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Powell v. National Football League: The Eight Circuit Sacks the National Football League Players Association

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POWELL V. NATIONAL FOOTBALL LEAGUE: The Eighth Circuit Sacks the National Football League Players Association

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I. INTRODUCTION: EMPLOYMENT RELATIONSHIP IN NFL

Imagine the following scenario: the United States Bar Association ("USBA") has driven the American Bar Association out of existence and assumed sole and absolute control over entry into the legal profession. The USBA has divided the country into specific regions and has adopted rules regulating the competition for and the availability of legal services in each region.

You have just graduated first in your class from Harvard Law School. The USBA has rewarded you for your extraordinary academic performance by assigning you to a legal aid clinic in North Dakota, a state located in a region which suffers from a scarcity of quality legal services for the indigent. You are offered a yearly salary of $50,000 and must, according to USBA regulations, either accept the offer or engage in an occupation unrelated to the practice of law during the coming year. In the event that you choose to engage in a different occupation, the USBA will re-assign you next year to practice law in another region that needs and desires your services. If, on the other hand, you choose to accept the offer, that region will, regardless of the term of your contractual arrangement, retain perpetual rights to your services as well as the right to fire you at any time if in its sole discretion it judges your skill to be unsatisfactory as compared to other lawyers.

If the above scenario sounds unimaginable, un-American, and unlawful, be thankful that you practice law or some other occupation rather than "play" professional football because this scenario is in fact an occupational reality for those who make a living from professional football.[1] My experience with the employment relationship in the National Football League ("NFL") is more than academic. The harshness of the NFL's system became apparent to me between 1984 and 1986 during my negotiations with the Chicago Bears on behalf of a player named Al Harris.

Harris had been the ninth player selected in the first round of the

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1. *See* 1982 Collective Bargaining Agreement Between the National Football League Players Association and the National Football League Management Council art. XV (Dec. 11, 1982) [hereinafter 1982 Collective Bargaining Agreement]. On February 1, 1989, the NFL unilaterally implemented the Plan B modification of art. XV. *See infra* notes 98-103 and accompanying text.

1979 NFL draft and had signed a series of five one-year contracts with the Bears. The contract for the fifth year contained an option clause which, in effect, bound Harris to the Bears for a sixth year. The option clause, if exercised in 1984, would pay Harris 120% of his base salary for the 1983 NFL season, the fifth year of his contractual commitment with the Bears.[2]

By 1982 it became apparent that the contractual arrangement between Harris and the Bears was particularly advantageous to the team. Unfortunately for Harris, the team's good fortune became his misfortune. The length of his contractual commitment eclipsed the escalation of salaries which occurred between 1982 and 1984 as a result of both the 1982 Collective Bargaining Agreement[3] and the random bidding war for players between the NFL and the United States Football League ("USFL"). The former was significant because the 1982 agreement raised minimum salaries to levels that created upward pressure on all subsequently negotiated contracts.[4] The latter was particularly significant to Harris because it took the USFL two years to figure out that defensive players, even stars, would increase neither gate receipts nor television ratings. By 1985 much of the bidding for players between the two leagues had ceased as the new league realized that large contracts for stars were for the most part financially unsound. The net result for Harris, a player who failed to benefit from either of these inflationary pressures, was that his salary in the final year of his contractual commitment with the Bears (1984) was grossly below the market for a six year veteran who started every game during the 1984 season.

Harris' contractual situation in 1984 was particularly noteworthy because of the well-publicized contract of Wilbur Marshall, a rookie linebacker selected by the Bears earlier that year in the first round of the NFL amateur draft. Unlike Harris, Marshall did benefit from the USFL's existence. A phantom offer from the USFL Tampa Bay Bandits[5] triggered an immediate reaction from the Bears who, fearful of losing Marshall, signed him within days after the 1984 draft to a series of four one-year contracts with a reported gross value of approximately $2.8 million. Marshall and Harris played the same position, and during the 1984 season, Marshall's first and Harris' sixth in the NFL, Marshall sat on the bench while Harris played virtually every defensive play and enjoyed the best year of his career.

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2. Harris was represented by his father and another individual in the negotiations with the Bears for this series of contracts.

3. *See* 1982 Collective Bargaining Agreement, *supra* note 1, art. XXII. This article raised minimum salaries significantly above the levels established in the 1977 agreement between the parties. 1977 Collective Bargaining Agreement Between the National Football League Players Association and the National Football League Management Council art. XXII (Mar. 1, 1977).

4. The average salary in the NFL in 1982 was approximately $90,000. By 1985 the average salary had reached almost $200,000. This information is available at the National Football League Players Association.

5. Telephone interview with Bruce Allen, General Manager of the USFL Arizona Wranglers at the time Marshall was drafted. (Dec. 15, 1989).

Although Harris' contractual commitment with the Bears ended on February 1, 1985, he was not free to decide where and for how much he would play in 1985. Instead, Harris' future in the NFL was controlled by the right of first refusal/compensation system contained in article XV of the 1982 Collective Bargaining Agreement.[6] Under that system, Harris was permitted to accept offers from other teams between February 1, and April 15, 1985. The Bears, however, had the opportunity either to match the offer and retain Harris or to receive draft choice compensation from the other team. The compensation, which was based on the new team's offer and the number of years Harris had been in the NFL, raised the price of obtaining Harris' services to a level that completely deterred new teams from making offers to Harris. In fact, this result was predictable. Between 1977, the year that the NFL's right of first refusal/compensation system was first implemented, and 1984, the final year of Harris' contractual commitment with the Bears, only one player changed teams under article XV of the 1977 and 1982 Collective Bargaining Agreements.[7] Not surprisingly, Harris received no offers and his right to talk to other teams ended on April 15, 1985.

Subsequent negotiations between Harris and the Bears were unproductive. The Bears rejected Harris' demands, literally offering him a small fraction of Marshall's contract. In June 1985, the Bears granted Harris written permission to speak to other teams concerning the possibility of working out a trade with the Bears. Several teams expressed interest in Harris, but no trade materialized; and, in August 1985, the Bears revoked their permission for Harris to speak with other teams.

As the 1985 season approached, Harris was faced with a choice: he could either relinquish his demands and accept the Bears' offer or he could forego playing football in 1985. He rejected the Bears' offer; and, unable to negotiate a contract with any other NFL team without the Bears' permission, he was unemployed while the Bears compiled a 15-1 record en route to Super Bowl XX. Moreover, the Bears not only won the Super Bowl without Harris, but Marshall, Harris' replacement, was commended by the Bears' management for his stellar performance during the 1985 season.

Unfortunately for Harris, his willingness to sacrifice a year's employment and income had no impact on his ability to seek employment with other NFL teams. The Bears' rights to Harris under the NFL's right of first refusal/compensation system were perpetual. In other words, Harris was subject to the same system in 1986 that restricted his freedom in 1985. After sitting out an entire year, he was in no better position to seek employment with another team that might value his services more highly than the Bears. In fact, his bargaining position appeared to be even more tenuous in 1986. He was now faced with the

6. 1982 Collective Bargaining Agreement, *supra* note 1.

7. *See* Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L. J. 339, n. 57. (citing Powell v. NFL, 678 F. Supp. 777, 780 (D. Minn. 1988), *rev'd*, 888 F.2d 559 (8th Cir. 1989)).

decision either to sit out another season, an alternative that almost certainly would have ended his career, or accept an offer from the Bears, a team that won the Super Bowl without him and who now valued his services as a back-up rather than as a starter. He would now feel both edges of the NFL's restrictions on free agency. He not only was unable to have his salary determined in a competitive market, but he also was unable to seek employment with a team for which he could play on a regular basis.

Harris' situation was unique only because he chose an alternative that few players choose — he sat out an entire season. Every year, hundreds of players whose contractual commitments with their teams have expired are subjected to the NFL's right of first refusal/compensation system.[8] Virtually all players, recognizing that sitting out will diminish a significant portion of their career earnings without increasing their bargaining leverage or ability to negotiate with other teams, ultimately accept their team's offer.

II. CURRENT DISPUTE BETWEEN NFLPA AND NFL.

The collective bargaining agreement containing the right of first refusal/compensation system that restricted Harris' ability to negotiate and contract with teams other than the Bears expired on August 31, 1987.[9] Negotiations between the National Football League Players Association ("NFLPA") and the National Football League Management Council ("NFLMC") for a new agreement were unproductive; and, in October 1987, the NFLPA filed an antitrust action challenging the continued imposition by the NFL of its restrictions on veteran free agents.[10] In response to motions by both parties, a federal district court in Minnesota held that the non-statutory labor exemption immunized the restrictions in the 1982 Collective Bargaining Agreement from antitrust attack until these restrictions became an issue over which the parties bargained to impasse.[11] A subsequent ruling by the Minnesota federal district court that the parties had in fact reached impasse exposed the NFL's right of first refusal/compensation system to antitrust scrutiny.[12] The Eighth Circuit, however, granted the NFLMC's petition for interlocutory appeal of the district court's ruling regarding the expiration of the labor exemption.[13] On November 1, 1989, the Eighth Circuit reversed the district court, ruling that the non-statutory labor exemption extended beyond impasse and that the antitrust laws were inapplicable to the circumstances of the NFLPA-NFL dispute.[14] On January 17, 1990, the Eighth Circuit issued an order denying the NFLPA's petition for rehear-

8. *Id.* at n. 44 (citing *Powell*, 678 F. Supp. at 779-81).
9. 1982 Collective Bargaining Agreement, *supra* note 1, art. XXXVIII § 2.
10. *Powell*, 678 F. Supp. 777.
11. *Id.* at 788-89.
12. Powell v. NFL, 690 F. Supp. 812, 814 (D. Minn. 1988).
13. Petition for Permission to Appeal and Memorandum in Support of Petition, Powell v. NFL, No. 89-5091, (8th Cir., granted Feb. 24, 1989).
14. Powell v. NFL, 888 F.2d 559 (8th Cir. 1989), *petition for cert. filed*, No. 89-1421 (Mar. 12, 1990).

ing and suggestion for rehearing *en banc*.[15]

The Eighth Circuit's decision, which I have been asked to critique, does not address the merits of the players' claim that the NFL's right of first refusal/compensation system described above and the modified version of that system unilaterally implemented by the NFL on February 1, 1989, violate federal antitrust laws. The court considered only the threshold issue of the scope of the non-statutory labor exemption. More specifically, the court addressed only the question of whether and to what extent the non-statutory labor exemption, an exemption that immunizes terms in a collective bargaining agreement from antitrust attack, survives the expiration of the collective bargaining agreement.[16]

III. BACKGROUND

The purpose of federal antitrust law is to promote competition.[17] To this end, the Sherman Act,[18] enacted in 1890, was designed to regulate commercial activity.[19] In the years immediately following the enactment of the Sherman Act, however, courts interpreted the Act's general language to apply not only to commercial activity, but also to combinations among employees, or unions, as well as to various types of concerted union activity that interrupted the free flow of commercial activity.[20]

Application of the Sherman Act to labor combinations impeded the development of unions, a result not intended by Congress. Thus, Congress included two provisions in the 1914 Clayton Act to reduce the impact of the antitrust laws on the labor movement.[21] Section 6 of the Clayton Act provides that labor unions are not combinations in restraint of trade.[22] Section 20 restricts the injunctive power of courts in labor disputes to certain enumerated types of union organizational activities.[23]

The Supreme Court interpreted section 20 narrowly and many union activities were, after 1914, still subject to antitrust attack and the

15. Order Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*, Powell v. NFL, No. 89-5091, (8th Cir. Jan. 17, 1990) (LEXIS, Genfed library, Courts file).

16. *Powell*, 888 F.2d 559.

17. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (" 'The Sherman Act is designed to promote national interest in a competitive economy . . . .' ") (quoting American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968)); Fishman v. Estate of Wirtz, 807 F.2d. 520, 536 (7th Cir. 1986) ("[The] Court . . . has instead stressed that the antitrust laws seek to protect competition.").

18. 15 U.S.C. §§ 1, 2 (1988).

19. Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 803-06 (1945).

20. R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 3 (1976).

21. Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1988); 29 U.S.C. § 52 (1982)).

22. 15 U.S.C. § 17 (1988).

23. 29 U.S.C. § 52 (1982).

injunctive power of the courts.[24] The Norris-LaGuardia Act,[25] enacted in 1932, expanded the protection given to union activity by further restricting the use of injunctions in labor disputes.[26] Together, the relevant Clayton Act and Norris-LaGuardia Act provisions constitute the statutory labor exemption. This exemption protects unions and certain types of union activity from antitrust liability.[27]

The statutory labor exemption does not immunize from antitrust attack agreements between labor and management.[28] The courts, however, have recognized that the application of antitrust laws to labor-management agreements would undermine the collective bargaining process mandated by Congress in the National Labor Relations Act ("NLRA").[29] Thus, courts have created a common law non-statutory exemption to immunize labor-management agreements.[30]

The scope of this non-statutory labor exemption is not precisely defined.[31] The Supreme Court has not articulated a general standard for applying the labor exemption to union-employer agreements. More specifically, the Court has not addressed the issue of whether the labor exemption immunizes provisions in an expired agreement.

Furthermore, the Court's prior decisions addressing the labor exemption do not provide any clear guidelines with which to resolve this question within the context of professional sports. In rendering its earlier decisions, the Court faced and responded to the question of whether the labor exemption would immunize certain union-proposed restraints. In those cases, the union asserted the labor exemption to escape antitrust liability. The plaintiff was either the employer or a third party challenging a union-proposed restraint embodied in an unexpired agreement.[32] In the current NFL dispute, as well as in each of the other player restraint cases in which the application of the labor exemption was at issue, the union is the plaintiff, and the NFL has raised the ex-

24. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 471-74 (1921) (secondary boycott not immunized from antitrust attack because defendant employees lacked direct employment relationship with company which was ultimate object of boycott).

25. Ch. 90, 47 Stat. 70, 71-73 (1932) (codified at 29 U.S.C. §§ 104, 105, and 113 (1982)).

26. *See, e.g.*, Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621-22 (1975) (statutory enactments exempt specific union activities from operation of antitrust laws).

27. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 501-03 (1940) (federal labor policy codified in statutory exemption immunizes inherently anticompetitive collective activities by employee).

28. *See* Bridgeman v. NBA, 675 F. Supp. 960, 964 (D.N.J. 1987) (citing United States v. Hutcheson, 312 U.S. 219 (1941)).

29. 29 U.S.C. §§ 151-69 (1982 & Supp. V 1987).

30. *See, e.g.*, *Connell*, 421 U.S. at 621 (The nonstatutory exemption has as its source the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions.); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965) ("[The] [e]xemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws.").

31. *See* J. WEISTART & C. LOWELL, THE LAW OF SPORTS 525 (1979).

32. *See Id.* at 526 (citing *Connell*, 421 U.S. 616); United Mine Workers v. Pennington, 381 U.S. 657 (1965); *Jewel Tea*, 381 U.S. 676.

emption to immunize its own proposed restraints.[33]

This distinction is significant in light of the original purpose of the labor exemption. Congress created the statutory labor exemption to protect unions and their legitimate organizing activities from antitrust attack.[34] The purpose of the non-statutory labor exemption, which is derived from the statutory exemption, is to effectuate Congress' limited objective as expressed in the statutory exemption.[35] To protect the union's role in collective bargaining, both parties to the agreement must be protected from antitrust liability. As a result, the non-statutory exemption affords employers derivative protection from the antitrust laws.[36] Nevertheless, the exemption is aptly denominated the "labor" rather than "management" exemption.[37] The original purpose of the exemption — to benefit labor — endures and has undoubtedly influenced the Supreme Court's decisions.

The prior player restraint cases within the context of professional sports are also of limited precedential value in the current dispute. In each of the earlier cases the challenged restraints were unilaterally implemented prior to the formation of the players association. The restraints were initially incorporated in a collective bargaining agreement while the union was in its infancy and too weak to resist management's demands. The willingness of courts to recognize the union's infancy as a factor in determining the scope of the labor exemption factually distinguishes the current dispute from the earliest player restraint cases. More important, no previous court has addressed the legal effect of an expired agreement.[38] In each of the earlier player restraint cases, of course, the court addressed the same general policy choice raised in the current dispute: whether federal labor policy encouraging collective bargaining overrides the federal antitrust policy prohibiting unreasonable restraints of trade. The focus of the current dispute, however, is more specific: whether the federal labor policy encouraging collective bargaining compels courts to exempt restraints contained in an expired agreement. This specific policy choice was not addressed in the prior cases.[39]

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33. *See* Mackey v. NFL, 543 F.2d 606, 609 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Robertson v. NBA, 389 F. Supp. 867, 884-86 (S.D.N.Y. 1975) (challenge by NBPA), *aff'd in part and rev'd in part sub nom.* California State Council of Carpenters v. Associated General Contractors 648 F.2d 527 (9th Cir. 1980), *rev'd* 459 U.S. 519 (1983).

34. *See Jewel Tea*, 381 U.S. at 700-13; Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 801-08 (1945); United States v. Hutcheson, 312 U.S. 219, 229-37 (1941).

35. *Connell*, 421 U.S. at 622.

36. J. WEISTART & C. LOWELL, *supra* note 29, at 527.

37. Garvey, *Foreword to The Scope of the Labor Exemption in Professional Sports: A Perspective on Collective Bargaining in the NFL*, 1989 DUKE L.J. 328, 337-38.

38. In *Mackey*, the only challenge to restraints in an expired agreement, the court withheld the exemption because of the absence of bona fide, arm's-length negotiations. 543 F.2d at 615-16. The court specifically noted that its decision did not reach the question whether the exemption survived the expiration of the agreement. *Id.* at 616 n.18.

39. *Mackey*, however, does offer some guidance. The *Mackey* court held that the labor exemption immunizes player restraints provided those restraints are the product of bona fide, arm's-length negotiations. *See supra* note 38. In other words, union approval seems

IV. IMPASSE TEST

In the current dispute between the NFLPA and NFL, the district court held that the non-statutory labor exemption expired upon impasse.[40] The lower court reasoned that impasse "respects the labor law obligation to bargain in good faith over mandatory bargaining subjects following expiration of a collective bargaining agreement" and "promotes the collective bargaining relationship and enhances prospects that the parties will reach a compromise on the issue."[41] At the same time, the court reasoned that its impasse standard properly accommodated competing antitrust policies: "[b]y allowing a labor exemption to survive only until impasse, the law will not insulate a practice from antitrust scrutiny, but will only delay enforcement of the substantive law until continued negotiations over the challenged provision become pointless."[42]

The appellate court prefaces its rejection of the district court's impasse standard with a discussion of various issues that the court deems germane to the scope of the non-statutory labor exemption. Among those issues are the extent to which the framework of the NLRA precludes judicial intervention and application of the antitrust laws in labor disputes, and the offsetting obligations, remedies, and weapons available under federal labor law to parties involved in a dispute over terms and conditions of employment.[43] These issues, along with the underlying purpose of the labor exemption to accommodate competing labor and antitrust policies, are discussed below.

A. *Judicial Intervention in Labor Disputes*

The Eighth Circuit correctly recognizes that "[t]he labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts."[44] Similarly, the court correctly recognizes "that disputes over employment terms and conditions are not the central focus of the Sherman Act."[45] Yet, the court's recognition of these principles does not warrant its ultimate decision. These principles simply do not control the outcome of the current dispute between the NFLPA and NFL.

When it enacted the federal labor statutes, Congress clearly intended to limit judicial involvement in labor disputes. The relevant provisions of the Clayton Act and the Norris-LaGuardia Act preclude courts from enjoining various types of concerted activity in labor disputes.[46]

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to be a prerequisite to the application of the exemption; the mere potential for bargaining is not enough to immunize the restraints, and the exemption will not immunize restraints unilaterally implemented by management.

40. *Powell*, 678 F. Supp. at 788-89.
41. *Id.* at 789.
42. *Id.*
43. *Powell*, 888 F.2d 559.
44. *Id.* at 567.
45. *Id.* at 566.
46. *See supra* notes 21-27 and accompanying text.

The purpose of the National Labor Relations Act is to promote industrial peace through collective bargaining[47] and its procedural framework compels parties involved in a collective bargaining relationship to make an honest effort to resolve their differences at the bargaining table and to seek redress for unfair labor practices from the National Labor Relations Board ("NLRB") rather than the courts.[48]

Asking a court to enjoin protected concerted activity, redress an unfair labor practice or invalidate a collectively bargained term of employment contained in an unexpired agreement, however, is certainly distinguishable from seeking a declaration of the parties' respective rights under the antitrust laws regarding provisions in an expired collective bargaining agreement. The above legislation notwithstanding, no authority exists to support an argument that a determination of the parties' rights under federal antitrust law is precluded in the current dispute. Judicial resolution of the underlying antitrust claim in the NFLPA-NFL dispute simply will not result in the type of judicial involvement in the bargaining process with which Congress was concerned.

The purpose of limiting judicial intervention in labor disputes is to preserve the parties' right to arrive at their own agreement.[49] Certainly, judicial condemnation of the challenged restraints may benefit the union at the bargaining table — it has the potential to shape the terms of the agreement in the same manner that a declaration of the parties' respective rights under the labor laws or any other federal statute will shape the agreement. As the court admits, however, the challenged restraints involve mandatory subjects of bargaining. Thus, the parties have an obligation to bargain over the restraints, regardless of the outcome of the current litigation.[50] Whether the court condemns the challenged restraints or instead concludes that they are immunized from antitrust attack, the parties will ultimately determine in what form, if any, the restraints will continue to exist.

Much of the language cited by the Eighth Circuit to support the proposition that the collective bargaining framework mandated by the NLRA automatically precludes antitrust review suggests that the court confuses the distinction between the statutory and non-statutory labor exemption. The court cites *Associated General Contractors of California v. California State Council of Carpenters*,[51] in which the Supreme Court noted

47. 29 U.S.C. §§ 151-69 (1982 and Supp. V 1987). Section 151 reads in pertinent part: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . ."

48. *See, e.g.*, Wood v. NBA, 809 F.2d 954, 962 n.5 (2d. Cir. 1987) ("Any claim of unreasonable bargaining behavior must be pursued in an unfair labor practice proceeding charging a refusal to bargain in good faith, . . . not in an action under the Sherman Act.") (citation omitted).

49. *See, e.g.*, Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 150 n.11 (1976); NLRB v. Insurance Agents' International Union, 361 U.S. 477, 488-89 (1960).

50. *See* 29 U.S.C. § 158(a)(5), (b)(3), (d) (1982).

51. 459 U.S. 519 (1983).

that Congress developed " 'a separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions.' "[52] The *Powell* court also cites *Amalgamated Meat Cutters Local Union No. 576 v. Wetterau Foods, Inc.*,[53] a case in which "employer agreements adopted in response to a strike caused plaintiffs to be denied employment."[54] In that case, the Eighth Circuit determined that the challenged employer conduct, the replacement of striking workers, was lawful conduct under federal labor law and thus could not constitute a violation of antitrust law: " 'the magnitude and nature of any restraint of trade or commerce in this case directly follows from the sanctioned conduct [and] [t]he agreement had no anticompetitive effect unrelated to the collective bargaining negotiations.' "[55] Finally, the *Powell* court cites *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America*,[56] where the Fifth Circuit held that an employer's refusal to deal with a union with respect to terms of employment was governed by the NLRA and not the Sherman Act.

In each of the above cited cases, reference is made to employer or employee conduct. The types of conduct shielded from antitrust scrutiny in the above cases, however, have very little to do with the non-statutory labor exemption. It is self-evident that union organizational and representational activities, the replacement by an employer of striking workers, or an employer's refusal to deal with a union concerning terms of employment are not vulnerable to antitrust attack. A union's organizational activities fall within the scope of both the statutory labor exemption and the NLRA.[57] Similarly, the replacement of striking workers or an employer's refusal to bargain with a union is conduct governed by the NLRA and not the Sherman Act.[58]

In essence, the court, by relying on the above types of conduct and activities to conclude that the challenged restraints are immune from antitrust attack, equates the right to form a union and engage in various concerted activities, protected under the Clayton,[59] Norris-LaGuardia[60] and National Labor Relations[61] Acts, with the mere potential to bargain over mandatory subjects. This analysis suggests that the exemption would apply by virtue of the union's existence from the moment of union certification. Such an interpretation completely eliminates the distinction that courts consistently have recognized between the statutory and non-statutory labor exemptions. It completely ignores the fact

52. *Powell*, 888 F.2d at 566 (quoting *Associated Gen. Contractors*, 459 U.S. at 539-40).
53. 597 F.2d 133 (8th Cir. 1979).
54. *Powell*, 888 F.2d at 566 (citing *Wetterau Foods*, 597 F.2d 133).
55. *Id.* (quoting *Wetterau Foods*, 597 F.2d at 136).
56. *Id.* (citing *Prepmore Apparel*, 431 F.2d 1004, 1007 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971)).
57. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621-22 (1975) (statutory enactments exempt specific union activities from operation of antitrust laws); 15 U.S.C. § 17 (1988); 29 U.S.C. §§ 52, 104, 105, 113, and 159 (1982).
58. 29 U.S.C. § 158(a)(5) (1982).
59. 15 U.S.C. § 17 (1988); 29 U.S.C. § 52 (1982).
60. 29 U.S.C. §§ 104, 105, and 113 (1982).
61. 29 U.S.C. §§ 151-69 (1982 and Supp. V 1987).

that the non-statutory labor exemption evolved after Congress enacted the federal labor statutes because the courts recognized that those statutes authorized collective bargaining without immunizing restraints in collective bargaining agreements.[62] In fact, absolute judicial refusal to determine the parties' antitrust rights is inconsistent with the existence of the labor exemption. If judicial reluctance to shape the terms of an agreement precludes courts from resolving antitrust disputes, the labor exemption would be unnecessary. Courts would not have created the non-statutory labor exemption to immunize provisions from antitrust attack if the policy of judicial non-intervention already accomplished the same purpose.

B. *Remedies and Weapons Available under NLRA*

In rejecting the district court's impasse test, the Eighth Circuit essentially concludes that the NFLPA-NFL dispute is a labor rather than an antitrust dispute and, as such, should be resolved exclusively within the framework of the National Labor Relations Act.[63] The court, in reaching this conclusion, attaches great significance to the offsetting legal and economic weapons available before and after impasse under federal labor law through which the parties may seek resolution of their dispute.[64] To allow an action under the Sherman Act would, according to the Eighth Circuit, "improperly upset the careful balance established by Congress through the labor laws."[65]

The court notes the comprehensive array of obligations, weapons, and remedies which, upon expiration of the collective bargaining agreement, govern employer and employee conduct.[66] Both parties are obligated to bargain in good faith;[67] and, prior to impasse, management is obligated to maintain the status quo concerning terms contained in an expired agreement.[68] Upon impasse, management is permitted to make unilateral changes reasonably comprehended within its pre-impasse proposals.[69] At the same time, the union has a right to strike,[70] management has a right to lockout its employees,[71] and both parties have a continuing right to petition the NLRB to seek a cease and desist order prohibiting conduct constituting an unfair labor practice.[72] Thus, if management exceeds its labor law rights in implementing employment

62. *See* Bridgeman v. NBA, 675 F. Supp. 960, 964 (D.N.J. 1987) (citing United States v. Hutcheson, 312 U.S. 219 (1941)).

63. *Powell*, 888 F.2d at 566-68.

64. *Id.* at 566-67.

65. *Id.* at 567.

66. *Id.*

67. *Id.* at 565 (citing 29 U.S.C. § 158(a)(5), (d) (1982)).

68. *Id.* (citing Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund, 654 F.2d 625, 627 (9th Cir. 1981)).

69. *Id.* at 566-67 (citing Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 543 n.5 (1988)).

70. *Id.* (citing NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962)).

71. *Id.* at 567 (citing American Ship Building Co. v. NLRB, 380 U.S. 300 (1965)).

72. *Id.* (citing Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938)).

terms at impasse, the union must utilize NLRB procedures rather than institute an action under the Sherman Act.

The court suggests that the weapons, remedies and procedures sanctioned under the NLRA preclude antitrust scrutiny in the current dispute. According to the court, application of the antitrust laws is a weapon inconsistent with those weapons available under the NLRA as well as the federal labor policy fostering collective bargaining.[73] Thus, the court incorrectly implies that the weapons under the NLRA and the antitrust laws are mutually exclusive. This analysis blurs the distinction between federal labor policy and the policy underlying the labor exemption.

The NLRA was designed to eliminate "obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining."[74] Accordingly, the general policy underlying the weapons and remedies sanctioned by the NLRA and, in fact, all principles of federal labor law, is to promote collective bargaining. Two widely accepted labor law principles cited by the Eighth Circuit in *Powell* illustrate this point. For example, the prohibition against unilateral employer action fosters collective bargaining both by preserving mandatory items for the bargaining table and by protecting the union's status as exclusive bargaining representative.[75] Similarly, the specific purpose of the status quo doctrine, which requires employers to continue in effect provisions in an expired agreement, is to prevent management from undermining the union's bargaining authority.[76] The status quo doctrine is thus a logical extension of the prohibition against unilateral action regarding mandatory subjects of collective bargaining. Both principles are designed to protect and preserve the bargaining process.

To the extent that the labor exemption immunizes restraints contained in a bona fide arm's-length agreement, the labor exemption also fosters collective bargaining. Obviously, neither party would want to bargain away any benefit in exchange for a provision that could subsequently be challenged on antitrust grounds. To suggest, however, that this common purpose requires that the labor exemption continue beyond impasse for an indefinite period obscures the policy distinction between the exemption and other principles of federal labor law such as the status quo doctrine and the prohibition against unilateral employer action.

The foundational policy of the labor exemption, to reconcile antitrust and labor policies,[77] is clearly distinguishable from a policy

73. *Id.* at 566-68.

74. 29 U.S.C. § 151 (1982).

75. *See, e.g.*, NLRB v. Katz, 369 U.S. 736, 747 (1962).

76. *See, e.g.*, NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 485 (1960) (employer's unilateral change "tends to subvert the union's position as the representative of the employees"); Leeds & Northrup Co. v. NLRB, 391 F.2d 874, 877 (3d Cir. 1968) (employer's unilateral action "would undermine the union's authority by disregarding its status as the representative of the employees").

77. *See, e.g.*, Mackey v. NFL, 543 F.2d 606, 614 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

designed to protect the status of the exclusive bargaining representative or to preserve the bargaining process. Moreover, limiting the scope of the labor exemption is simply not inconsistent with the status quo doctrine or any other labor law doctrine designed to foster collective bargaining.

Enabling the union to enjoin unreasonable restraints after the agreement expires and at a point when immunizing the restraint no longer fosters collective bargaining does not interfere with federal labor policy. The labor exemption logically immunizes restraints of trade only as long as doing so fosters the bargaining process. An employer should not be permitted to use policy arguments to shield illegal provisions that the union no longer desires after a point in the negotiations when the labor exemption no longer furthers these policies. At that point, an employer should be exposed to antitrust liability. If the union has indicated unambiguously that it no longer is interested in continuing the challenged restraints, neither maintaining the status quo nor continuing the labor exemption will foster collective bargaining or protect the union's bargaining status.

The fact that the restraint was previously subject to good faith negotiations is relevant to an employer's obligation to maintain the status quo; previous good-faith negotiations are not relevant to the application or non-application of the labor exemption once the agreement has expired. At some point after the expiration of the agreement, an employer should be forced either to comply with the antitrust laws or to negotiate away benefits in return for the unreasonable restraint. The owners' argument that such a result creates an unjustifiable shift in bargaining leverage is difficult to accept. The union *should* have leverage to modify or eliminate an illegal restraint it determines is no longer in its best interest.

The court's conclusion that the exemption should continue beyond impasse is particularly remarkable in light of the limits of one of the doctrines the court relies on to justify its position. An employer's obligation to maintain the status quo does not continue indefinitely. The status quo doctrine requires an employer only to continue prior conditions of employment until the parties reach impasse.[78] After bargaining in good faith to impasse, an employer is free to implement unilateral changes as long as those changes are consistent with the latest proposals offered to the union prior to impasse.[79] Under the court's interpretation of the labor exemption, a union that has agreed to a restraint may not challenge that restraint on antitrust grounds even after the parties reach impasse and the employer is free to make unilateral change in employment conditions. Thus, an agreement to a particular *unreasonable* restraint for a finite period operates to waive, indefinitely according to the Eighth Circuit's decision, a party's rights under the antitrust laws. In

78. Bi-Rite Foods, Inc., 147 N.L.R.B. 59, 64-65 (1964).
79. *Id.* at 65.

short, the players' rights under the antitrust laws lie, after the agreement has expired, in the hands of the owners.

The Eighth Circuit's inability to distinguish the policy consideration underlying the labor exemption from those policies underlying the weapons of remedies available under the Act also led the court to confuse the labor exemption with impasse. Significantly, the court recognized impasse as a part of the bargaining process sanctioned by the NLRA. The court, citing the Supreme Court in *Charles D. Bonanno Linen Service, Inc. v. NLRB*,[80] characterized impasse as a " 'temporary deadlock' " in negotiations broken in almost all cases through a change of mind or the application of economic force. Moreover, the court viewed impasse as a weapon " 'brought about intentionally by one or both parties as a device to further rather than destroy the bargaining process.' "[81]

On the basis of this language, as well as the Supreme Court's conclusion that impasse was a recurring feature in the bargaining process not sufficiently destructive of group bargaining to justify unilateral withdrawal,[82] the court somehow concludes that the district court's impasse test treats impasse, a lawful stage of the collective bargaining process, as misconduct and, as a result, conflicts with federal labor law.[83] In other words, the court suggests that since impasse is a lawful stage of the bargaining process, exposure to antitrust liability upon impasse is inconsistent with the federal labor policy fostering collective bargaining. In essence, the court perceives exposure to antitrust liability as a penalty for impasse.

Impasse is a labor concept, rather than a concept intended to accommodate the intersection of conflicting antitrust and labor policies.[84] Impasse means that the bargaining process, intended to be protected by the exemption, has stopped. The significance of that occurrence is that the employer is then permitted to unilaterally implement pre-impasse proposals.[85] At that point, it is impossible to conclude that the restraint is the product of collective bargaining or that the restraint emerged from the bargaining process. It is simply a unilateral rule imposed by management.[86]

To continue to immunize a restraint unilaterally imposed by management after impasse raises a serious question concerning not only the purpose and scope of the labor exemption but also the objectives of

80. *Powell*, 888 F.2d at 564 (quoting *Bonanno Linen Service*, 454 U.S. 404 (1982)).

81. *Id.* (quoting *Bonanno Linen Service*, 454 U.S. at 412).

82. *Id.*

83. *Id.* at 566-68.

84. Bridgeman v. NBA, 675 F. Supp. 960, 965-67 (D.N.J. 1987).

85. *See* Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n.5 (1988) (citing Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), *aff'd sub nom.* American Fed'n of Television and Radio Artists v. NLRB, 395 F.2d 622 (1968)).

86. Order Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*, Powell v. NFL, No. 89-5091, at 7 (8th Cir. Jan. 17, 1990), (Lay, C.J., dissenting) (LEXIS, Genfed library, Courts file).

federal labor law. Was the labor exemption intended to protect the process or the results of collective bargaining?[87] Significantly, the federal labor laws do not require the parties to reach an agreement.[88] The Act mandates the collective bargaining process; it does not mandate an agreement between the parties. The labor exemption was intended to protect this process.

Continuing the exemption beyond the point in time when the process is likely to produce an agreement over a particular restraint and when permitting management to unilaterally implement the restraint is to protect the substance or results of the bargaining process rather than the process itself. This result redefines the labor exemption. The labor exemption protects the process only if its application is contingent upon consent or, in other words, if the restraint immunized emerges from the process of collective bargaining. The results of that process are protected only to the extent necessary to protect the process itself. How can the exemption be said to protect the process when its application immunizes restraints rejected by the other party after the process has stopped?

Ironically, the court itself cites Professor Weistart for the proposition that the NFLPA-NFL dispute ought to be resolved free of judicial intervention " 'where the union has had sufficient impact in shaping the content of the employer's offers' " and where the challenged restraint is " 'clothed with union approval.' "[89] Yet, according to this language, Weistart would appear to support a different conclusion than the Eighth Circuit reached in *Powell*. If the bargaining process comes to a standstill, can it be assumed that the union has had an impact shaping the content of the restraint? Moreover, how can a restraint over which the parties bargain to impasse and which is then unilaterally implemented by management be said to be clothed with union approval?

C. *Accommodation of Competing Labor and Antitrust Policies*

Application of the labor exemption is not appropriate just because its application is consistent with federal labor policy. The purpose of the labor exemption is to accommodate conflicting policies under federal antitrust and labor laws.[90] To foster collective bargaining, the courts have willingly subordinated antitrust policies and immunized otherwise unlawful restraints which are the product of bona fide arm's-length negotiations. Thus, the parties are free to resolve their differ-

87. This question was raised by Professor Roger Noll, Stanford University, in a telephone interview with the author (Dec., 1989).

88. *See* 29 U.S.C. § 158(d) (1982) (Bargaining collectively creates an obligation to meet and confer in good faith but "does not compel either party to agree to a proposal or require the making of a concession.").

89. *Powell*, 888 F.2d at 567 (quoting J. WEISTART & C. LOWELL, THE LAW OF SPORTS 590 (1979)).

90. *See, e.g.*, Mackey v. NFL, 543 F.2d 606, 613-14 (8th Circuit 1976), *cert. denied*, 434 U.S. 801 (1977) (availability of exemption "turns upon whether the relevant federal policy is deserving of pre-eminence over Federal antitrust policy").

ences over mandatory subjects through the bargaining process. Either party may determine that agreeing to a restraint or bargaining away rights under the antitrust laws, in return for certain benefits, is in its best interest. As long as the restraint primarily affects the parties to the agreement, their consent justifies immunization from the antitrust laws.[91]

In situations where the parties agree to a particular restraint in the course of good faith negotiations, the exemption is based on the parties' consent and is intended to preserve the integrity of the bargaining process. A union clearly should not be permitted to invalidate undesirable restraints contained in an unexpired agreement simply because it has second thoughts concerning those restraints or makes a mistake in judgment during the negotiations. To permit a union to attack such restraints would undermine the federal labor policy favoring collective bargaining by giving employers "no assurance that they could enter into an agreement without exposing themselves to an action for treble damages."[92] In effect, this approach would completely subvert federal labor law in favor of antitrust policies, a result clearly not intended by Congress or the courts.[93]

By the same token, however, management should not be permitted to unilaterally impose unlawful restraints indefinitely or after the union withdraws its consent simply because the union at one time agreed to the restraint. This result would also undermine the bargaining process. If this were the law, the union would be disinclined to accept any restrictions proposed by management.

In the current NFLPA-NFL dispute, the decision by the Eighth Circuit to continue to immunize the challenged restraints beyond impasse neither advances federal antitrust and labor objectives nor accommodates competing antitrust and labor policies. Instead, continuing to immunize the challenged restraints further reduces competition in the industry, a result inconsistent with federal antitrust laws, without promoting the policies of the NLRA. In fact, the court's decision to continue to immunize these restraints undermines the policies of the NLRA. Absent the risk of antitrust liability, the owners have no incentive to bargain with the union over the restrictions on free agency. Because of the lack of meaningful penalties under the NLRA, the NFL can avoid incurring costs by simply refusing to bargain over and continuing to impose the current system on the players.[94]

Within the context of the current NFL-NFLPA dispute, the proper accommodation of federal antitrust and labor law requires that the labor exemption expire certainly upon impasse if not simultaneously with the collective bargaining agreement.[95] As Judge Lay points out in his dis-

91. *Id.* at 614.
92. Wood v. NBA, 809 F.2d 954, 961 (2d Cir. 1987).
93. *Id.*
94. *See* Lock, *Employer Unfair Labor Practices During the 1982 NFL Strike: Help on the Way*, 6 U. BRIDGEPORT L. REV. 189 (1985).
95. For a discussion of the justifications for the expiration of the exemption simulta-

sent to the Eighth Circuit's denial for rehearing *en banc*, it is a complete *nonsequitor* to hold that the restraints are entitled to protection after impasse "as an accommodation of good faith bargaining."[96] The bargaining process intended to be protected by the exemption ceased when the parties reached impasse in negotiations over the restrictions on player services. At that point, management was entitled under federal labor law to unilaterally impose restrictions on free agency. In fact, that is exactly what management did. The court erred, however, in concluding that the restraints were, even after impasse, the product of collective bargaining by virtue of the fact that the union agreed to them in a prior agreement.

In this dispute, application of the antitrust laws after expiration of the agreement and upon impasse will not undermine federal labor law. The parties in this dispute were free to negotiate in good faith from the conclusion of the 1986 season until sometime after February 1, 1988, before potential free agents would accrue any damages under the antitrust laws. Thus, the parties had over a year to resolve this dispute through the collective bargaining process without the risk of antitrust liability. The parties were unable to reach an agreement during that time frame — the collective bargaining process had reached a standstill. As of January 1990, that standstill remains — absolutely no progress has occurred in the negotiations between the parties over the restrictions on player services. Perpetuating the exemption in this case completely negates the antitrust laws without fostering collective bargaining. Thus, no justification exists for not furthering the purposes of the antitrust laws.

V. EIGHTH CIRCUIT'S DECISION IN CURRENT DISPUTE

The right of first refusal/compensation system contained in the 1982 NFL-NFLPA Collective Bargaining Agreement and described above in the introduction virtually eliminated the movement of veteran free agents in the NFL. Between 1977 and 1988, only two players changed teams under that system.[97] Moreover, the system precluded competitive bidding among teams for players and, as a result, suppressed player salaries far below open market levels. An employment relationship of this nature, in which the employer retains perpetual rights over employees, is unimaginable in almost every industry other than professional sports and almost certainly violates federal antitrust law.

The modified right of first refusal/compensation system unilaterally implemented by management on February 1, 1989, permits each team

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neously with the expiration of the agreement, *see* Lock, *The Scope of the Labor Exemption in Professional Sports* 1989 DUKE L.J. 339.

96. Order Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*, Powell v. NFL, No. 89-5091, at 5 (8th Cir. Jan. 17, 1990) (Lay, C.J., dissenting) (LEXIS, Genfed library, Courts file).

97. *See* Affidavit of Richard A. Berthelsen, NFLPA General Counsel, at 13-14, *Powell*, 678 F. Supp. 777 (D. Minn. 1988) (No. 4-87-917).

to protect thirty-seven players.[98] The new system, referred to by teams and sports journalists as Plan B, subjects the thirty-seven "protected players" on each team to a right of first refusal system similar to the one contained in the 1982 agreement. Not surprisingly, not a single protected player changed teams under this system in 1989.[99]

Under the new system, unprotected players become unrestricted free agents, free to sign a contract with a new team without the compensation requirements applicable to protected players.[100] Two hundred and twenty-nine unprotected players changed teams in 1989 under Plan B.[101] A large majority of these players, however, were either aging veterans with large contracts, players recovering from serious injuries, or marginal players.[102] The top thirty-seven players on each team are still subjected to a right of first refusal/compensation system similar to the one contained in the 1982 agreement; and, accordingly, the NFLPA has also challenged the new system.[103]

The non-statutory labor exemption represents a judicial accommodation between competing congressional policies favoring collective bargaining under the NLRA and free competition in business markets under federal antitrust law.[104] Nonetheless, with the exception of its discussion of the holdings in *Mackey* and *Bridgeman v. NBA*, the Eighth Circuit in *Powell* largely ignores this well-established objective underlying the non-statutory labor exemption.[105] Instead, the court completely subverts antitrust law on the premise that immunizing restraints beyond impasse is somehow required under federal labor law.

The court cryptically states that its ruling does not entail that once a union and management enter into collective bargaining, management is forever exempt from the antitrust laws or that restraints on player services can never offend the Sherman Act.[106] At another point in the opinion, the court states that its reading of the authorities leads it to conclude that the NFL and players have not reached the point in negotiations where it would be appropriate to permit an action under the Sherman Act.[107] These statements by the court are remarkable in light of what has transpired since the 1982 Collective Bargaining Agreement expired on August 31, 1987.

Since that date the players have adamantly refused to agree to the

98. *See Scorecard*, SPORTS ILLUSTRATED, Feb. 13, 1989, at 7.

99. King, *Inside the NFL*, SPORTS ILLUSTRATED, Sept. 18, 1989, at 68.

100. *Id. See also Powell*, 678 F. Supp. at 779-81.

101. *See* King, *supra* note 99, at 68.

102. *See generally id.*, ("Of the 229 players who switched clubs under the system 105 (46%) made opening day rosters. Of these, 33% (14% of the total) started in Week 1 . . . .").

103. *Id.* (" 'It wasn't lawful and wasn't adequate for all players in 1989, and it won't be lawful or adequate in 1990.' says Doug Allen, the union's assistant executive director.")

104. *See, e.g.*, Mackey v. NFL, 543 F.2d 606, 613-14 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977) (availability of exemption "turns upon whether the relevant federal policy is deserving of pre-eminence over federal antitrust policy").

105. *Powell*, 888 F.2d 559.

106. *Id.* at 568.

107. *Id.* at 566.

continuation of the NFL's restrictions on free agency. Meanwhile, the players struck and management staged replacement games during the 1987 regular season, both parties have filed unfair labor practice charges with the NLRB,[108] the current antitrust dispute has been delayed by motions and interlocutory appeals and continues to linger in the courts while a new action is being contemplated and the NFLPA has allegedly renounced its union status to enable the players to avoid the Eighth Circuit's decision.[109] Finally, no meaningful negotiations concerning the restrictions on free agency have taken place since the strike ended in the fall of 1987 and management has since withdrawn from and terminated both contributions to the NFL pension and the accruals of severance pay for the 1989 season and thereafter.[110] Presumably, these benefits were part of the *quid pro quo* for the NFL's restrictions on free agency contained in the 1982 Collective Bargaining Agreement. If, as the Eighth Circuit states, its decision does not absolutely preclude antitrust review, it is difficult to imagine what else must transpire to trigger application of the antitrust laws. As Judge Lay rhetorically asks in his dissent from the court's denial of hearing *en banc*: "If the exemption does not end at impasse, when does it end?"[111] Rather than accommodating labor and antitrust policies, the court's decision gives an employer everlasting immunity from the antitrust laws.

Expiration of the labor exemption does not mean that management's restrictions on free agency necessarily have to violate federal antitrust law. The Sherman Act condemns only unreasonable restraints of trade.[112] In the absence of an agreement, management is always free upon impasse to unilaterally implement reasonable restrictions on free agency. Presumably, management implemented Plan B with the intention of positioning itself to argue that its restrictions were reasonable in the event of an adverse decision from the Eighth Circuit. It is unlikely that a court would conclude that Plan B is a reasonable restraint of trade. That is not to say, however, that the NFL could not implement a more enlightened free agency system that would survive antitrust scrutiny.

VI. CONCLUSION

In the absence of an antitrust exemption, the NFL's current system of free agency almost certainly violates federal antitrust law. During the

108. *See* NLRB Case No. 2-CB-12117 (NFLMC charge); NLRB Case Nos. 5-CA-19170, 19508 (NFLPA charges).

109. *See Startling Move to Decertify Leaves NFL Union in 'Uncharted Area,'* Wash. Post, Nov. 9, 1989, at C10, col. 1 (NFLPA to "seek decertification as the legal bargaining representative for NFL players in an effort to strip the league of . . . antitrust immunity").

110. The NFL withdrew from the pension on March 31, 1989. Telephone interview with John Macik, NFL staff representative, (Jan. 29, 1990).

111. Order Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*, Powell v. NFL, No. 89-5091, at 6 (8th Cir. Jan. 17, 1990) (Lay, C.J., dissenting) (LEXIS, Genfed library, Courts file).

112. *See, e.g.*, Chicago Board of Trade v. United States, 246 U.S. 231, 238-39 (1918); Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 56-66 (1911).

life of the 1982 Collective Bargaining Agreement and, according to the district court in *Powell*, until the parties reached impasse,[113] that system was exempt from antitrust attack by virtue of the non-statutory labor exemption. The non-statutory labor exemption is based on union consent.

The current NFLPA-NFL dispute involves an employment system that the union has unequivocally rejected for more than two years. It is absolutely inconceivable that a court could conclude that the NFL's current system is somehow the product of collective bargaining or union consent, and thereby qualifies for the protection of the non-statutory labor exemption when in fact the system has been unceremoniously rammed down the union's throat by management. Yet, this is exactly what the Eighth Circuit has concluded.

Although the court insists that its decision does not preclude antitrust review, the court gives no indication of what might trigger application of the antitrust laws.[114] The union is thus left with the option of decertification in order to invoke the protection of the antitrust laws. As Judge Lay says, "the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable."[115] The Eighth Circuit could not possibly argue that the appropriate accommodation of federal labor and antitrust policy requires a union to decertify in order to invoke, on behalf of its members, rights under the antitrust laws.

113. *Powell*, 678 F. Supp. at 788-89.

114. *Powell*, 888 F.2d at 568.

115. Order Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*, Powell v. NFL, No. 89-5091, at 8 (8th Cir. Jan. 17, 1990) (Lay, C.J., dissenting) (LEXIS Genfed library, Courts file).