 (Marshall, J., dissenting).

40. HOUSE SELECT COMM. ON PROFESSIONAL SPORTS, 94th Cong. 2d Sess., PROFESSIONAL SPORTS AND THE LAW: A STUDY 1, 23-27 (Comm. Print 1976).

41. HOUSE SELECT COMM. ON PROFESSIONAL SPORTS, INQUIRY INTO PROFESSIONAL SPORTS, H.R. REP. NO. 94-1786, 94th Cong., 2d Sess., 60 (1977) [hereinafter cited as 1977 INQUIRY].

42. *Id.*

Select House Committee's term expired with the 94th Congress. The Committee was not renewed because Congress felt that it was infringing upon the jurisdiction of other committees. The chairman of the House Judiciary Committee led the fight to kill the sports panel and promised that his committee would promptly consider whether baseball's special exemption should be removed.[43] Because any recommendation of the Select Committee would have to proceed for approval through the House Judiciary Committee, the chances for a more speedy removal of the exemption actually may have been significantly increased.[44]

Much of the injustice that resulted from baseball's antitrust exemption has been remedied by an arbitration decision and a subsequent collective bargaining agreement.[45] But there is no justification for the continuation of the exemption. Rightly or wrongly, it is clear the courts have washed their hands of the matter. Therefore, it is the duty of Congress to act now to remove it. Congress can remedy a 55-year-old mistake, and it is urged that they do so. That which is clearly contrary to the antitrust laws and public policy of the United States cannot be allowed to continue.

Antitrust laws, however, have had a large impact on other professional sports. Specifically, they have been fairly effective in attacking the use of the player-control mechanisms. The unique operation of these devices and the player challenges against them will now be examined.

THE METAMORPHOSIS OF THE PLAYER-CONTROL MECHANISMS

Early in the history of professional team sports a variety of restrictions on player movement were devised by the team owners of the various leagues.[46] By controlling the players' mode of entry in-

43. Newsday, Mar. 9, 1977, at 81, col. 1.

44. Assuming that a proposal does reach the floor, sentimentality for the national pastime, however, could still make passage of such a bill nearly impossible. *See also* Flood v. Kuhn, 407 U.S. 258 (1972). Further, any bill that has been previously proposed to strip baseball of its antitrust exemption receives strong adverse mail for the public. For instance, Congressman Eydler once introduced a bill of this type and subsequently received the most "hate mail" he had ever received during this political career. INQUIRY INTO PROFESSIONAL SPORTS: HEARINGS BEFORE THE HOUSE SELECT COMM. ON PROFESSIONAL SPORTS, 94th Cong., 2d Sess., Pt. I at 46 (1976) [hereinafter cited as 1976 HEARINGS].

45. In re Arbitration of Messersmith, Grievance No. 75-27, Decision No. 29 (1975). *See* note 103 *infra* and accompanying text.

46. The earliest was the reserve clause which was originally adopted by the National Baseball League in 1879. For the history of this system see note 91 *infra* and acompanying text, and ORGANIZED BASEBALL, *supra* note 19, at 17-22.

to the league and restricting their movement thereafter, the owners attempted to equalize the competitive strength of all the teams.[47] However, these devices also had the effect of severely suppressing the salaries of the players since there was no competition for their services among the teams. For this reason, and in part because the players resented being treated as chattels, players began to challenge certain of these mechanisms as being violative of the antitrust laws. A combination of player victories in these suits and the development of effective collective bargaining units led to the metamorphosis of the player-control mechanisms.

This section will examine each of the major player-control mechanisms that have been challenged by the athletes. The watershed case of *Denver Rockets v. All-Pro Management, Inc.*,[48] will be studied first as it outlines the basic legal arguments and rules used in the majority of the subsequent cases. From there, the player draft, reserve and option systems, and blacklists will be analyzed. Each of these subsections will explain the basic mechanism and include the changes that have been made as a result of the player suits and the subsequent collective bargaining agreements. Since all of these new systems are incorporated into collective bargaining agreements, they are all presently not subject to attack on antitrust grounds. The reasons for this will be studied in the concluding section of this article dealing with the labor law exemption to the antitrust laws.

The Watershed: DENVER ROCKETS V. ALL-PRO MANAGEMENT, INC.

Although the *Denver Rockets* case involved eligibility rules—an area of limited justiciability—it was destined to become perhaps the most important adjudication for the professional athlete. From this point forward the courts became receptive to other player challenges of the rules and the more restrictive control mechanisms. The courts no longer hesitated to apply the same antitrust standards to professional sports as were applied to every other business. To understand the application of these antitrust laws to this breakthrough case, it is important to first look at the specific device challenged.

Prior to the *Denver Rockets* decision, no player was eligible to be drafted or to play in the National Basketball Association (NBA)

47. Obviously very few people will pay to see a contest when one team is certain to win because of vastly superior players.

48. 325 F. Supp. 1049 (C.D. Cal. 1971).

until four years after his high school class had been graduated. This rule was designed to protect collegiate athletic programs which the NBA utilized to develop talent in lieu of an expensive minor league system. Ironically, even if a player did not attend college, he had to wait four years to play in the league. The NBA provisions,[49] comprising what is commonly known as the four-year rule, were challenged in 1971 by a player so excluded in *Denver Rockets.*

The player had originally signed with the Denver Rockets of the old American Basketball Association (ABA).[50] As a result of certain fraudulent misrepresentations made to him by the owners, he disavowed and renounced his Denver contract.[51] After extensive negotiations with many teams the player, Spencer Haywood, signed with the Seattle Supersonics of the NBA. The Commissioner of the NBA refused to approve the contract because Haywood was not yet eligible under the four-year rule.[52]

---

49. The rule was composed of two sections of the NBA By-Laws:

2.05. *High School Graduate, etc.* A person who has not completed high school or who completed high school but has not entered college, shall not be eligible to be drafted or to be a Player until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved. Similarly, a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a player until the time when he would have first become eligible had he remained enrolled in college. Any negotiations or agreements with any such person during such period shall be null and void and shall confer no rights whatsoever; nor shall a Member violating the provisions of this paragraph be permitted to acquire the rights to the service of such person at any time thereafter.

6.03. *Persons Eligible for Draft.* The following classes of persons shall be eligible for the annual draft:

(a) Students in four year colleges whose classes are to be graduated during the June following the holding of draft;

(b) Students in four year colleges whose original classes have already been graduated, and who do not choose to exercise remaining collegiate basketball eligibility;

(c) Students in four year colleges whose original classes have already been graduated if such students have no remaining collegiate basketball eligibility;

(d) Persons who become eligible pursuant to the provisions of Section 2.05 of these By-laws.

50. Haywood was eligible in the ABA because that league only required high school graduation.

51. Haywood was told by the owners that he was to be paid $1.9 million. However, the court found that any amount over $394,000 was "illusory and indefinite." 325 F. Supp. at 1053.

52. B. LIBBY & S. HAYWOOD, STAND UP FOR SOMETHING: THE SPENCER HAYWOOD STORY 70-138 (1972).

Haywood then brought suit alleging that the rule violated the antitrust laws. In considering a motion for summary judgment, the district court initially held that the rule constituted "a 'primary' concerted refusal to deal wherein the actors at one level of a trade pattern (NBA team members)[53] refused to deal with an actor at another level (those ineligible under the NBA's four-year college rule)."[54] This alone did not decide the case. The court ruled that for a concerted refusal to be covered by the Sherman Act, two elements must be present: "(1) There must be some effect on trade or commerce among the several States, and (2) there must be sufficient agreement to constitute a 'contract, combination . . . or conspiracy'."[55] The proposition that the activities of professional basketball affected interstate commerce had recently been established.[56] Furthermore, the agreement of the NBA owners not to deal with those athletes omitted by the four-year rule satisfied the second element.[57] Having decided that the activity in question was covered under the Sherman Act, it remained to be seen whether these antitrust laws mandated the granting of the summary judgment, or whether more inquiry was necessary. This would be decided by the determination of which of two antitrust tests would be utilized.

In the history of antitrust laws, two major tests have been devised to determine the basic applicability of the laws to any particular situation. The Supreme Court originally limited the antitrust laws to regulate only unreasonable restraints, thereby formulating the "rule of reason" test, although the literal language of the Sherman Act declares "every" combination in restraint of trade to be illegal. In addition, the Court has found some practices to be so intrinsically harmful that they are deemed *per se* violations of the antitrust laws.

Under the rule of reason approach, courts are required to examine the agreement or practice in relation to the history and

53. Note that the use of NBA "teams" and "owners" are interchangeable.

54. 325 F. Supp. at 1061. A concerted refusal to deal has been defined as "an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms." Note, *Concerted Refusals to Deal Under the Antitrust Laws*, 71 HARV. L. REV. 1531 (1958). A group boycott is "a refusal to deal or an inducement of others not to deal or to have business relations with tradesmen." Kalinowski, *The Per Se Doctrine: An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. REV. 569, 580 (1964). In practice, the terms are often used interchangeably.

55. 325 F. Supp. at 1062.

56. *See* note 28 *supra* and accompanying text.

57. 325 F. Supp. at 1062.

economics of the industry in which it is employed. If supported by clear economic necessity, and if its dominant purpose is not a restraint of trade, the practice is declared reasonable and not violative of the antitrust laws.[58]

After the rule of reason became the recognized standard by which antitrust violations would be measured, the Supreme Court declared on numerous occasions that in certain cases the detriment of an illegal activity by itself outweighed any possible rationale that could be advanced for its continuance. Henceforth, these particular activities were deemed illegal *per se*, thereby avoiding the necessity for prolonged economic investigation.[59] Among those practices which have been held to be so pernicious as to be *per se* violations are group boycotts and concerted refusals to deal.[60]

It will be remembered that the *Denver Rockets* court had already decided that the four-year rule was a concerted refusal to deal. Therefore, the court could have directly based its decision on the strict *per se* approach. However, it considered another Supreme Court case where it was recognized that there was a narrow exception to the strict *per se* application in group boycott situations.[61] According to this exception, if three factors are present, the concerted refusal to deal will be entitled to rule-of-reason scrutiny. To qualify, it must be shown that, (1) the industry in question is afforded an opportunity of self-regulation, (2) the collective action is consistent with the self-regulation policy, is reasonable and is no more extensive than necessary, and (3) that there are procedural safeguards which assure that the restraint is not arbitrary and which furnish a basis for judicial review.[62] The court found that the NBA failed to qualify for this exception because there was no procedural mechanism under which the player could have appealed his non-eligible status. Therefore, the court held the four-year rule to be a *per se* violation of the antitrust laws and granted the summary judgment in the plaintiff's favor.[63]

The immediate ramification of the *Denver Rockets* decision was that the NBA ammended its by-laws to include what was known

58. Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

59. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1957).

60. United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originator's Guild v. FTC, 312 U.S. 457 (1941).

61. Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

62. 325 F. Supp. at 1064-65.

63. *Id.* at 1066.

Produced by The Berkeley Electronic Press, 1977

as the hardship rule. It allowed impoverished players to apply for an exemption to the four-year rule. Although there remained no provision for independent review, no practical harm resulted since every player who applied for the exemption was accepted.[64] These new provisions allowed a poor player to be drafted before his college class would be graduated, but the league retained its rule with regard to athletes from middle and upperclass backgrounds. Under the *Denver Rockets* decision, this situation was still clearly violative of the antitrust laws. The NBA finally recognized this problem and recently revised the eligibility rule again, allowing any person whose high school class has been graduated to become eligible for the draft by renouncing his intercollegiate basketball eligibility. The player must give written notice to the league at least forty-five days before the draft.[65]

These changes have allowed a great number of college players to join professional teams before graduating from college. However, the eligibility rules are player-control mechanisms only in that they regulate the means of entry into a league. They have not been regarded as one of the so-called "freedom" issues; i.e., they have not been considered as harsh as those devices that produce the involuntary servitude of the athlete by suppressing salaries or restricting movement. But the prime significance of *Denver Rockets* was that professional sport league provisions would henceforth be held accountable under the anti-trust laws.[66] The group boycott-concerted refusal to deal reasoning which the court used in *Denver Rockets* was to be repeated in later cases dealing with the major player-control mechanisms. The fate of one of these, the draft, was perhaps anticipated by the court as it noted *in dictum* that there was a substantial probability that it violated the antitrust laws at will.[67]

The Common Draft

The common draft is the system utilized by all professional sports leagues to control the entry and distribution of new players into the league. Generally, all players eligible to play in a league the following year are placed in a pool from which each team selects.[68]

---

64. S. GALLNEW, PRO SPORTS: THE CONTRACT GAME 24-25 (1974).

65. Collective Bargaining Agreement Between the NBA and the NBA Players Association, Article XVI, § 1(f) (April 29, 1976) [hereinafter cited as NBA Agreement].

66. Baseball is an exception. *See* notes 2-45 *supra* and accompanying text.

67. 325 F. Supp. at 1056.

68. The typical provisions of the National Football League draft were (until this year) as follows:

In order to equalize talent throughout the league, the teams which did poorly in the previous season are allowed to choose before those that did well, theoretically allotting to them the better talent. Once a player is drafted, he may only negotiate and sign with the team that chose him. This system thus precludes competition within each league for the newly eligible players and has a depressing effect on salaries. In addition, the athlete must either sign with the team that holds the exclusive rights to his service or he is not eligible to play at all.

For these reasons, the draft was the subject matter of two recent cases which challenged the NBA and National Football League (NFL) provisions. One result of these cases was that both leagues altered their draft systems making them less restrictive. This section will analyze each professional sport separately, examining both the cases and the present draft systems utilized in each league.

1. Basketball

In 1970 the legality of the NBA draft, which was structured similarly to that described above, was one of the issues of a class action brought by the NBA Players Association. In *Robertson v. National Basketball Association*,[69] the Players Association challenged the draft and reserve systems on antitrust grounds. The court denied a motion for summary judgment made by the NBA and noted preliminarily that the draft in conjunction with other player-control mechanisms was "analogous" to the *per se* violations of group boycotts, horizontal market allocations and price fixing under the Sherman Act.[70] However, the court failed to indicate whether the

14.3 (A) At each Selection Meeting each club participating therein, shall select players of its own choice; selection shall be made by the clubs in each round in the reverse order of their standing relative position based on won-lost record of the previous competitive season.

14.5 The selecting club shall have the exclusive right to negotiate for the services of each player selected by it in the Selection Meeting. Selected players shall be placed on the Reserve List of that club.

The National Football League Constitution and By-Laws, Article XVI at 50 (1975) [hereinafter cited as NFL Constitution].

69. 389 F. Supp. 867 (S.D.N.Y. 1975). Oscar Robertson was then head of the NBA Players Association.

70. 389 F. Supp. at 893. The group boycott was the NBA's concerted refusal to deal except through the restrictive devices. The horizontal market allocation here was the fact that business groups (the teams) agreed among themselves to allocate the product (the players services) to one area without competition for that product. Since this led to suppressed salaries because of this lack of competition, the court found this analagous to price-fixing, where producers or dealers, by means of an agreement, can set prices either artificially high or low. Here the salaries were artificially lower than they would have been had there been competition for their services.

Produced by The Berkeley Electronic Press, 1977

rule of reason or *per se* standard would have been employed in its final decision. As the case was eventually settled in conjunction with a collective bargaining agreement, the critical choice of test was never made. In the resulting agreement the draft was modified slightly in the area dealing with exclusive team rights to a draftee.

The initial phase of the new NBA draft remains the same. Only one team may select a particular player and thereby acquire exclusive rights over that player, provided it makes a "required tender." A required tender is an offer to the athlete of at least the minimum salary of the NBA, giving him thirty days to accept. If he remains unsigned when the next draft is held the following year, the original team loses its exclusive rights, and the player is eligible to be drafted by any team. Provided the second team also makes a required tender, it will hold the exclusive rights to the player for the upcoming year. If the player remains unsigned after two years, he becomes a free agent, eligible to sign with any team. He also becomes a free agent if in either draft the drafting team fails to make a required tender. Finally, the same result will occur if a player is drafted the first year, does not sign, and is not drafted the second year. It should be noted that a team subsequently signing a free agent does not have to compensate the team that formerly held the rights to that player.[71] Under this system a player will have to wait two years to become a free agent if he finds the offers of the drafting teams unacceptable. While in theory this system is less restrictive than its predecessor, the practical result is the same. It is not realistic to think that a player is going to be financially able to wait the two-year period. The effect of a two-year lay-off could irreparably damage his prospects to play effectively or even to remain in the league. Therefore, for the overwhelming majority of athletes there has been no effective change in the system.

2. Football

The basic draft system utilized by the NFL was ruled illegal in 1976 in *Smith v. Pro-Football*.[72] The plaintiff, Jim "Yazoo" Smith, had been drafted and signed in 1968 by the Washington Redskins. In the last game of his rookie season Smith sustained a serious neck injury that ended his professional football career. Smith asserted that because of the draft he was unable to negotiate a contract reflecting

71. NBA Agreement, *supra* note 66, Article XVI, (a).

72. 420 F. Supp. 738 (D.D.C. 1976). The defendants were Pro Football, Inc. (a/k/a the Washington Redskins) and the NFL.

the free market value of his talents and that it was impossible for him to negotiate a clause to guarantee against the loss of earnings in the event of injury.[73] The court found the draft to be *per se* violative of the antitrust laws:

> This outright, undisguised refusal to deal constitutes a group boycott in its classic and most pernicious form, a device which has long been condemned as a *per se* violation of the antitrust laws. . . . There is no question but that the restrictions comprising the draft are "naked restraints of trade" with no purpose except stifling of competition.[74]

In the alternative, the court also found that the draft was a violation of the antitrust laws when tested by the rule of reason. The NFL had argued that the draft was indispensable in maintaining the competitive balance of the league by allowing the poorer quality teams to select first. The league had further contended that the draft allocated new player talent in a reasonably even fashion throughout the league.[75] The court rebutted these arguments by stating that the league had offered no credible evidence to demonstrate an improvement in team performance correlative to the order of selection in the draft.[76] It also found that the NFL draft was the most restrictive system possible, leaving no room for competition for the service of the draftees. Since less restrictive alternatives were possible, it was decided that the present provisions could not be protected by the rule of reason.[77]

The court went on to propose procedures that were less restrictive than that used by the NFL. One alternative was to allow up to three teams to draft any player.[78] This would create competition for the individual draftee while still controlling, to a certain extent, the allocation of player talent. The other alternative would limit the draft to two rounds rather than the present seventeen.[79] The court reasoned that this would allocate the top players according to talent while permitting free competition for the remainder.

---

73. *Id.* at 741.
74. *Id.* at 744-45.
75. *Id.* at 745.
76. *Id.* at 746.
77. *Id.*
78. *Id.* at 747.
79. *Id.* A "round" consists of each team in the league picking one player. There are presently 28 teams in the NFL, so this proposal would allocate the top 56 players available.

Produced by The Berkeley Electronic Press, 1977

Whereas the first proposal appears to be sound, the court contradicted itself in the second. By the court's own reasoning, restricting the free competition for the top fifty-six players would still constitute a *per se* group boycott and a rule of reason violation of the antitrust laws. Merely reducing the magnitude of the harm caused by a group boycott does not render it legal. The court did state that the alternatives proposed were merely examples of less restrictive measures intended to show the unreasonableness of the present system.[80] However, the court should have refrained from proposing an illegal method to avoid the possible misconception of its legality. Fortunately, in formulating a revised draft the NFL did not rely on this system, though it did reduce the number of rounds to be held.

The new draft will be held on or about May 1 of every year and will consist of twelve rounds. If the drafting team and the player are unable to come to terms by June 7 of that year, the team must offer him one of the four options.[81] If the player refuses the offer, a system similar to that of the NBA is utilized,[82] with the player being drafted by another club the next year, and becoming a free agent if still unsigned after two years. As was discussed with the new NBA system, although this appears less restrictive, the practical result is identical. The only difference here is that a player can use the existence of the Canadian Football League as a bargaining tool.[83]

3. Baseball

The major league baseball draft has not been subject to legal attack because of the antitrust exemption that sport enjoys. In the system utilized by baseball, all newly eligible players are drafted in the "regular" phase of the selection meeting and the drafting team acquires the exclusive rights to deal with the players it selects.[84] If a player remains unsigned at the time of the next selection meeting,

---

80. *Id.* at 747 n.6.

81. The four options are: a one-year contract at $20,000; two years at $30,000 per year; three years at $40,000; and four years at $50,000. Note that the choice of which option may be offered is left to the team and not the player. If the team fails to offer one of the four the player becomes a free agent. Collective Bargaining Agreement Between Nat'l Football League Players Ass'n and Nat'l Football League Management Council, Article XIII at 26 (March 1, 1977) [hereinafter cited as 1977 NFL Agreement].

82. *See* note 72 *supra* and accompanying text.

83. One player agent has been particularly successful with this ploy. *See* Marshal, *This Agent's No Secret*, SPORTS ILLUSTRATED, May 16, 1977 at 60.

84. BASEBALL BLUE BOOK, Major League Rules 4(h) & (i) at 521-22.

he is glaced in the "secondary" phase where another team may acquire the exclusive rights to deal with him.[85] These selection meetings are usually held in January and June;[86] therefore, if a player wishes to go into the secondary phase, he will have to wait five months if first drafted in January or seven months if first drafted in June. This draft, which appears to have been a model for the new NBA and NFL drafts, offers what appears to be a shorter wait before the second draft. However, most of the players who become eligible for the draft become so at the end of the school year and as such are first selected in June. If they do not sign at this time they miss the entire playing season. It cannot be overemphasized that the athlete can ill-afford to wait out a season on the hope that another team will offer him more money the next year. Even if a team would choose to sign the player for the next season, the offer would have to be substantial enough to cover the amount the player would have made had he chosen to play the previous year.

4. Hockey

The World Hockey Association (WHA) and the National Hockey League (NHL) both utilize the basic form of the draft. Only one team drafts each player and acquires the exclusive negotiating rights to that player. Both leagues select in the reverse order of team finish from the previous season.[87] It is likely that neither of these drafts have been attacked because the existence of two leagues guarantees competition for the available players and thus the salaries of the players are not artifically lower than what they would otherwise be.

5. Summary

Although the *Robertson* and *Smith* cases resulted in modification of the NBA and NFL drafts, it is clear that in reality the draftees are in no better position than they were before the cases. The obvious question which arises is why the player unions would agree to such systems in collective bargaining. The probable reason is that the players accepted a restricted draft in a *quid pro quo* for increased benefits and, more importantly, completely restructured reserve systems. Therefore, although the draftees are still in effect

85. *Id.*

86. *Id.*, Major League Rule 4(d) at 520.

87. Phone conversations between Irene Puddester and this author, Central Registry, NHL offices in Montreal (Jan. 31, 1977), and with an official of the New England Whalers of the WHA in Hartford, Connecticut (Jan. 31, 1977).

Produced by The Berkeley Electronic Press, 1977

bound to the drafting club for a few years, after that time it is easier for them to become free agents and have teams bid for their services. The restructuring of the reserve systems will be examined next.

The Reserve and Option Clauses

The reserve and option clauses represent the most restrictive aspects of the player-control mechanisms. Until 1976 every league's standard contract contained one of these two clauses. Since every player must sign the standard league contract the provisions affected every professional team athlete.[88] The common thread is that both clauses allowed a team, at the expiration of the first contract, to unilaterally renew a player's agreement for one year, usually at a reduction in salary of ten percent. The reserve clause renewed the contract upon all the same terms and conditions contained in the contract. Since the reserve clause was in the original contract it was deemed to be in the renewed contract as well. Therefore the team could indefinitely renew the contract of a player, effectively binding him to that club for his entire playing career.

The option clause, on the other hand, renewed the contract upon the same terms and conditions except that there would be no further right of renewal. This was restrictively employed by implementing what was known as a forced trade situation if the athlete who had "played out his option" subsequently signed with another team.[89] Thus if Player *A* left Team *B* to join Team *C*, Team *C* would have to compensate Team *B* for the loss of *A*. The compensation could be any players that Team *C* had the exclusive negotiating rights to or draft choices. If the teams could not agree on compensation, an unappealable decision was made by the Commissioner of the league employing the option clause. This forced

88. *See, e.g.*, the NFL Constitution, supra note 69, Article XV provides:

> 15.1 All contracts between clubs and players shall be executed in triplicate and be in the form adopted by the member clubs of the League; such contract shall be known as the "Standard Players Contract." . . .

All leagues have a similar provision.

In reality the reserve system is comprised of a variety of restrictive devices. These include the reserve or option clause, the draft, tampering provisions (a team is fined or disciplined if it talks to a player whose rights are owned by another club) and the uniform or standard contract.

89. This entailed playing for the term of his contract plus the one option year. The player was then theoretically a free agent. The theory behind the compensation provision is to keep both the team that gained the player and the team that lost the player at the same relative position that each was in before the player switched teams.

trade situation is generally known as the "Rozelle Rule," named after NFL Commissioner Pete Rozelle. His harsh enforcement of the rule acted as an effective deterrent to the signing of free agents when the clubs could not agree on compensation.[90]

In examining the use of these clauses each sport will be considered separately. Included will be the original provisions the leagues employed and the cases that challenged these provisions. Each subsection will conclude with a review of the system that is presently utilized.

1. Baseball

Professional baseball has employed the reserve system since 1879, three years after the present National League was formed. The fifteen teams of that league had engaged in a bidding war from which only seven teams survived. Since the clubs in the cities attained a greater popularity they had more financial resources and were able to outbid the teams based in rural areas. The city teams initially dominated the league, but eventually the attendance fell because of the lack of real competition. Eight of the fifteen teams folded because of financial dispair. The seven remaining teams met secretly and agreed that they would each "reserve," free from economic competition, five star players each for the approaching season.[91] The agreement worked successfully and the financial stability of the league was assured by 1890.[92]

Modern baseball's reserve system was a complex intertwining of the Uniform Player's Contract[93] and the Major League Rules. The renewal clause, Section 10(a) of the Uniform Contract, provided that if a player did not sign a new contract with the team he had performed with the previous season, that club could unilaterally renew his contract upon the same terms.[94] If the team renewed the contract the player's salary could be reduced by up to twenty percent, but no more than thirty percent over a two-season period.[95] Major League Rule 4A(a) established a list of forty players that a team could reserve for the ensuing season. A player on this list could not

90. *See* note 173 *infra* and accompanying text.

91. ORGANIZED BASEBALL, *supra* note 19, at 17-22.

92. Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859, 861 (1971).

93. *See* note 88 *supra* and accompanying text.

94. National League Uniform Player's Contract § 10(a). The American League Contract is identical in all respects.

95. *Id.*

Produced by The Berkeley Electronic Press, 1977

play for, nor negotiate with, any other team until such time as he was traded or released.[96] Furthermore, Major League Rule 3(g) prohibited any other club from tampering with any player on the reserve list of another team.[97] Finally, these Major League Rules were incorporated by reference into the Uniform Player's Contract by Section 9(a) of that contract.[98]

Since the baseball antitrust exemption had been upheld in *Flood v. Kuhn*,[99] this complex reserve system appeared immune from attack. However, the 1973 collective bargaining agreement included an arbitration mechanism for grievances and complaints that put an end to the baseball reserve system as it then existed. Article X of the agreement, the arbitration clause, applied to any "complaint which involves the interpretation of, or compliance with, the provisions of any agreements between the Players Association and the Clubs or any of them, or any agreement between a Player and a Club," except for any grievance dealing with the benefit plan, dues check-off, the use of a player's picture for publicity, or action taken to preserve the integrity of the game.[100] A crucial factor was that the reserve system was not one of those items expressly excluded from this arbitration section. It thus appeared that a dispute involving the reserve clause could be the subject matter of a grievance proceeding before the arbitration panel. However, the

---

96. BASEBALL BLUE BOOK at 527 (1976).

97. This rule provides:

> *Tampering.* To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any league other than the league with which he is under contract or acceptance or terms, unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement.

Id. at 514. Tampering provisions are utilized by all leagues to enforce the other player control mechanisms, especially the reserve system. The commissioner usually imposes severe fines for a violation of the tampering rule. For instance, NFL Commissioner Rozelle once fined a team $10,000 for negotiating with a player at 11:00 a.m., when the player was not to be a free agent until 4:00 p.m. that day. S. GALLNER, *supra* note 65, at 10-11.

98. National League Uniform Players Contract § 9(a).

99. 407 U.S. 258 (1952).

100. Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Ass'n, Article X(A)(1)(a)-(b) at 16 (1973) [hereinafter cited as 1973 Baseball Agreement].

situation was complicated by Article XV of the agreement which stated that, "[e]xcept as adjusted or modified herein, this Agreement does not deal with the reserve system."[101] The resolution of this apparent contradiction was a crucial factor in the decision which put an end to the baseball reserve system.

The actual controversy involved surfaced when Andy Messersmith played during the 1975 season for the Los Angeles Dodgers under a renewed 1974 contract. At the end of the renewal year the Players Association filed an Article X grievance on behalf of Messersmith alleging that he had become a free agent.[102] The owners responded that the aforementioned Article XV excluded disputes concerning the "core" of the reserve system from the Article X grievance procedures.[103] Later, the club owners started a proceeding in federal district court to enjoin the arbitration proceedings for lack of jurisdiction. At the suggestion of the court, the parties stipulated that the arbitration hearings would proceed, but that the jurisdictional question could be re-examined by the court after a decision was rendered by the arbitration panel.[104]

The panel came to the conclusion that it did have jurisdiction to hear the merits of the action.[105] It first examined the temendous ambiguity Article XV had created.[106] Whereas the Article stated that the agreement did not deal with the reserve system, Article III of the same agreement incorporated the Uniform Player's Contract, which contained renewal clause 10(a). Furthermore, the contract had incorporated the Major League Rules by clause 9(a), including those

---

101. *Id.*, Article XV at 26. It states in full:

> Except as adjusted or modified hereby, this Agreement does not deal with the reserve system. The Parties have differing views as to the legality and as to the merits of such system as presently constituted. This agreement shall in no way prejudice the position or legal rights of the Parties or of any Player regarding the reserve system.
>
> During the term of this Agreement neither of the Parties will resort to any form of concerted action with respect to the issue of the reserve system, and there shall be no obligation to negotiate with respect to the reserve system.

102. The Twelve Clubs Comprising the Nat'l League of Professional Baseball Clubs and the Twelve Clubs Comprising the Am. League of Professional Baseball Clubs v. Major League Baseball Players Ass'n, Decision No. 29, Grievance Nos. 75-27 & 75-28, at 2 (Dec. 28, 1975) [hereinafter cited as Messersmith].

103. *Id.* at 3. The distinction between the "core" and peripheal matters concerning the reserve system was never explained satisfactorily by the clubs.

104. *Id.* at 4.

105. *Id.* at 31.

106. *Id.* at 7.

provisions comprising a major portion of the reserve system. The panel summarized the paradox by stating:

> [I]t is not easy to understand how the Basic Agreement could state that it does not "deal" with the Reserve System, when, at the same time, its own provisions and the provisions of the Players Contract and the Major League Rules which are absorbed into the Basic Agreement patently do "deal" with such rules.[107]

This apparent contradiction, according to the panel, was explained by the circumstances surrounding the insertion of Article XV into the collective bargaining agreement. The article was originally inserted into the 1970 agreement to maintain the *status quo* pending the resolution of the *Flood* challenge to the reserve system.[108] The *status quo* was the normal operation of the reserve system. Therefore, by signing this 1970 agreement, the Players Association reluctantly acquiesced in the enforcement of that system.[109] The Association felt that the reserve system was illegal and feared that by agreeing to it in this manner, the Association could share liability with the leagues in a player's suit challenging the system under the antitrust laws. Therefore, the Association requested the inclusion of the language stating that the agreement "does not deal with the reserve system," hoping that this would be an effective defense to such litigation.[110]

The arbitration panel decided that the section did not mean to exclude the reserve system from arbitration, but was inserted merely to insulate the Players Association from antitrust attack.[111] As consideration for the inclusion the Association agreed that there would be no negotiation over the reserve system during the term of the agreement, and that it would not engage in "any form of concerted action with respect to the reserve system" pending the conclusion of the *Flood* case.[112]

In negotiations for the subsequent agreement in 1973 the owners refused to bargain over the major provisions of the reserve system as a result of the *Flood* reaffirmation of the baseball anti-

---

107. *Id.* at 20. The Basic Agreement referred to is the 1973 Baseball Agreement, *supra* note 101.

108. *Id.* at 20.

109. *Id.* at 24.

110. *Id.* at 25.

111. *Id.*

112. *Id.* at 25-26.

trust exemption.[113] The Players Association then requested and received the insertion of Article XV into the new agreement.[114] Despite *Flood*, the Association felt that an action could still be entertained, and it wanted to be held blameless in that event.[115] Thus, it never appeared that Article XV was meant to apply to the Article X grievance procedure, and the panel concluded that it had jurisdiction to decide the merits of the action.[116]

Proceeding to the merits the panel determined that the renewal clause 10(a) of the Uniform Players Contract was only effective to renew a contract for one year. The chairman stated that there was nothing that prohibited successive renewals of the contract but that in order for such an intention to be effectuated it would have to be expressed with "explicit clarity."[117] The panel held that such an interpretation would not be implied merely from the language of section 10(a) which stated "upon the same terms." Therefore, it was held that the contractual obligation of Messersmith to the Dodgers was terminated by the expiration of his once-renewed contract.[118]

The baseball leagues then contended that even if the contractual obligation had terminated, the exclusive rights to Messersmith's services still belonged to Los Angeles, who had named him to reserve pursuant to Major League Rule 4A(a).[119] In addition, it was stipulated that no other club could negotiate with him because of the tampering provision. The panel disagreed with both of these propositions.[120] As to the validity of the Rule 4A(a) reservation, the

---

113. Two minor changes were agreed to. First, a player with ten years Major League experience, the last five of which were with the same club could veto a trade. Second, there was a provision for arbitration of player salaries.

114. It was apparent no agreement on the reserve system was going to be reached, so the parties once again stipulated to put the issue aside so that the season could start.

115. Messersmith, *supra* note 103, at 28-30. Marvin Miller, executive director of the Players Association, wrote a letter to the owners, which was confirmed by the two league presidents, which stated "that during the term of the Agreement the Clubs will indemnify and save harmless the Players Association in any action based on the Reserve System brought against the Association as a party defendant." *Id.* at 29.

116. *Id.* at 31.

117. *Id.* at 41-42. The panel relied on Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (Ct. App. 1969), and Central New York Basketball, Inc. v. Barnett, 190 Ohio Op. 2d 130, 181 N.E.2d 506 (C.P. Ohio 1961), where similar type of reserve provision was held to bind the player for one option year only.

118. Messersmith, *supra* note 103, at 47.

119. *Id.* at 47-48.

120. *Id.* at 52-56.

Produced by The Berkeley Electronic Press, 1977

panel reasoned that the necessary prerequisite for such a reservation was that the player was under contract.[121] Since it had already been decided that Messersmith was no longer bound, it clearly followed that he could not be reserved.[122] Likewise, the tampering provision prohibited any club from dealing with a player who was under contract to, or reserved by, another club. The previous rulings were outcome determinative: Messersmith was no longer under contract to, nor reserved by, the Los Angeles Dodgers. The panel ordered the Dodgers to remove Messersmith from their reserve list, thereby making him a free agent.[123]

The owners appealed to the district court challenging the panel's jurisdiction. Finding that the arbitration panel did have jurisdiction, the court further agreed with the panel's decision on the merits. The court applied the general rule that an award will be upheld if it is within the scope of the arbitrator's authority, or if it is an award which "draws its essense from the collective bargaining agreement."[124] Again the owners appealed, unsuccessfully asserting critical jurisdictional error.[125] In affirming the lower court's approval of the arbitrator's decision the Eighth Circuit Court of Appeals relied upon the federal policy calling for a "presumption of arbitrability."[126] According to this policy a broad arbitration provision such as Article X of the 1973 agreement could exclude a particular grievance in only two situations: "(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."[127]

If the arbitration panel had cited this policy it would have greatly simplified its jurisdictional decision. It is obvious that the first situation did not exist since Article X did not exclude the reserve system. The second situation did not apply either. While Article XV was surely an "ambiguous exclusionary provision," the

121. *Id.* at 52.

122. *Id.* at 50-52.

123. *Id.* at 62.

124. Kansas City Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233 (W.D. Mo. 1976).

125. Kansas City Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976).

126. *Id.* at 620.

127. *Id.* at 621. *See* Gateway Coal Co. v. United Mine Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

testimony did not present "forceful evidence" that the reserve system should be excluded from Article X.

The immediate impact of Messersmith was that all players who were currently under contract could play out the one renewal year and then become free agents. The more important consequence was that the decision forced the owners to negotiate over the reserve system for the first time with the players. As a result of this bona fide bargaining, a new collective agreement was reached in July of 1976.[128]

The agreement was divided into two sections to provide for those players who had not signed prior to ratification of the agreement and those who subsequently signed. The first section was inserted in order to not prejudice the rights that were won in the arbitration decision. For this reason, any player who signed a contract prior to the ratification will become a free agent after playing out his renewal year. The club which subsequently signs such a player will not have to compensate the player's prior club.[129]

A player signing after the date of ratification can become a free agent merely by notification to his team at the conclusion of a season, if, but only if, he has completed at least six years of major league service.[130] Alternately, any player with at least five years of major league service may demand a trade by notification to his club at the conclusion of a season.[131] If the team does not consummate a trade, the player becomes a free agent. In addition, the player can name six teams to which he shall not be traded.[132] Having demanded a trade or become a free agent, the player is restrained from re-exercising these rights immediately. He must wait five years before again becoming a free agent and three years before making another trade demand.[133] Subject to the above player rights, a team may renew a player's contract from year to year.[134]

Any player who becomes a free agent is placed into a "re-entry draft." This procedure allows him to negotiate with at least thirteen other teams[135] thus offering greater assurance that a player will be

128. Major League Baseball Players Ass'n, Tentative Agreement (1976).
129. *Id.* § I(A)(2)(d) at 2.
130. *Id.* § I(B)(1) at 2.
131. *Id.* § I(B)(2) at 2-3.
132. *Id.*
133. *Id.* § I(B)(3) at 3.
134. *Id.* § I(B)(4) at 3.
135. Twelve teams (thirteen in 1977 and thereafter) can draft and negotiate with a free agent. In addition, the team the player previously played with can

offered a contract reflecting his true market value.[136] A team that subsequently signs a free agent pursuant to the six-year requirement must compensate his former club with a draft choice.[137]

The agreement between the players and the owners, reached as a direct result of Messersmith, has been long overdue. For the first time in 100 years baseball players have an opportunity to receive compensation that reflects their true worth to a ball club. However, the system is still not without its flaws. For instance, the player with less than five years of service in the major leagues is still subject to restrictive devices. Apparently the Players Association felt that a five-or-six year restriction on movement was warranted because of the high development costs incurred by baseball.

2. Basketball

Prior to *Robertson v. National Basketball Association*[138] the NBA employed the basic option clause with a forced trade compensation provision which was enforced by the NBA Commissioner. It was this system that the court found analagous to various *per se* antitrust violations.[139] The case was resolved in April 1976 through an out-of-court stipulation and settlement agreement in conjunction with a ten-year collective bargaining agreement. In addition to the substantive changes in the reserve system which will be discussed, the settlement had many other legal and non-legal ramifications.[140]

---

negotiate with him without the necessity to draft him. The procedure for this re-entry draft is reprinted in Appendix A. This is Attachment A from the *Tentative Agreement*, *supra* note 129.

136. The first group who became free agents after the 1976 season averaged over $1 million per player for the term of their contracts. Keith, *After the Free-For-All Was Over*, Sports Illustrated, Dec. 13, 1976, at 29.

137. Tentative Agreement, *supra* note 129, § I(B)(1)(c) at 2. If the team signing the free agent is one of the twelve lower ranking clubs from the previous season it gives up a second round draft choice upon signing its first free agent, a third round draft choice upon signing its second free agent, etc. If the team is one of the twelve higher teams it gives up its first pick upon signing its first free agent, and so on.

138. 389 F. Supp. 867 (S.D.N.Y. 1975); *See* note 70 *supra* and accompanying text.

139. *See* note 71 *supra* and accompanying text.

140. In exchange for the dismissal of the class action the league and member teams agreed to pay a settlement fund of $4.3 million for the benefit of the class of 479 past and present players. It further agreed to pay the class attorneys' fees of $1.1 million. The parties on both sides covenanted not to sue the players with respect to any current NBA player control mechanism and the NBA and member teams with respect to any claim in the *Robertson* case. Finally, the court dissolved the injunction barring merger of the NBA and ABA, which was accomplished shortly thereafter. NBA Stipulation and Settlement Agreement, reprinted in 1977 INQUIRY, *supra* note 41, at 311-22.

In this new agreement the option clause is eliminated from all player contracts except in one-year rookie contracts and where specifically agreed to by a veteran as a result of "specific negotiation on substantive matters."[141] This has resulted in virtually every veteran player becoming a free agent at the end of his contract. The present compensation provision—the NBA version of the Rozelle Rule—will remain in effect through the end of the 1980-81 season.[142] Beginning with the 1981-82 season and lasting for five years the compensation rule will be replaced by the "right of first refusal."[143] This revolutionary plan will allow the player to bargain with any team desirous of his services. When a player who had previously been on Team *A* comes to an agreement with Team *B*, Team *A* is given the opportunity to make a "substantially equivalent" offer. If Team *A* does produce such an offer the player must remain with that club; if not, he is free to sign with Team *B*. Any disagreement as to whether the offers are "substantially equivalent" will be settled by arbitration.[144]

The players agreed to the five-year extension of the compensation provision conceding that it would have taken that long if they had awaited a final determination by the courts.[145] It is this type of realistic compromise that the player's associations of all leagues have been willing to accept in exchange for modifications of the harsh reserve systems of the past. It would appear that if the owners had bargained throughout in the same good faith the players have shown, agreements could have been reached much earlier. In the case of the NBA it took the exceptional and well-proven political skills of Commissioner Larry O'Brien to persuade the owners to compromise.[146]

3. Hockey

The existence of two competing hockey leagues guarantees that player salaries will not be artifically depressed regardless of the reserve methods these leagues utilize. The two-league situation

141. NBA Agreement, *supra* note 66, Article XVI § 1(b).

142. *Id.* Article XVI § 1(c).

143. *Id.* Article XVI § 1(d).

144. *Id.*

145. *See* Looney, *The Start of a Chain Reaction*, Sports Illustrated, Feb. 16, 1976, at 18-20.

146. Mr. O'Brien now says what the fans have wanted to hear for so long: "We have gotten out of the courtroom, hopefully, and back on the court." Interview with Mr. Lawrence O'Brien in New York City (October 5, 1976).

Produced by The Berkeley Electronic Press, 1977

arose with the advent of the World Hockey Association (WHA) in 1971, which precipitated a major change in the structure of professional hockey. Until that time all of the minor and amateur hockey leagues were affiliated with the National Hockey League (NHL). In the agreement between the NHL and the amateur leagues each recognized the other as the sole and exclusive governing body of professional and amateur hockey, respectively.[147] The association with the minor leagues was so strong that the NHL reserve clause was incorporated into all of the minor league contracts with only slight alterations.[148] This represented a perpetual reserve system in which the renewed contract was deemed to include the renewal provision. The result of these agreements and the reserve system was to effectively preclude the entry of the WHA into the professional hockey business. Any professional player the WHA desired to sign was already bound in perpetuity by the reserve system. Nevertheless, the WHA signed enough players from these sources for the league to operate. Approximately sixty percent of those who signed with the WHA were bound by either a NHL or minor league reserve clause.[149] This obviously led to litigation, and four major decisions were rendered in 1972 that have determined the future of professional hockey.

In *Philadelphia World Hockey Club v. Philadelphia Hockey Club*,[150] the WHA brought suit to enjoin the further enforcement of the NHL reserve system. The WHA alleged that the reserve system and the monopoly enjoyed by the NHL were violations of Sections 1 and 2 of the Sherman Act.[151] Reacting to the monopoly charge, NHL Commissioner Clarence Campbell made the ill-advised statement that the purpose of the affiliations with the other leagues was to insure that the NHL would always be "the only major professional hockey league operating from coast to coast in the United States or Canada."[152] Not surprisingly, the court granted the injunction, holding that the complete and monopolistic control of players by the NHL and its affiliates resulted in a Section 2 Sherman Act violation.[153]

---

147. Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462, 478 (E.D. Pa. 1972).

148. *Id.* at 476.

149. *Id.* at 493.

150. 351 F. Supp. 462 (E.D. Pa. 1972).

151. *See* notes 2-4 *supra* and accompanying text.

152. 351 F. Supp. at 476.

153. *Id.* at 509.

The other three actions in 1972 were initiated by NHL clubs to enforce the reserve clause utilized by that league by enjoining the players who had attempted to move to the WHA. In two of these actions the courts denied relief to the NHL on the grounds that the apparent perpetuality of the reserve system would in all probability be found violative of the antitrust laws at trial.[154] The court in the other case granted a one-year injunction, interpreting the reserve system solely as a one-year option clause.[155] The NHL altered its reserve system in accordance with the rule in this latter case vitiating the possible defense of perpetuality raised in the two former cases.

In its basic structure the new NHL system provides for a one-year option clause with a compensation provision. This latter section is called "equalization" and is different from the prior NFL and NBA provisions in that a determination is made by an independent arbitrator.[156] Unlike the other professional leagues the NHL option year may be enforced by either the club or the player[157] which is made possible by the omission of a particular clause in the NHL contract. In all of the other leagues in which it is used, the clause provides that if the player does not exhibit sufficient skills to qualify as a member of the team, the club may unilaterally terminate his contract.[158] Thus the NHL player is guaranteed employment with the club (or one of its minor league teams at a reduced salary) for the term of his contract plus the one option year.

This NHL option system works as follows: At the end of the final year of a contract the club may tender a "Player's Termination Contract" to the athlete.[159] Should the athlete decide not to sign the contract he is given his unconditional release from the team.[160] If the player does sign he must be employed by the club for the one extra option season at his previous year's salary, at which time he is given

---

154. Nassau Sports v. Hampson, 355 F. Supp. 733, 735 (D. Minn. 1972); Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 267 (D. Mass. 1972), *remanded*, 472 F.2d 127 (1st Cir. 1972).

155. Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972).

156. *See* Appendix B for the procedure for free agency and equalization.

157. NHL Standard Player's Contract § 17.

158. *See* National League Uniform Player's Contract § 7(B)(2); WHA Uniform Player's Contract § 10.2.3; NFL Standard Player Contract § 6; and NBA Uniform Player Contract § 20(b)(2).

159. NHL Standard Player's Contract § 17(a).

160. *Id.* A club that subsequently signs such a player need *not* provide equalization.

his unconditional release.[161] If the club wishes to retain the services of the athlete it will tender a regular "Standard Player's Contract" to the player at the end of the term of his previous contract.[162]

Regardless of the choice made by the club the athlete may notify the club that he wishes to sign a Player's Option Contract.[163] This contract includes the same terms and conditions as the previous year. However, at the end of the option year the player becomes a free agent, and only at this point does equalization apply.[164] It is readily apparent that this choice will only be made by an athlete who is first tendered the Standard Contract from the club. If he were first tendered the Termination Contract, it would be to his advantage not to utilize the Option Contract because a club subsequently desiring his services would be more willing to sign him if they would not have to provide equalization to his former team.

This elaborate system was originally imposed unilaterally by the owners but has since been agreed to through collective bargaining.[165] However, the NHL Players Association has an option to terminate the present reserve system if the NHL decides to merge with the WHA.[166] This provides additional security for the NHL players who now utilize the WHA as a bargaining tool.

The WHA contract contains neither a reserve nor an option clause.[167] Instead of the unilateral renewal of these systems, in case the parties fail to come to terms for the next playing season, each appoints a representative to resolve the dispute. An independent arbitrator is appointed if the representatives are unsuccessful. If both sides acknowledge that his decision is fair, a contract is executed on those terms; if either feels that it is unfair, the player is

---

161. NHL Standard Player's Contract, supra note 159.

162. *Id.* § 17(b).

163. *Id.* § 17(c).

164. *Id.*

165. Collective Bargaining Agreement Between NHL Member Clubs and NHL Players Ass'n, § 9.03 (May 4, 1976).

166. *Id.* § 9.03(c). The NHL offered a consolidation agreement to the WHA on June 24, 1977. Under this plan six of the nine WHA teams would be admitted to the NHL as a separate division for the 1977-78 season. There would be no interplay between the WHA division and the NHL division except for exhibition games and the Stanley Cup playoffs. The New York Times, June 25, 1977 at 13, col. 1. Shortly thereafter, the NHL Players Ass'n proposed the following changes to the reserve system. If a free agent earns $100,000 or more, the present equalization rules would apply. If the player earns $75,000-$100,000, compensation would be a first round amateur draft selection; $45,000-$75,000, a second round pick. under $45,000, a third round pick. Newsday, June 28, 1977 at 82, col. 1.

167. WHA Uniform Player's Contract § 16.2.1. The entire Article 16 is reprinted in Appendix C.

automatically entered into a second draft.[168] The draft is held in the same manner and order of selection as the regular draft except the player's former team cannot choose him in the second draft. One more draft is held before the season begins if the player and the subsequent drafting club do not come to terms.[169]

A major difference between the WHA and NHL system is the use of an option clause by the NHL. This means that an NHL player can be enjoined for the option year before he can sign with the WHA. However, the WHA players are free to sign with the NHL merely upon the termination of their contracts without an enforced year's delay.

4. Football

As a result of twenty years of lawsuits the NFL has undergone several changes in its use of the reserve system. After *Radovich v. National Football League*[170] the NFL changed its original reserve system into a one-year option clause without a compensation provision. The option clause was upheld in a Texas court as early as 1961.[171] That state court also ruled that the player involved could not sit out the option year. He either had to play the extra year or be enjoined.

One player did play out this option year and subsequently signed with another club. This player independence annoyed the NFL, and in 1963 the league unilaterally adopted the Rozelle Rule, which provided compensation to a team that lost a player in this way. If the teams could not agree on compensation, Commissioner Rozelle would make the decision. Although it was only technically invoked by Rozelle five times,[172] its harshness was sufficient to deter athletes from paying out their options. It was invoked the last time in 1974 when Rozelle assigned an active player as compensation. The player was granted a temporary restraining order by the federal district court, which held that the Rozelle Rule, in conjunction with the option clause, violated Section 1 of the Sherman Act.[173] As a result, Rozelle officially sent the player back to his original club and an-

168. *Id.* § 16.2.4.

169. *Id.* § 16.4.

170. 352 U.S. 445, *reh. denied*, 353 U.S. 931 (1957).

171. 348 S.W.2d 37 (Tex. Civ. App. 1961).

172. For examples of Rozelle's determinations on compensation see Mackey v. National Football League, 407 F. Supp. 1000, 1003-05 (D. Minn. 1975).

173. Chicago Tribune, July 31, 1975, § 4, at 1, col. 1.

Produced by The Berkeley Electronic Press, 1977

nounced that the compensation would be a first round draft pick plus additional unstated compensation.[174]

Although this decision struck a blow at the Rozelle Rule, two cases that were pending in the courts at the time would prove fatal to the rule. The holding in both cases would be that the Rule was violative of antitrust laws.[175] In the first of the cases, *Kapp v. National Football League*, the court applied the rule of reason test to the Rozelle Rule. The case was initiated when Rozelle would not let Kapp continue to play in the NFL without signing one of the standard contracts.[176] The suit challenged the draft, the option clause, the standard contract rules and the tampering provisions as violative of the Sherman Act.[177] The court found that all of the above, except for the option clause, violated the antitrust laws. The court refused to utilize the *per se* standard but relied instead on the rule of reason.[178] Although this test generally calls for a full inquiry into the justifications of the system challenged, the court granted the plaintiff a summary judgment, stating that the rules were so patently unreasonable as to create no genuine issue for trial.[179] The court concluded that the Rozelle Rule "imposes upon the player-employees such undue hardship as to be an unreasonable restaint and such a rule is not susceptible of different inferences concerning its reasonableness; it is unreasonable under any legal test . . . ."[180]

The case that put an end to the Rule was *Mackey v. National Football League.*[181] Filed on behalf of the NFL Players Association, the cause of action alleged that the Rozelle Rule was a *per se* antitrust violation, and in the alternative, violative of the rule of reason standard. The district court found that the Rule was a concerted refusal to deal and a group boycott, and hence violative of the Sherman Act.[182] In addition, the court admitted evidence which related to the reasonableness of the Rule.[183] Even under the rule of reason the

174. Chicago Tribune, Aug. 2, 1975, § 4, at 1, col. 1.

175. 390 F. Supp. 73 (N.D. Cal. 1974).

176. *Id.* at 78. *See* the standard contract requirement, *supra* note 89.

177. 390 F. Supp. at 78.

178. *Id.* at 82.

179. *Id.* An interesting discussion of the alleged misapplication of the rule of reason in *Kapp* is contained in Note, *National Football League Restrictions on Competitive Bidding for Players' Services*, 24 BUFF. L. REV. 613 (1975).

180. 390 F. Supp. at 83. In a subsequent trial for damages, a jury found that Kapp had not been damaged and awarded him nothing. The decision is being appealed.

181. 407 F. Supp. 1000 (D. Minn. 1975), *aff'd* 543 F.2d 606 (8th Cir. 1976).

182. 407 F. Supp. at 1007.

183. *Id.* Judge Larson apparently admitted and ruled on this evidence so there would be a full record for appeal purposes.

court held the Rozelle Rule to be illegal in that it restrained the players, was overly broad, and afforded no procedural safeguards.[184] The court rejected the justification for the reasonableness of the Rule presented by the defendants. The NFL argued that the Rule protected its investment in player development; the court reasoned that other businesses incur like expenses. The NFL also argued that player continuity was important to the success of a team and was aided by the Rule.[185] The court found that all teams would be equally affected and that the quality of play in the NFL would not decrease. Furthermore, even if the quality of play would decrease, that would still not justify the anticompetitive nature of the Rule. Finally, the court found that the elimination of the Rule would not be immediately disruptive, nor would it cause irreparable damage to the NFL.[186]

The Court of Appeals for the Eighth Circuit affirmed the district court's finding of antitrust violations.[187] However, the appellate court determined that the *per se* standard should not have been applied and that the lower court should have relied solely on the rule of reason.[188] As to the merits of the case the court of appeals agreed with the court below and found that the Rozelle Rule was "significantly" more restrictive than necessary and violated Section 1 of the Sherman Act:

> 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. Sec-

184. *Id.*

185. *Id.* at 1008.

186. *Id.*

187. 543 F.2d 606 (8th Cir. 1976).

188. The court cited two reasons for utilizing the rule of reason here. First, it stated that the typical *per se* case involved agreements between competitors in the traditional sense. Professional football teams were not seen to be competitors in this sense because each team has a vested interest in the financial success of the other teams in the league. The court stated that when a unique or novel business situation is studied it is proper to inquire into its reasonableness. *Id.* at 619. *Accord,* White Motor Co. v. United States, 372 U.S. 253 (1962); Worthen Bank & Trust Co. v. National Bank Americard, 485 F.2d 119 (8th Cir. 1973). The second ground for applying the rule of reason was that a lengthy and burdensome inquiry had already been completed by the district court. Since the avoidance of such an inquiry is a major consideration when the *per se* rule is applied, there was little reason to utilize the *per se* in this situation. 543 F.2d at 619-20. The district court trial transcript was over 11,000 pages, with an addition 400 exhibits entered into evidence. 400 F. Supp. at 1002.

Produced by The Berkeley Electronic Press, 1977

> ond, 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.[189]

As a result of these cases the NFL finally agreed on a new reserve system in the collective bargaining agreement reached in early 1977.[190] The new system eliminates the option clause from the contracts of players with four or more years of experience unless it is mutually agreed to by the player and the club. A one-year rookie contract will necessarily include the clause. For a rookie signing for more than one year, or for veterans with two or three years of experience, the contract will include the option provision, although it may be negotiated out through mutual assent.[191] If a player's contract is renewed for the option season he must be paid at least 110 percent of his previous year's salary.[192]

After a player obtains free agent status, the right of first refusal, discussed earlier in the NBA section, is utilized. If the team elects not to match the offer of the signing club, the team losing the player will receive compensation in the form of predetermined draft choices calculated upon the player's new salary.[193] The draft choices must be for the upcoming May 1 draft. By this method the number of free agents that a team may sign is directly limited by the number of draft choices it has. For instance, since each team has only one first-round selection, in order to sign more than one player earning over $75,000 a year that team will have to engage in a trade to procure another first-round pick. The NFL feels that this will in-

---

189. 543 F.2d at 622.
190. 1977 NFL Agreement, *supra* note 82.
191. *Id.*, Article XIV, Sections 1-2 at 32-33.
192. *Id.*, Article XIV, Section 3 at 33.
193. *Id.*, Article XV, Section 12 at 40-41.

New Yearly Salary	*Compensation*
$ 50- 65,000	One third round pick
$ 65- 75,000	One second round pick
$ 75-125,000	One first round pick
$125-200,000	One first round and one second round pick
$200,000+	Two first round picks, one in each consecutive years

sure continued competitive balance. The NFL Players Association apparently agreed to this system in exchange for other benefits.[194] The only thing left unsettled by the agreement was whether teams that had signed free agents after *Mackey* and before the agreement would have to retroactively compensate the teams that lost those players.

5. Summary

As the reserve and option systems stand now, every athlete who has proven his worth to a club by remaining in the professional leagues for a certain amount of time will be rewarded with a contract that reflects his true market value. Whereas previous salaries were invariably lower because of the restrictions on movement, every major sport now contains some provision for an athlete to become a free agent if his present team does not pay him what he feels he is worth. Once a player becomes a free agent, his talent plus the basic economic principle of supply and demand will determine the compensation he will receive. The athlete will finally be able to sell his services in the open market and for the first time receive a salary commensurate with his talents. But as will be seen in the next section, the athlete is not as yet completely protected from unfair actions that could end his career.

Blacklists

The most stringent restraint that can be invoked against a player is the blacklist—an absolute prohibition from competition in a league. Blacklisting usually is the result of a decision by the commissioner to suspend or expel the player from the league. The commissioner's powers in this regard are immense. For instance, the NBA Constitution allows the commissioner to fine or suspend any player, coach, manager, or other employee whose conduct "has been prejudicial to or against the best interests of the Association or the game of basketball."[195] If the alleged violation involves gambling or the fixing of games, the sanction is unappealable even though the

194. For example, during the three years in which there was no agreement the owners paid no money into the players' pension fund. Presently the owners will make retroactive payments into the fund totaling some $55 million. The *Mackey* case and other litigation was settled for approximately $16 million. In addition, the players gained a closed shop agreement and increases in insurance benefits, playoff money and minimum salaries. Finally, the players apparently agreed to increase the regular season to sixteen games from the previous fourteen. The New York Times, March 2, 1977, § A, at 17, col. 1.

195. National Basketball Ass'n Constitution § 35(d).

Produced by The Berkeley Electronic Press, 1977

player may be permanently disqualified.[196] Blacklisting can also arise from a tacit agreement among club owners not to deal with a certain player. This usually occurs when a player does something that team owners feels is prejudicial to their interests.

Several excluded players have challenged the blacklist technique as being a "concerted refusal to deal" violation of the antitrust laws. The first actions brought before the courts concerned the blacklist of players who had violated the reserve clause of their contracts. Although these courts did not decide the merits of the claims involved, each noted that the allegation of a blacklist in this context constituted a cause of action under the antitrust laws.[197]

In at least one case, maintenance of the public confidence in the sport of basketball was held paramount to any injury caused a player by being blacklisted. In *Molinas v. National Basketball Association*,[198] the plaintiff, who admitted placing bets on his team to win, was suspended indefinitely by the commissioner. The court stated that Molinas had failed to show an unreasonable restraint of trade as defined by the antitrust laws. The court held that the league provision seemed "not only reasonable but necessary for the survival of the league."[199] Unfortunately, the court failed to make any mention of the possible due process violation that may have occurred as the player had not been given a hearing prior to his suspension.

The lack of due process in the blacklisting of a player may have tragic personal consequences. Although the blacklisted player in this case was undeniably a superbly talented athlete, he was not drafted when he became eligible in 1964. The club owners and the commissioner tacitly agreed that no team would deal with him. Official blacklisting occurred in May, 1966, when the NBA Board of Governors voted to ban the player on the grounds that he had been implicated in a college gambling scandal.[200]

The situation was finally settled in 1969 as a consequence of a suit filed by the aggrieved player.[201] The plaintiff had been restricted from employment in the NBA for five years. Despite the favorable ruling in *Molinas*, the NBA settled with the player for

196. *Id.* § 35(h).

197. Radovich v. National Football League, 352 U.S. 445, *reh. denied*, 353 U.S. 931 (1957); Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949).

198. 190 F. Supp. 241 (S.D.N.Y. 1961).

199. *Id.* at 243.

200. D. WOLF, FOUL! THE CONNIE HAWKINS STORY 299 at n.203 (1972).

201. 288 F. Supp. 614 (W.D. Pa. 1968) (venue hearing).

over a million dollars.[202] It was later learned that the owners had decided to blacklist the player solely because of unsubstantiated newspaper reports.

An important consequence of this case was that now the NBA Constitution requires that a player be given notice and an opportunity to be heard prior to any suspension or disciplinary action by the commissioner.[203] The other leagues now employ similar provisions.[204] In all sports, the decision of the commissioner remains unappealable when it involves gambling or other conduct affecting the integrity of the sport.[205]

It is obvious that the integrity of a sport must be maintained. Nevertheless, a decision should be appealable to an independent arbitrator. This would give the player at least one review to insure the correctness of the commissioner's decision. Only through such a procedural safeguard can these provisions necessarily remain inviolate of the antitrust laws.[206] However, if it is found that these provisions have been agreed to in collective bargaining through an incorporation clause, a player will not have standing to challenge the system regardless of its legality.

Even the existence of procedural safeguards cannot protect a player when the blacklist involves a tacit agreement between the club owners. For example, former third baseman Clete Boyer was apparently blacklisted from baseball after publicizing a dispute he had with the general manager of his team.[207] When football players tried to organize a union the owners blacklisted the organizer, Bernie Parrish.[208] With the formation of effective collective bargaining units in each sport, it is believed that future conduct of this nature will precipitate in charges of unfair labor practices under the National Labor Relations Act (NLRA). Section 8(a)(3) of the NLRA states that it is an unfair labor practice for an employer to

---

202. The settlement in this case made Hawkins an instant millionaire. *See* D. Wolf, *supra* note 200, at 344-46.

203. O'Brien interview, *supra* note 147.

204. *See, e.g.*, BASEBALL BLUE BOOK, Major League Agreement Article I, § 2-4; NFL Constitution, *supra* note 69, at 29-31, 34, §§ 8.13, 8.14, Article IX.

205. *See, e.g.*, NFL Constitution, *supra* note 81, at 32-33, § 8.13(c).

206. *Accord*, Kapp v. National Football League, 390 F. Supp. 73, 82 (N.D. Cal. 1974). Here the court found that an unappealable decision by the commissioner on another matter was "patently unreasonable."

207. Keefe, *Positively Mr. Kipling? Absolutely Mr. Kuhn!*, 58 A.B.A.J. 651-52 (1972).

208. Note, *The Balance of Power in Professional Sports*, 22 ME. L. REV. 459 (1970).

Produced by The Berkeley Electronic Press, 1977

"discriminate in regard to hir[ing] or tenure of employment or [to] discourage membership in any labor organization . . . ."[209] Recently this section was successfully utilized by players who had been traded by their NFL teams because they were the Player's Association representatives on those teams.[210] It appears that players can be protected at least from blacklists tacitly imposed by the owners where labor-management relations are concerned.

At the beginning of this decade the players in every league were subject to a series of restrictive mechanisms that had been unilaterally adopted by the owners of those leagues. These devices were completely repugnant to the public policy of the United States as embodied in the antitrust laws. Since the owners would not agree to modifications of these systems through collective bargaining, the players were forced to commence legal actions for a declaration of their rights.[211]

When the NFL finally arrived at an agreement in March of 1977, the metamorphosis had been completed. The totality of provisions in every major league now assure that each player will be compensated at his fair market value upon the fulfillment of certain temporal pre-conditions. These provisions effectively protect the interests of the players while providing some means of control which the owners feel is necessary. The best "reserve" agreement, as far as contractual freedom is concerned, is the NBA right of first refusal. There is no restriction as to the team with whom a player can sign. His only limitation is that his original team can regain first rights if it is willing to match the subsequent salary offer.[212]

A major question remaining after many successful player suits was whether the rule of reason or a *per se* antitrust test would be applied to future actions. However, with the inclusion of the new systems of player-control mechanisms in the collective bargaining process the question has been rendered moot. For the duration of these agreements no antitrust action can be brought successfully against any of these mechanisms. The constant stream of antitrust

209. 29 U.S.C. 148 (1970).

210. National Football League Management Council and NFL Players Ass'n NLRB Case No. 2-CA-13379 (June 30, 1976), *reprinted in* 1977 INQUIRY, *supra* note 41, at 465, 519-21.

211. These legal actions accomplished three things: (1) they cost the owners and players a great deal of money; (2) they frustrated and embittered the fans; and (3) they ultimately resulted in similar modifications to the systems as the players originally advocated.

212. *See* note 143 *supra* and accompanying text.

suits between the leagues and the players has subsided. The next five years should provide the experience with which to improve any flaws that may be inherent in the new systems. Now that bona fide collective bargaining has occurred with respect to all the issues, it is hoped that the courts will never again have to intervene to protect the rights of the players. The concluding section of this article will discuss the reasons why the inclusion of these mechanisms into collective bargaining agreements precludes any further antitrust suits by the players.

PLAYER CONTROL MECHANISMS AND THE LABOR LAW EXEMPTION FROM THE ANTITRUST LAWS

A basic policy of American labor law is to exempt from the scrutiny of the antitrust laws those employer-employee agreements that have been reached as a result of bona fide collective bargaining. For this reason, all of the player control mechanisms utilized by the professional sports leagues are not presently subject to attack on antitrust grounds. This section will survey the rationale for the immunity of these mechanisms. First, the labor law exemption itself as it has been outlined by the Supreme Court will be reviewed. The requirements set forth by the Supreme Court will then be applied to cases in the sports world that have considered the exemption. Finally, it will be shown why the current mechanisms qualify for the exemption.

The Labor Law Exemption from Antitrust Laws

The statutory basis for the labor law exemption is found in sections 6 and 20 of the Clayton Act[213] and various sections of the

213. Section 6 of the Clayton Act, 15 U.S.C. § 15 (1970), provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organization, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act, 29 U.S.C. § 52 (1970), provides in pertinent part:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case, between an employer and employees, or between employees, or between persons employed and persons seeking employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making

Produced by The Berkeley Electronic Press, 1977

Norris-LaGuardia Act, most importantly sections 4, 5 and 13.[214] Judicial interpretation of the Clayton Act had been so restrictive as to effectively emasculate any basis for a labor exemption from antitrust coverage.[215] Congress responded to this narrow construction by the courts with the passage of the Norris-LaGuardia Act. Aided by the clearly evident legislative intent of the later act the Supreme Court reinterpreted the Clayton Act and found legitimate union activity to be exempt from antitrust laws.[216]

Since the labor law exemption has been almost entirely a creation of Supreme Court decisions which have interpreted these acts, it is necessary to study the five leading cases in this context to understand the applicability of the exemption to the sports world. In *United States v. Hutcheson*,[217] the Supreme Court for the first time considered all of the statutory material together: "Whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and §20 of the Clayton Act and Norris-LaGuardia Act as a harmonizing text of outlawry of union conduct."[218] Analyzing these acts, the Court found that union conduct is generally immune from antitrust attack as long as the union acted in its self-interest without combining with non-labor groups.[219]

This did not exempt all union activity. An example of a case where union activity was held within the scope of the antitrust laws was *Allen-Bradley v. Local 3, I.B.E.W.*.[220] Here a union combined through a collective agreement with various electrical equipment manufacturers and contractors to restrain trade and monopolize the supply of electrical equipment in New York City. Some of the ex-

---

the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

214. 29 U.S.C. § 104, 105, 113 (1970).

215. *See, e.g.*, Duples Printing Co. v. Deering, 254 U.S. 443 (1925).

216. United States v. Hutcheson, 312 U.S. 219 (1941); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

217. 312 U.S. 219 (1941).

218. *Id.* at 232.

219. The court stated that:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under Section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id.

220. 325 U.S. 797 (1945).

cluded manufacturers brought an antitrust action against the union alleging a combination of the union and employers in violation of the Sherman Act. The Supreme Court held that a union loses the exemption when it combines with non-labor groups in the furtherance of a business monopoly.[221] Such a monopoly was said to be "no less such because a union participates, and such participation is a violation of the Sherman Act."[222] But note that if the same result had occurred as the natural consequence of union activity free from collusion with the employers, it would have been protected by the Clayton Act.[223]

The next major Supreme Court decisions on the labor law exemption did not come until twenty years later. In companion cases, the Court delineated the outer bounds wherein union negotiation of mandatory subjects of bargaining were exempted from the antitrust laws. In *United Mine Workers v. Pennington*,[224] a coal company, by cross complaint, alleged that the UMW had conspired with the large coal producers to drive the smaller less efficient operators out of business by establishing an industry-wide rate at a higher level than the small producers could afford. The Court recognized that the UMW had a legitimate interest in procuring standard wages—a mandatory subject of bargaining under the NLRA.[225] However, according to Mr. Justice White, the fact that an agreement by which a restraint is imposed concerns a mandatory subject of bargaining does not insure insulation from antitrust attack.[226] Thus the exemption does not apply and the union is in violation of the Sherman Act when it conspires with its employers to eliminate competition from the industry.[227] It is immaterial that the consideration the union receives for participating in the conspiracy happens to bear upon a mandatory subject of bargaining.

Having shown a situation where a union agreement concerning a mandatory subject of bargaining was not exempted because of a combination with non-labor groups, the companion case outlined the requirements necessary to insure that a bargaining agreement will

---

221. *Id.* at 808.
222. *Id.* at 811.
223. *Id.* at 809.
224. 381 U.S. 657 (1965).
225. Section 8(d) of the NLRA, 29 U.S.C. § 148(d) (1970). Under this section a mandatory subject of bargaining is one that deals with "wages, hours, and other terms and conditions of employment."
226. 381 U.S. 664-65.
227. *Id.* at 665-66.

Produced by The Berkeley Electronic Press, 1977

be exempt from the workings of the antitrust laws. In *Amalgamated Meat Cutters v. Jewel Tea Co.*,[228] the Meat Cutters Union and the vast majority of Chicago food stores had entered into an agreement which provided for uniform operating hours for all stores. The Jewel Tea supermarket chain agreed to the same provisions under duress of a strike vote. Jewel then brought suit under the Sherman Act alleging that the provision was an attempt by Jewel's competitors to prevent the use of the pre-packaged, self-service meat vending equipment which Jewel utilized at night. The Supreme Court upheld the contention of the union that it was exempt from the workings of the antitrust laws. As contrasted to the situation in *Pennington*, the Court found no evidence of employer-union conspiracy in this case. Instead it determined that the union had acted alone in furtherance of the butchers' best interests.[229] After these findings, Mr. Justice White reiterated the federal policy favoring exemption for the mandatory subjects of bargaining. Thus the issue of the case as stated by the Court was whether the uniform hours restriction was

> so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide arm's length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with non-labor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.[230]

As the provision was found to be related in the required manner the union activity of negotiating that term into the collective bargaining agreement was held exempt.

Finally, in *Connell C. v. Plumbers and Steamfitters Local 100*,[231] the Supreme Court decided that the exemption is only applicable where the union's activity primarily affects only the parties or potential parties to a collective bargaining agreement. The proper and necessary parties to such an agreement are the union and the employer. While activity relating to such an agreement is protected, the union is not protected when its activity leaves the realm of the employer-employee relationship.[232] Here the union activity was directed against a party who was not an employer of potential or ac-

228. 381 U.S. 676 (1965).
229. *Id.* at 688.
230. *Id.* at 689-90.
231. 421 U.S. 616 (1975).
232. *Id.* at 625.

tual union members and the federal policy favoring collective bargaining was inapplicable.[233]

To summarize, the elements required for application of the labor law exemption are as follows: (1) A restraint of trade resulting from the unilateral activity of a union if its self-interest was held within the Clayton Act and exempt from the antitrust laws. The only proscribed activity was the combination or conspiracy of a union and a non-labor group in furtherance of a restraint of trade or business monopoly. (2) There must be a legitimate union objective in the negotiation of the restraint imposed. A legitimate objective is one that deals with wages, hours or working conditions—the mandatory subject of bargaining under the NLRA. (3) The restriction imposed must have been embodied in an agreement reached through bona fide arm's length collective bargaining. (4) The restrictive practice must primarily affect only the proper parties to that collective bargaining agreement. Now that the elements of the labor law exemption have been examined, this article will survey those cases involving professional team sports that have dealt with the exemption.

The Labor Law Exemption and Prior Sports Cases

In each of the five sports cases that have considered the exemption, no court has found it to be applicable. In each case the league had attempted to utilize the exemption as a defense to antitrust action brought by a player or players. None of the cases had at issue a player agreement containing the challenged mechanisms which had been reached through bona fide collective bargaining. This section will review the five cases that have been decided on this subject and will illustrate the reasons the exemption was not applied.

The first time a league raised the labor law exemption as a defense was in *Flood v. Kuhn.*[234] The Supreme Court did not need to reach the merits of the defense. Since upholding the baseball exemption from antitrust laws generally, such a determination was unnecessary.

The National Hockey League asserted the exemption as a defense in *Philadelphia World Hockey Club v. Philadelphia Hockey Club.*[235] The court noted that from *Hutcheson* to *Jewel Tea*, litigation involving the labor law exemption had always concerned a union's

233. *Id.* at 625-26.
234. 407 U.S. 258 (1972). *But see id.* at 294-96 (Marshall, J., dissenting).
235. 351 F. Supp. 462 (E.D. Pa. 1972).

Produced by The Berkeley Electronic Press, 1977

allegedly conspiratorial role in restraining product market competition. It was the union, not the employer that asserted the exemption. In this case, it was clear that the players association was not a joint conspirator with the league in the retention of the reserve system.[236] Further, the traditional labor cases pertained to issues in the interests of the union members where there had been extensive, arm's length collective bargaining. However, in the instant case the NHL had employed the reserve system for sixteen years before the players association was formed. Clearly, the league and the players had never seriously negotiated any agreement on the issue.[237] Furthermore, if the parties had agreed to the reserve system through collective bargaining it would have created a situation where there would be a joint union-employer conspiracy in restraint of trade. The perpetual binding of a player through the reserve system would obviously prevent the WHA from entering the market for any player's services. This situation then would be similar to *Allen-Bradley*, and as such would be an illegal restraint of competition.[238]

> In rejecting the NHL's attempt to invoke the exemption, the court stated: The labor exemption which could be defensively utilized by the union and employer as a shield against Sherman Act proceedings when there was bona fide collective bargaining, could not be seized upon by either party and destructively wielded as a sword by engaging in monopolistic or other anticompetitive conduct. The shield cannot be transmuted into a sword and still permit the beneficiary to invoke the narrowly carved out labor exemption from the antitrust laws.[239]

The court held that granting the exemption in this case would undermine the policies of both labor and antitrust law which had evolved through the years.[240]

The same decision was reached in a case involving professional basketball. In *Robertson v. National Basketball Association*, the NBA asserted that the issues raised by the plaintiff belonged at the bargaining table and consequently the players were precluded from

---

236. *Id.* at 498.
237. *Id.* at 498-99.
238. *Id.* at 499.
239. *Id.* at 499-500.
240. Judge Higginbotham finished his discussion by quoting from the Supreme Court: "Benefits to organized labor cannot be utilized as a cat's paw to pull employers chestnuts out of the antitrust fires." *Id.* at 500, citing United States v. Woman's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949).

raising them in an antitrust suit.[241] The court disagreed, flatly holding that only union activities were protected by the labor law exemption.[242] Since the employers had unilaterally adopted the system it obviously could not be deemed a union activity. The court, on an admittedly incomplete record, suggested that the reserve system itself did not constitute a mandatory subject of bargaining. The court noted that such a determination alone would not carry with it "talismanic immunity" from the antitrust laws.[243]

The remaining three exemption cases involved the NFL in suits that challenged its draft and reserve system. In the first of these, *Kapp v. National Football League*,[244] the court first held the question moot. At the date of Kapp's alleged contract no collective bargaining agreement was in effect.[245] The court stated further that even if the challenged league rules had been accepted through collective bargaining:

> the labor law exemption does not and should not go so far as to permit immunized combinations to enforce employer-employee agreements which, being unreasonable restrictions on an employee's right to freely seek and choose his employment, have been held illegal on grounds of public policy long before and entirely apart from the antitrust laws.[246]

It is believed that the court erred here because clearly the employee's right to freely choose in such a case would have been exercised had he elected a collective bargaining representative. At that point, no player has standing to challenge the union's hypothetical action.[247] As a result, a rival league could challenge the restraint of trade but an individual within the bargaining unit could not. The court's reliance on public policy principles was clearly misplaced.

In spite of the unfavorable ruling it had already received on the issue, the NFL raised the same defense in *Smith v. Pro-Football*.[248] The league argued that as the draft was a mandatory subject of

241. 389 F. Supp. 867 (S.D.N.Y. 1975).
242. *Id.* at 885.
243. *Id.* at 888, 891.
244. 390 F. Supp. 73 (N.D. Cal. 1974).
245. *Id.* at 85.
246. *Id.* at 86.
247. *See* J. I. Case Co. v. N.L.R.B., 321 U.S. 322, 399 (1944); Section 9 of the NLRA, 29 U.S.C. § 149 (1970); Jacobs & Winters, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 7-10 (1971).
248. 420 F. Supp. 738 (D.D.C. 1976).

Produced by The Berkeley Electronic Press, 1977

bargaining, it was exempt from antitrust scrutiny. The league relied on Mr. Justice Goldberg's concurring opinion in *Jewel Tea* where he had stated that mandatory subjects of bargaining, when embodied in an agreement, cannot result in antitrust liability.[249] According to the *Smith* court the critical point of distinction was that Mr. Goldberg postulated the existence of an agreement on the issue before the application of the exemption.[250] Additionally, the Supreme Court's opinion rendered in *Pennington* made it clear that the mere fact that an agreement dealt with a mandatory subject of bargaining did not insure that the exemption would apply.[251] The *Smith* court reasoned that if the completed agreement was not exempt, a mandatory subject upon which there has been no agreement could not be exempt either. This determination was crucial here as the cause of action arose between the time of certification of the union as collective bargaining representative for the players, and the first collective bargaining agreement. There could be no exemption until the mechanism challenged as violative of the antitrust laws became part of an agreement negotiated by the players association in its own self-interest.[252] With no agreement in effect there could be no exemption.

To underscore the inapplicability of the labor law exemption, the court proceeded to review the case as though there had been an agreement reached through a bona fide collective bargaining process which included a draft provision. The draft provision would have had to have been found to constitute a mandatory subject of bargaining.[253] Making these initial presumptions, the court pointedly referred to the well established rule that a union can neither acquiesce in nor be a joint conspirator to any combination by either its employers or other non-labor groups whose objective is an illegal restraint of trade, and still expect to receive the benefit of labor's antitrust exemption.[254] Thus the exemption could not have been applied in this case under any circumstance. An agreement to the restrictive, regressive nature of the draft could not be described in the union's self-interest. Clearly, the agreement would have been made with a non-labor group and its effect would have been to accomplish one of the proscribed acts of unfairly restraining trade.

---

249. 381 U.S. 657, 711-12. 714 (1965).
250. 420 F. Supp. at 742.
251. *Id.* *See* note 226 *supra* and accompanying text.
252. 420 F. Supp. at 742.
253. *Id.* at 743.
254. *Id.* at 743-44.

The most recent and most important case to scrutinize the exemption in the sports context, *Mackey v. National Football* League,[255] is also the first circuit court of appeals case on the issue. The court asserted that although union activity unilaterally undertaken in furtherance of its own interests is exempted, this does not mean that the union is the only party entitled to assert the exemption.[256] It held that in "appropriate circumstances" an employer or other non-labor group could assert it as a defense, as the benefits of the exemption extended to both parties of the agreement.[257]

The test applied by the *Mackey* court was as follows: (1) the restraint on trade caused by the Rozelle Rule must affect only the parties to the collective bargaining agreement; (2) the Rozelle Rule must constitute a mandatory subject of bargaining; and (3) the Rule must be the product of bona fide arm's length bargaining.[258] If all of these requirements were found to be present in this case the Rozelle Rule would be held exempt from the workings of the antitrust laws.

The court found on the first point that the restraint of trade caused by the Rozelle Rule clearly affected only the parties to the agreement. It should be noted that there was no rival league competing with the NFL at the time of the decision. If there had been, the restraint might have been seen as affecting the rival league—as found in the *Philadelphia Hockey* case. As to the second part of the test, the Eighth Circuit Court of Appeals held that the question of whether an agreement concerns a mandatory subject of bargaining should be determined solely under federal labor law.[259] It will be remembered that the Rozelle Rule requires compensation by the team that subsequently signs the player to the team that loses him. Thus a literal reading of the Rule would seem to indicate that it did not deal with "wages, hours and other terms or conditions of employment." However, "whether an agreement concerns a mandatory subject depends not on its form but on its practical effect."[260] In this context the Eigth Circuit Court of Appeals held that since the practical effect of the Rule depressed player salaries by restricting their ability to move between teams, it did constitute a mandatory subject of bargaining within the meaning of the NLRA.[261]

---

255. 543 F.2d 606 (8th Cir. 1976).
256. *Id.* at 611-12.
257. *Id.* at 612.
258. *Id.* at 614.
259. 543 F.2d at 615.
260. *Id.*
261. *Id.*

Produced by The Berkeley Electronic Press, 1977

Having met the first two prongs of the test the bona fide bargaining criterion became paramount. The facts clearly showed that the rule had been *unilaterally imposed* by the league.[262] In addition, the court found that the provisions of the Rule did not inure to the benefit of the players or the union. Finally, the court rejected the NFL contention that the union accepted the status quo continuance of the Rozelle Rule in collective bargaining agreements in 1968 and 1970 in a *quid pro quo* for increased pension benefits. The exemption was not available on the question of the draft because the players had never agreed to the provision by an arm's length bargaining process.[263] As of now, however, more of the present player-control mechanisms are subject to antitrust attack as the labor law exemption will now protect them. This is the result of current collective bargaining agreements existing across the spectrum of professional sports.

Summary: The Present Immunity for Player Control Mechanisms

By studying the various criteria that have been imposed by the courts, it will be seen that all professional sports leagues have new systems for player control which are exempt from attack by the players on antitrust grounds. Each of the following subsections will list one of the elements necessary for the labor law exemption to apply and will explain the reasons that the present agreements in all leagues are so exempt.

1. Threshold Questions: Recognized Union and Actual Collective Bargaining Agreement

Before any of the other criteria are applicable, it must be shown that the union involved is a proper representative of the players and that in fact this union negotiated a valid collective bargaining agreement. The *Philadelphia Hockey* case raised the question whether the union was duly authorized to bargain with the league. Section 9 of the NLRA provides that a union is the proper representative when a majority of the employees express their desire to be so represented.[264] The union can be accepted by the

262. 407 F. Supp. at 1009-10.

263. *Id.* at 616.

264. Section 9(a) of the NLRA, 29 U.S.C. § 149(a) (1970), provides that:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.
See NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

employer upon a showing of majority status, or the union can apply for certification to the National Labor Relations Board, who upon showing of majority status will certify the union as the exclusive bargaining representative.[265] The football players association has been certified and the unions in baseball, hockey and basketball were duly recognized by the employers upon a showing of their majority status.[266] In addition, as was seen in the section on player control mechanisms, all the leagues presently have collective bargaining agreements in effect.

2. The Restrictive Mechanism Must Primarily Affect Only the Parties to the Agreement

It is clear that the new forms of the reserve system in all leagues primarily affect only the players and the owners. This requirement—promulgated in *Connell*—came after *Philadelphia Hockey*, the only sports case on the issue brought by a competitor. It is believed that in the event of a renewed challenge to the reserve system, the labor law exemption would apply because at the most the newly formed league would have to wait the one option year retained in some of the league contracts. Regardless, in negotiating the agreements the players' association did not engage in activity intending to restrain trade among possible competitors nor create a business monopoly, so the *Connell* case would be satisfied and the exemption would be applicable.

3. Bona Fide Arm's Length Collective Bargaining

This requirement was spelled out in *Jewel Tea* and requires that the issue in question be actually bargained over in good faith and not thrust upon the union by the employer. In the leading case of *Mackey v. National Football League*, it was this requirement that prevented the exemption from being applied. However, because the players have since sought and received modifications of the previously restrictive control mechanisms, this indisputedly constitutes a bona fide arm's length collective bargaining. Therefore, in no league will this requirement bar the exemption.

4. Mandatory Subject of Bargaining

In order to be entitled to the exemption the mechanism in question must pertain to a mandatory subject of bargaining, as

265. *See* Section 9(c) of the NLRA, 29 U.S.C. 149(c) (1970).

266. Note, *The Professional Athlete and the First Amendment: A Question of Judicial Intervention*, 4 HOFSTRA L. REV. 417, 432 n.5 (1976).

Produced by The Berkeley Electronic Press, 1977

outlined in the *Jewel Tea* and *Pennington* decisions and the National Labor Relations Act. *Mackey* provided the only meaningful decision to date as to this issue among the sports cases. In *Mackey*, a court of appeals correctly decided that the player control-mechanism involved was a mandatory subject of bargaining. These mechanisms were central to the sports collective bargaining negotiations that have recently been concluded. A leading article noted that it is "difficult to construct even a hypothetical argument that a contractual provision so intimately connected with determining the team for which an athlete will play and what salary and other benefits he may extract through individual bargaining is not a term or condition of employment."[267]

5. The Union Acted in Furtherance of its Own Interest, and There Was No Conspiracy or Combination with a Non-Labor Group

There can be no question but that these requirements, first announced by the Supreme Court in the *Allen-Bradley* and *Hutcheson* cases, are met in the modified player-control mechanisms. The present mechanisms are undeniably more favorable to the athletes than past devices and resulted from the various players' associations negotiating in their self-interest. It is just as clear that there was no conspiracy or combination between the employers and the players to restrain trade or create a business monopoly for the benefit of the employers.

The only question remaining is whether an agreement on the draft provisions constitutes an effort of the union acting in self-interest. After all, the draftees cannot be considered a party to the agreement since they are not player-members of the league until actually signed. Upon being drafted, they are only potential employees. Furthermore, the existence of a draft prejudices the rights of the draftee in that it restricts his entry into the league. However, the mode of entry utilized also has a great effect on the present members of the union. If huge bonuses are paid to unproven draftees it will limit the money available to the player who has earned his salary through hard work within the league. In addition, this can be analogized to hiring hall agreements which require entry in the union before a person is eligible to work.[268] In the only decision on this problem, the *Smith* court held that the inclusion of an agreement on the draft was entirely proper and would be protected by the exemption.[269] Since the new draft systems have been modified to

267. Jacobs and Winters, *supra* note 247, at 11-12.
268. *Id.* at 16.
269. 420 F. Supp. at 744.

be less restrictive than before, it is believed that they will extend the exemption. The union, in negotiating the modifications, will be seen to have fulfilled its duty of fair representation of the potential employees.[270]

6. Summary

Both the present reserve system and the modified draft are embodied in the collective bargaining agreements presently in effect. Potential antitrust suits will be barred because of the free player-league negotiation reflected in current agreements. From now on any player grievance brought as a result of the player control mechanisms in any of the agreements will necessarily be brought before the National Labor Relations Board, not the civil courts.

If Congress finally acts to remove baseball's general antitrust exemption, it is doubtful that the leagues' present reserve system would be subject to any antitrust attack. The leagues' player agreement reached in the summer of 1976 would seem to satisfy all the tests for extension of the labor law exemption.[271]

CONCLUSION

When Lawrence F. O'Brien became NBA Commissioner, he continually stressed one point: If the league was to operate in this

---

270. *See, e.g.*, Steele v. Louisville and Nashville R.R., 323 U.S. 192 (1944). Commissioner O'Brien believes that the new draft in his league adequately represents the potential players and thus satisfies the exemption:

> You can't reach any agreement in any context in life that affects people unborn, so I don't know how that might affect the future in that regard. But I would say the closest you could come to an agreement that would stabilize the situation and insure continuity of it is to have it not only in an agreement affecting a litigation but also incorporate the out-of-court settlement into the collective bargaining agreement into one package, which was done. That certainly is the best surety you could bring to the situation.

O'Brien interview, *supra* note 147.

271. A report made for the Select House Comm. on Professional Sports came to this same result. 1977 INQUIRY, *supra* note 41, at 446. However, the authors of the report, the American Law Division of the Congressional Research Service, erred in their reasoning. The test they utilized was a combination of the reasonableness of the provision in conjunction with the requirements for the labor law exemption. It has been shown herein that if the criteria for the labor law exemption are all present, a court will not look into the reasonableness of the provision; an exemption would not serve much purpose if the courts went ahead and applied an antitrust test. It should be noted that the Committee report ultimately relied on the correct test and not on this report. 1977 INQUIRY, *supra* note 41, at 26.

Produced by The Berkeley Electronic Press, 1977

society, it would have to live by the rules and laws of this society.[272] This simple principle had apparently been overlooked by team owners since the inception of professional sports. Applying this principle it became clear that the *Robertson* case would be decided just like every other case on the issue of player-control mechanisms. By doing the common-sense thing and settling the case in conjunction with a collective bargaining agreement, the NBA ushered in a new era of peace in professional sports. As a result of the NBA action and the continued adverse judicial response to the owners' old arguments, within a year all the leagues would be exempt from the antitrust laws as a result of the bona fide collective bargaining agreement.

Although these agreements have precluded action on the antitrust front, the fan is still not completely finished reading about legal disputes. In the papers of today are articles about criminal action being taken as a result of hockey violence, owner-commissioner disputes, the legal implications of moving team franchises, and so on. However, by settling their differences through collective bargaining, the owners and the athletes have let it be known that they are primarily interested in competition on the sports field. This is to the benefit of not only the owners and players, but most importantly, to the benefit of the fan.

272. O'Brien interview, *supra* note 147.

APPENDIX A
Major League Baseball
Negotiating Rights Draft and
Signings Pursuant Thereto

1. A Selection Meeting of the Major League Clubs of both leagues shall be convened by the Commissioner during the period between November 1 and November 15 of each year for the purpose of permitting the clubs to select rights to negotiate with players who have obtained free agency status . . . Such players shall be listed on an "Eligible List" prepared by the Commissioner's Office and certified by the League President and the Players Association. Selections shall be made from the Eligible List.

2. At the Selection Meeting, clubs shall draft in inverse order of their standing in the championship season just concluded. Percentage of games won and lost shall determine the order within each League without respect to divisions. In 1976, the League drafting first shall be determined by lot and Leagues shall alternate choices thereafter. In succeeding years, the League that selected second in the previous year shall select first.

3. Clubs may continue to select negotiation rights to players listed as eligible as long as there are players they wish to negotiate with; except that when a player has been selected by 12* clubs he may not be selected by additional clubs and shall be removed from the Eligible List. Clubs may only negotiate with and sign players whom they have selected in a negotiation draft.

4. Regardless of the number of players for whom they have drafted negotiation rights, Clubs shall be limited in the number they may subsequently sign to contracts. The number of signings permitted shall be related to the number of players on the Eligible List. If there are 14 or less players on the Eligible List no club may sign more than one player. If there are from 15 - 38 players on the Eligible List, no club may sign more than 2 players. If there are from 39 -62 players on the Eligible List, no club may sign more than 3 players. Etc.

5. Irrespective of the provisions of paragraph 4 above:

*Thirteen beginning in 1977. In addition, the player's original club shall also be granted negotiation rights to the player, if it so desires.

Produced by The Berkeley Electronic Press, 1977

(a) Any club shall be eligible to sign at least as many players as it may have lost through players having obtained their free agency at the close of the season just concluded . . . .

(b) No player shall be prevented from negotiating with (and potentially signing with) at least 6 clubs; or if less than 6 clubs have selected negotiation rights with him, then the number of clubs that have selected negotiation rights with him. Should the signing of other players reduce the number of clubs eligible to sign a particular player below 6 (or below the number of clubs drafting him if less than 6), then the Commissioner shall make an additional club(s) eligible to sign such player. The additional club(s) shall be determined by lot from teams that (1) originally drafted negotiation rights with the player but became ineligible to sign the player because they had exhausted the limit of player signings permitted them under paragraphs 4 and 5 above, and (2) indicate at the time of drawing lots that they continued to be interested in signing such player. If the above procedure fails to restore the number of clubs eligible to sign the player to 6 (or the number of clubs drafting him if less than 6), then the additional clubs shall be determined by lot from all the remaining clubs which, at the time of drawing, indicate interest in signing the player, in order to restore the number of clubs.

(c) If less than 2 clubs selected negotiation rights with a player on the Eligible List, then such player shall be free to negotiate with all clubs and his signing shall not be considered with respect to the limitation on signings per club, and the awarding of a (free agent draft) choice shall not be made.

6. Any player who, under these procedures, is unsigned on February 15 may elect to resubmit himself to a new drawing of lots by the clubs for the selection of negotiating rights with him. Negotiating rights shall be granted to 4 clubs determined by lot from clubs that indicate at the time of the drawing that they are interested in signing such player. Of the 4 clubs so determined, two shall be from each League, except, in the event less than two clubs from one League indicate interest, more than two clubs may be de-

termined from the other League in order that a total of 4 clubs are determined.

7. Any club drafting negotiation rights to and signing a player under this Agreement may not sell his contract for cash consideration until after June 15 of the next succeeding season. However, such contract may be assigned for other player contracts prior to June 15 if the player gives written consent to such transaction.

APPENDIX B
National Hockey League
By-Law Section 9A
Free Agents and Equalization
(Adopted November 17, 1973)

Free Agents

1. A player who becomes a "free agent" pursuant to subsection 2 or 3 of this By-Law shall have the right to negotiate and contract with any Member Club or with any club in any other league.

2. A player who enters into a 1974 Form Standard Player's contract shall have the right to become a free agent in accordance with the terms of Section 17 of said contract and in accordance with the Player's Option contract to which said Section 27 refers.

3. Any other player under contract to any Member Club on the date of this By-Law is adopted, the final year of whose contract ends on or after September 30, 1974, shall become a free agent on June 1 of the final year of that contract, except that any such player whose contract is a 1972 Form Standard Player's contract whose final year ends on September 30, 1974, shall become a free agent on June 1, 1975. For purposes of this subsection 3, the "final year" of a contract shall be the last year of its fixed term specified in Section 1 of said contract, including, however, any period added to that term by any addendum or exercised special option contracted for by the Member Club and player.

4. The foregoing subsection 3 shall not be construed to derogate in any way from the rights of any player under any contract but constitutes instead a waiver of any and all rights by each Member Club under the contracts to which said subsection is applicable to require the services of players for periods beyond those set out in said subsection.

Produced by The Berkeley Electronic Press, 1977

Free Agent List

5. On or before May 15 in each year each Member Club shall deliver to the President a report in writing, by TWX, telegram or by mail, (which report shall remain confidential until the issuance of the Free Agent List described below), setting forth the name of each player under contract to it who, unless signed to a new contract with said Club prior to June 1 of that year, will become a free agent as of that date. Each Member Club shall also furnish to the President after May 15 of such year, by immediate TWX or telegram, information as to any change of status of any such player. The President shall, on June 1 of such year, issue to all Member Clubs a Free Agent List setting forth the names of all players he finds to be free agents as of such date, together with the name of the Member Club with which each such player was last under contract, and shall thereafter promptly issue such bulletins correcting, amending, or updating such list as may be necessary to ensure its accuracy and currency. Except during a period that a player's name remains on the Free Agent List, no Member Club other than the Club with which he was last under contract may sign a contract or negotiate with such player, directly or indirectly, without the prior written consent of the Member Club with which he was last under contract, or otherwise take any action which would violate Section 15 of these By-Laws.

Obligation to make equalization payment

6. Each time that a player becomes a free agent and the right to his services is subsequently acquired by any Member Club other than the club with which he was last under contract or by any club owned or controlled by any such Member Club, the Member Club first acquiring the right to his services, or owning or controlling the club first acquiring that right, shall make an equalization payment to the Member Club with which such player was previously under contract, as prescribed by subsection 8 of this By-Law. Each Member Club may acquire the right to the services of as many free agents as it wishes, subject to the provisions of subsection 9 of this By-Law.

Determination of Equalization Payment

Purpose

7. The purpose of the equalization payment shall be to compensate a player's previous Member Club fairly for loss of the right to his services when that player becomes a free agent and the right

to his services is acquired by another Member Club or a club owned or controlled by another Member Club.

Procedure

8. (a) The Member Club acquiring the services of a free agent, or owning or controlling the club acquiring such services, shall immediately notify the player's previous Member Club and the President of that fact by TWX or telegram. The equalization payment shall be determined, if possible, by mutual agreement of the two Member Clubs involved. If no such agreement is reached within three business days after the date on which the player's services are acquired, each of the Member Clubs involved shall within two additional business days submit by TWX or telegram its proposal for an equalization payment to a neutral arbitrator selected from time to time by majority vote of the Board of Governors of the League.

(b) Within two business days after the deadline for receipt of the Clubs' proposals, the arbitrator shall, unless notified by both Clubs in writing, by TWX or by telegram that they have reached agreement on the equalization payment, select without change one of the proposals submitted to him, and his determination shall be final and not subject to review.

(c) The Clubs' proposals and the arbitrator's determination of equalization must be limited to:

(i) the assignment of a contract or contracts for the services of a player or players binding upon such player or players for at least the next season; and/or

(ii) choices in any intra-league and/or amateur drafts to be held at any time subsequent to such proposal and/ or unsigned draft choices or negotiation nominees; and/or

(iii) cash.

In making his selection the arbitrator shall be governed by the policy that cash shall be used for equalization purpose only as a last resort.

(d) The contracts of all players under contract to the acquiring Club at the time a free agent is acquired shall be available for equalization purposes.

(e) The cost of the arbitrator shall be borne by the League.

(f) To facilitate a good faith effort to reach agreement on the equalization payment, the acquiring Club shall furnish to the Club entitled to that payment such information as may reasonably be required with respect to any player the assignment of whose contract is proposed by either party as an equalization payment, in whole or in part, including, but not limited to the salary, bonus, and other compensation of such player, a copy of the player's contract, and any adverse information with respect to the physical, mental, or emotional condition of such player.

(g) The details of the procedure to be followed in the event arbitration is required shall be set forth in the agreement entered into by the League and the arbitrator.

Satisfaction of Equalization Obligation

9. No Member Club, or any club owned or controlled by such Member Club, shall be entitled to sign or acquire the right to the services of any free agent until it has satisfied in full its equalization obligation under these By-Laws as to each other free agent, the right to whose services it has acquired, by assigning the player contracts and/or draft rights and otherwise consummating the equalization payment required by mutual agreement or by arbitration. It shall be the responsibility of the acquiring Club to notify the President that it has satisfied its equalization obligation.

10. The President shall disallow the right of any acquiring Member Club to use the services of any signed free agent if he has not received the notice specified in subsection 9 or otherwise finds that the equalization payment for that player or for any other free agent previously signed has not been fully satisfied by said Member Club in accordance with this By-Law.

Reprinted from *1977 Inquiry, supra* note 48 at 282-84.

APPENDIX C
World Hockey Association
Uniform Player's Contract
Article 16

16. Player Negotiations.

16.1 If the Player and the Club fail to sign a new contract for the season following the termination of this contract before June 1, the arbitration procedure outlined in this Paragraph 16 shall automatically go into effect.

16.2 *Arbitration Procedure*

16.2.1 On or before July 4 following the last playing season of this contract, in the event the Player and the Club fail to enter into a new contract, the Player and the Club shall each appoint one person to hear and determine the dispute preventing the signing of such new contract. If these persons are able to reach agreement on or before July 15 of the year of the dispute, no further proceedings are necessary. If they are unable to reach agreement on or before that date, then they shall immediately select a third impartial arbitrator whose decision shall be reached on or before July 31 of the year of the dispute.

16.2.2 Player and Club agree to arbitrate in good faith.

16.2.3 If the Player and Club agree that the decision of the impartial arbitrator is fair, a new contract will be executed embodying the terms of his decision.

16.2.4 If either the Player or the Club disagree with the decision of the impartial arbitrator, they may refuse to enter into a contract and the player automatically enters into a special "secondary draft" pool on August 1 of the year of the dispute.

16.3 *Secondary Draft.*

16.3.1 Once a Player enters the secondary draft pool, he may not sign a contract with any other club until he is drafted.

16.3.2 The League will hold, in accordance with its normal draft procedure, a "secondary draft" on or about

Produced by The Berkeley Electronic Press, 1977

August 15 of each year. Teams will draft in the same order as in the normal yearly draft.

16.3.3 The Club with which the Player was under contract immediately prior to the secondary draft may not draft the Player in this manner.

16.4 *Subsequent Secondary Drafts.*

In the event the Player and the Club that drafted him in the secondary draft are unable to reach an agreement by September 1, the Player will enter a pool for a new secondary draft, the date of which will be determined by the League President.

16.5 *Costs of Arbitration.*

The costs of the arbitration, including costs expended by the President and his staff if his services are required, will be borne equally by the Club and the Player hereby authorizes his employing club to deduct his share of the expenses from the first payment due the Player under the next contract he signs.