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THE LEGALITY UNDER THE NATIONAL LABOR RELATIONS ACT OF ATTEMPTS BY NATIONAL FOOTBALL LEAGUE OWNERS TO UNILATERALLY IMPLEMENT DRUG TESTING PROGRAMS

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I. INTRODUCTION

One of the most prominent vestiges of the quest for individual freedom and self-realization that propelled the cultural revolution in America in the late 1960s was drugs.[1] Since the late 1960s, the use of drugs in American society has steadily increased. This counter-culture phenomenon has, over the past twenty years, spread to all segments of American society, including the middle class and working population.[2] Heroin, hallucinogens, prescription drugs for nonmedical purposes, and especially marijuana are among the drugs used and abused by Americans from all age groups and income levels.[3] The use of cocaine has increased dramatically in recent years, especially by those over the age of twenty-six[4] who "think they can work harder, faster,

1. Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LABOR L.J. 42, 43 (1985).

2. *Id.* at 42. In 1962, less than 4% of the population had ever used an illegal drug. *Id.* at 43. Two decades later, The National Institute on Drug Abuse reported that 33% of Americans over the age of 12 had used illegal drugs. *Id.*; *see U.S. Social Tolerance of Drugs on the Rise*, N.Y. Times, Mar. 21, 1983, at A-1, col. 2 [hereinafter *U.S. Social Tolerance*].

3. Susser, *supra* note 1, at 43; *see U.S. Social Tolerance*, *supra* note 2, at A-1.

4. Between 1979 and 1982, one survey reported that cocaine use by those over 26 had doubled. *U.S. Social Tolerance*, *supra* note 2, at A-1. In 1983, cocaine use among the general population rose approximately 12%. Susser, *supra* note 1, at 45 (citing NAT'L NARCOTICS INTELLIGENCE CONSUMERS COMM., NARCOTICS INTELLIGENCE ESTIMATE 1 (1983)).

and better" while using the drug.[5]

Drug abuse in the workplace conceivably impacts a firm's productivity and profits. Drug abuse also endangers the health and safety of employees, including those who do not use drugs.[6] The increase in the use of drugs has forced employers in all industries to address the problems associated with drug abuse.[7] In an effort to curb drug use by employees, many employers have implemented drug testing programs.[8] In fact, massive drug screening is currently being conducted by approximately twenty-five percent of the Fortune 500 companies.[9] Last year, drug tests were administered to nearly five million Americans.[10] Not surprisingly, these tests have raised a difficult combination of social, medical, and legal issues.

Incidents of drug abuse in the professional sports industry have been widely publicized.[11] Because of America's infatuation with professional sports and sports heroes, individual cases of drug abuse by professional athletes have received an inordinate amount of media attention.[12] Drug addiction is a powerful illness. Its power has been particularly apparent in professional sports, where highly-skilled athletes have destroyed their careers and wasted millions of dollars because of an inability to control their drug problems.[13]

Team owners, like employers in other industries, have attempted to implement drug testing programs as a solution to drug abuse within

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5. Susser, *supra* note 1 (quoting *Business and the Military Face up to Drug Challenge*, Christian Sci. Monitor, May 5, 1982, at 13, col. 1).

6. *Id.* at 42-43.

7. *Id.* at 46.

8. *Id.*

9. Stille, *Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat'l L.J., Apr. 7, 1986, at 1, col. 1.

10. *Id.*

11. *See, e.g.*, Reese & Underwood, *Special Report: I'm Not Worth a Damn*, SPORTS ILLUSTRATED, June 14, 1982, at cover, 66-82.

12. *See, e.g.*, Angell, *Reflections: The Cheers for Keith*, THE NEW YORKER, May 5, 1986, at 48-65 (discussion of America's infatuation with the problem of drug abuse in professional sports).

13. *See, e.g.*, Reilly, *When the Cheers Turned to Tears*, SPORTS ILLUSTRATED, July 14, 1986, at 28-34. Several players, including John Drew, John Lucas, and Quinton Dailey, have been suspended without pay from the National Basketball Association (NBA) because of drug problems. Michael Ray Richardson, a star guard with the New Jersey Nets, was banned from the NBA after his third drug infraction. Angell, *supra* note 12, at 49. Most tragic, of course, were the recent cocaine related deaths of Boston Celtic draft choice Len Bias and Cleveland Browns safety Don Rogers. Reilly, *supra*, at 29.

the sports industry.[14] Considerable attention has been focused on various issues surrounding the implementation of these programs, including the reliability of the tests administered by individual teams,[15] the efficacy of testing as a means to curb drug abuse, and the privacy rights of individual players.[16] Another issue raised by drug testing within the context of professional sports, and one that has been less publicized, is the potential conflict between employer and employee rights under federal labor laws.[17] Team owners perceive drug testing

14. Prior to the 1986 Major League Baseball (MLB) season, individual teams insisted on the inclusion of drug testing clauses in individual player contracts. Brief of the Major League Baseball Players Ass'n (MLBPA), *In re* Arbitration between: MLBPA and the 26 Major League Clubs, Grievance No. 86-1 (Jan. 6, 1986). Similarly, at the conclusion of the 1985 NFL season, eight teams attempted to force players to submit to drug testing as part of their post-season physical examinations. *See infra* notes 47-48 and accompanying text.

15. Current drug testing procedures are unreliable for a number of reasons. *See* Morgan, *Problems of Mass Urine Screening for Misused Drugs*, 16 J. PSYCHOACTIVE DRUGS 305, 306 (1984). The tests are designed to yield a qualitative positive or negative result, and the potential exists for both false negatives and false positives. A false negative indicates that no evidence of drugs is present in the urine even though the person tested has recently ingested one of the drugs sought. The EMIT test, the most commonly used drug test, is extremely sensitive and, unless the enzyme function is altered because the sample is old or because ionizing salts have been placed in the urine, failure to detect drugs actually ingested rarely occurs. *Id.* at 308.

False positives, however, frequently occur. *See* Angell, *supra* note 12, at 56 (persistent error factor of 15-20%). *But see* Allen & Stiles, *Specificity of the EMIT Drug Abuse Urine Assay Methods*, 18 CLINICAL TOXICOLOGY 1043, 1044, 1062 (1981) (estimating incidence of false positives at 3-5%). Because the EMIT test is so sensitive, the results can be positive even though the drug sought is not present. Failure to clean the instruments, as well as human error, can produce unreliable results. Morgan, *supra*, at 309. When the number of tests increases, so does the error rate. *Id.* at 313-14.

Even absent human error, false positives commonly occur because of cross-reactivity. Allen & Stiles, *supra*, at 1062; Morgan, *supra*, at 309-12. Cross reactivity means that other substances produce the same reaction in the urine as marijuana. In 1981, researchers from the University of Oklahoma found 62 substances, including aspirin, that can create false positives. Allen & Stiles, *supra*, at 1045-60. Several prescription analgesic drugs may cause false positives. *Id.* In addition, the human body produces substances that may create false positives in urine screens. *Id.* at 1062.

The tests are not drug specific and, thus, do not indicate whether a person who tests positive has smoked marijuana or taken aspirin or some other drug. *See id.* at 1064. Thus, the danger exists that many athletes who do not smoke marijuana might be disciplined on the basis of inaccurate results. Because these tests are subject to inaccurate results, they should not be used to identify illegal or deviant behavior. *See* Morgan, *supra*, at 316.

For a discussion of the reliability of current drug testing technology, see Morgan, *supra*, at 305-17; Zeese, *Marijuana Urinalysis Tests*, DRUG L. REP., May-June 1983, at 25-36.

16. *See, e.g.*, Goldsmith, *Laws Provide Framework for Procedure*, N.Y. Times, Feb. 9, 1986, at S2; Glasser, *Right to Privacy is a Basic Principle*, N.Y. Times, Feb. 9, 1986, at S2. MLB and NFL players and union leaders also voiced privacy concerns. *See* Angell, *supra* note 12, at 48-65, (reference to privacy concerns on the part of MLB players); Neff & Sullivan, *The NFL and Drugs: Fumbling for a Game Plan*, SPORTS ILLUSTRATED, Feb. 10, 1986, at 83 (reference to privacy concerns on the part of NFLPA).

as a dramatic and, from a public relations standpoint, useful solution to a complex problem and have, along with league commissioners, attempted to unilaterally implement team and league-wide compulsory drug testing programs.[18] Players' associations have challenged these "unilateral" efforts, not because the associations have categorically refused drug testing programs, but because of their obligation as the players' exclusive bargaining representatives to participate in the formation of such programs.[19]

Despite these concerns, drug testing programs proposed by team owners probably do not raise constitutional questions. The purpose of the fourth amendment is to protect against unreasonable searches or seizures by the state or federal government. Schmerber v. California, 384 U.S. 757, 767 (1966). Blood, urinalysis, and breathalyzer tests all constitute searches within the meaning of the fourth amendment. *Id.* at 771 (blood alcohol test); Shoemaker v. Handel, 609 F. Supp. 1089 (D.C.N.J. 1985) (urinalysis and breathalyzer tests). The Constitution, however, does not shield a person from conduct, no matter how discriminating or wrongful, by a private person. State action is necessary to invoke the Constitution. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 13, (1948); Johnson v. Educational Testing Serv., 754 F.2d 20, 23 (1st Cir. 1985).

Conduct by professional sports team owners probably will not constitute state action. However, no precise formula exists to determine when "otherwise private conduct constitutes state action." *See, e.g.*, Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984). State action has been extended to persons performing government functions or receiving government assistance. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972).

Admittedly, state governments regulate professional sports franchises, but this involvement would not constitute state action. In light of the Supreme Court's recent decisions, a court would be unlikely to find that a professional sports league performed a traditionally exclusive state prerogative. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1975) (operating utility plants and private schools are not functions traditionally reserved to the state).

For a discussion of the constitutionality of drug testing in the context of college sports, see Lock & Jennings, *The Constitutionality of Mandatory Student-Athlete Drug Testing Programs: The Bounds of Privacy*, 38 U. FLA. L. REV. 582 (1986).

17. For an overview of professional sports and the labor laws, see L. SOBEL, PROFESSIONAL SPORTS AND THE LAW §§ 4.1-.3(c) (1977).

18. See *infra* notes 47-56 and accompanying text for discussion of attempts by NFL management to unilaterally implement drug testing. See *infra* notes 67-68 and accompanying text for a discussion of NFL Commissioner Rozelle's attempt to unilaterally implement drug testing. MLB owners and MLB Commissioner Ueberroth made similar efforts. *See supra* note 14; *see also* N.Y. Times, Dec. 1, 1985, at I5, col. 2 (commissioner soliciting player participation in testing programs and major league clubs inserting mandatory drug testing clauses in contracts).

19. In a 1982 Collective Bargaining Agreement, the NFLPA agreed to urinalysis testing during pre-season physical examinations and for probable cause. 1982 COLLECTIVE BARGAINING AGREEMENT BETWEEN NFLPA AND NFL MANAGEMENT COUNCIL, art. XXXI [hereinafter 1982 COLLECTIVE BARGAINING AGREEMENT]. The NFLPA argued that the union and management had appropriately bargained for a drug program in 1982 and that the bargaining table

This article will discuss the legal issues raised by the efforts of professional sports leagues and individual team owners to implement drug testing programs. The relevant legal principles have broad application and are clearly useful in analyzing drug testing programs by employers in other unionized industries. Section II will summarize the factual context in which drug testing has been proposed or implemented within the National Football League (NFL). Section II also includes a summary of the recent disputes between the NFL and the NFL Players' Association (NFLPA) regarding the issue of drug testing and the two arbitration decisions resolving these disputes.

Section III focuses on the general question of whether management has the right under the National Labor Relations Act (NLRA)[20] to unilaterally implement, without first bargaining with the union, the type of drug testing programs proposed in professional sports. The answer depends upon the classification of these drug testing programs as mandatory or non-mandatory subjects of collective bargaining.[21] Although the classification of these programs as either mandatory or non-mandatory has a significant impact on the bargaining relationship between the parties, neither the National Labor Relations Board (NLRB) nor the arbitrators has considered this issue.

The NFLPA filed an unfair labor practice charge in one of the two disputes ultimately resolved at arbitration.[22] The NLRB, in accordance with its broad deferral policies,[23] deferred the dispute to arbitration. The arbitrators, in each of the two disputes, appropriately based their decisions on contractual grounds and concluded that management's unilateral action violated the League's 1982 collective bargaining agreement.[24] Neither arbitrator addressed the question of whether a drug

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was the proper place to discuss future agreements on that topic. *See infra* notes 47-71, 75-91 and accompanying text.

20. 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

21. Employers and representatives of employees must "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d) (1982). These subjects are mandatory subjects of collective bargaining and it is an unfair labor practice for management to refuse to bargain over any topic that falls within this category. *Id.* § 158(a)(5). For a discussion of the distinction between mandatory and non-mandatory subjects, see *infra* notes 108-60 and accompanying text.

22. *See* Charge Against NFLMC, NLRB Case No. 2-CA-21403 (Dec. 18, 1985) (filed by NFLPA).

23. *See* Levy, *The Unidimensional Perspective of the Reagan Labor Board*, 16 RUTGERS L.J. 269-390 (1985); *see also infra* notes 298-310 and accompanying text (discussion of NLRB's deferral policies).

24. *See* Opinion and Decision, *In re* Arbitration between NFLMC and NFLPA, Re: Post-

testing program constitutes a mandatory subject of collective bargaining.[25] As a result, questions concerning the bargaining rights and obligations of the parties with respect to drug programs still exist as the parties approach the upcoming negotiations for a new collective bargaining agreement. Section IV contains a brief discussion of the NLRB's deferral policies.

Random drug testing is the most controversial element of the drug programs proposed in professional sports. Management has taken the position that random testing is justified because it is "good for the industry."[26] Management's right to implement random drug testing, however, depends not on the merits of random testing but on the classification of this topic as either a mandatory or non-mandatory subject of collective bargaining. This article analyzes the issue of drug testing programs under the NLRA and concludes that this issue constitutes a mandatory subject of collective bargaining.

II. Factual Background

A. *History of Drug Problems in the National Football League*

Although the problem of drug abuse among athletes has only recently dominated the sports pages, the presence of drugs in the NFL is not a new phenomenon. During the 1970s, isolated instances of drug abuse appeared periodically in the press.[27] By 1982, evidence of widespread drug abuse in the NFL became public.[28]

Season Physical Examinations (Oct. 20, 1986) (Kagel, Arb.); Opinion and Decision, *In re* Arbitration Among the NFLPA and the NFLMC and the NFL (Oct. 25, 1986) (Kasher, Arb.).

25. In the Arbitration Pursuant to Article VII, the arbitrator held that the Commissioner could unilaterally implement a drug policy to augment the League's existing policy if the augmented policy did not contradict the collective bargaining agreement. Opinion and Award, Expedited Arbitration Pursuant to Article VII, *In re* Arbitration Among the NFLPA and the NFLMC and the NFL (Oct. 25, 1986) (Kasher, Arb.). *See infra* notes 90-94 and accompanying text.

26. Rozelle publicly stated that the drug problem was an economic problem that could affect league income and ultimately cripple the NFL financially. *See* N.Y. Times, Mar. 11, 1986, at B8, col. 4. At the same time, the NFL insisted that more extensive testing was an essential deterrent to drug use. Neff & Sullivan, *supra* note 16, at 83. The MLBPA noted that major league clubs also argued that testing is "good" for the industry. *See* Brief of the Major League Baseball Players Ass'n (MLBPA) at 27, *In re* Arbitration between: MLBPA and the 26 Major League Clubs, Grievance No. 86-1 (Jan. 6, 1986) (arbitration involving attempts by MLB clubs to insert drug testing clauses in individual player contracts).

27. For examples of NFL drug-related problems in the 1970s, see *Drugs in the NFL*, USA Today, Jan. 29, 1986 at C3; Mandell, *Pro Football Fumbles the Drug Scandal*, Psych. Today, June 1975, at 39-47; Underwood, *Speed is all the Rage*, Sports Illustrated, Aug. 28, 1978, at 30-41.

28. *See, e.g.*, Reese & Underwood, *supra* note 11.

In July, 1982, former Miami Dolphin and New Orleans Saint Don Reese stated in an article published in Sports Illustrated that "a cocaine cloud covers the entire league."[29] Reese suggested a large number of players in the NFL had a drug problem. Reese identified teammates and other players who used and purchased cocaine in his presence.[30] Perhaps as a result of that article, several players were placed in drug dependency programs.[31] Miami owner Joe Robbie admitted in 1982 that several suspected drug users were cut or traded from the Dolphins following the 1976 season. Robbie's admission suggests that management had been aware of the problem before it became public.[32]

Not surprisingly, the drug problem surfaced in 1982 as an issue during the negotiations for a new collective bargaining agreement. In June, 1982, NFL Commissioner Pete Rozelle instructed individual teams to implement drug programs.[33] On July 19, 1982, the NFLPA filed an unfair labor practice charge alleging that the NFL Management Council (NFLMC) had unilaterally implemented drug programs and urinalysis testing without first bargaining with the union.[34] While that charge was pending, the NFLPA continued to demand collective negotiations on the drug issue.[35] Nonetheless, individual teams continued to cooperate with league-sponsored lectures on drug abuse and drug counseling programs.[36]

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29. *Id.* at 69.

30. *Id.*

31. Cleveland running back Charles White, San Diego running back Chuck Muncie, Minnesota defensive end Randy Holloway and Denver wide receiver Rick Upchurch were among those placed in drug dependency programs in 1982. *Drugs in the NFL*, USA Today, Jan. 29, 1986, at C3.

32. *Id.*

33. Telephone interview with Timothy J. English, Staff Counsel, NFLPA (Sept. 10, 1983).

34. Charge Against Constituent Member Clubs of the NFL, NLRB Case No. 2-CA-18995 (July 19, 1982) (filed by NFLPA).

35. Supplemental Affidavit of Richard A. Berthelsen, NFLPA attorney, submitted to NLRB to supplement previous affidavits filed on July 19, 1982 and Aug. 11, 1982, at 5-6 (Sept. 22, 1982).

36. *Id.* The cooperation by individual teams led to another unfair labor practice charge. In August 1982, representatives from the League office visited individual teams to conduct lectures on drugs. *Id.* Prior to a meeting with the Buffalo Bills, Bills' player-representative Mike Kadish confronted the League representatives with questions concerning confidentiality, penalties, and testing procedures under the proposed program. As a result of this confrontation, the meeting was cancelled and, on September 8, the Bills released Kadish. Telephone interview with Timothy J. English, Staff Counsel, NFLPA (Sept. 10, 1983). Almost immediately thereafter, the NFLPA filed an unfair labor practice charge alleging that Kadish had been discharged because of his

The unfair labor practice charge was withdrawn as part of a settlement agreement between the NFLPA and NFLMC executed on December 11, 1982, the same day the new collective bargaining agreement was signed.[37] Article XXXI of the new agreement addressed the problem of drug abuse in the League.[38] Under section 5 of that article, each player is obligated to undergo a standardized minimum pre-season physical examination conducted by the team physician. The standardized minimum examination is outlined in appendix D of the agreement and includes urinalysis and blood testing. Section 5 also provides for a post-season physical examination. Section 7 states that the team physician, upon reasonable cause, can direct a player to the Hazelden Foundation in Center City, Minnesota. The Hazelden Foundation administers the league-wide drug program, testing for chemical abuse or dependency problems. Perhaps most significantly, section 7 clearly precludes spot checking for chemical abuse or dependency by either the club or club physician. Section 8 requires that details concerning the identity or treatment of any player remain confidential and are not to be the basis for any disciplinary action.

Sections 5 through 8 of article XXXI essentially define the rights of individual teams to test, treat, or impose disciplinary sanctions upon players for drug abuse. One other provision in the 1982 collective bargaining agreement is potentially relevant to the problem of drug abuse. Article VIII, entitled Commissioner Discipline, gives the League Commissioner the authority to fine, suspend, or otherwise discipline individual players for conduct detrimental to the integrity of, or public confidence in, the game of professional football.[39]

Articles VIII and XXXI of the 1982 agreement did little to solve the NFL's drug problem. In fact, the number of reported incidents of drug abuse continued to increase. In 1983, Cleveland Browns Head Coach Sam Rutigliano publicly stated that eight Browns were taking part in a drug rehabilitation program offered by the team. Also in 1983, other players around the NFL admitted cocaine dependency and entered rehabilitation centers.[40] Meanwhile, Commissioner Rozelle invoked his power under article VIII and suspended four players, without pay, for four games during the 1983 season because of their involve-

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union activities. Charge Against Baltimore Colts and Buffalo Bills and Member Clubs of NFL, NLRB Case No. 2-CA-19103 (Sept. 9, 1982) (filed by NFLPA).

37. Settlement agreement between NFLPA and NFLMC 1-4 (Dec. 11, 1982).

38. 1982 COLLECTIVE BARGAINING AGREEMENT, *supra* note 19, art. XXXI.

39. *Id.* art. VIII.

40. *Drugs in the NFL*, USA Today, Jan. 29, 1986, at C3.

ment with cocaine.[41] Isolated incidences of drug involvement continued to surface during 1984 and 1985.[42] Clearly, the relevant provisions of the 1982 Collective Bargaining Agreement failed to discourage the use of drugs in the NFL.

B. *Recent Disputes Between the National Football League and the National Football League Players' Association Regarding Drug Programs*

As the number of reported cases of drug abuse in the NFL increased, so did reports of drug abuse in Major League Baseball (MLB) and the National Basketball Association (NBA).[43] By the fall of 1985, the use of drugs became one of the most widely reported issues in the sports industry. In a November 18 interview with Bob Costas on NBC's "NFL '85," Commissioner Rozelle stated that "the drug issue is the biggest concern of fans."[44]

As the 1985 season progressed, Commissioner Rozelle publicly suggested that the NFL would push for mandatory drug testing in the next collective bargaining agreement.[45] The NFLPA polled its members and reported that 72.5 percent of NFL players opposed spot checking through urinalysis.[46] In the meantime, several individual owners decided to take immediate action. At the close of the 1985 season, eight NFL teams attempted to force their players to submit to drug tests as part of their post-season physical examination.[47] Many players refused and were fined $1,000 each for their failure to comply.[48]

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41. *Id.* The four players suspended were Pete Johnson and Ross Browner of the Cincinnati Bengals, E.J. Junior of the St. Louis Cardinals, and Greg Stemrick of the Houston Oilers. *Id.*

42. *Id.*

43. For examples of drug use in the NBA, see, e.g., Jasner, *NBA Brass, Players Ponder Spot-Testing*, Phila. Daily News, Feb. 17, 1986, at 77 (reference to drug problems of players John Drew, Quintin Dailey, John Lucas, Michael Ray Richardson and Walter Davis). For examples of drug use in major league baseball see, e.g., *Drug Poll Indicates Pros' Use*, USA Today, Sept. 6, 1985, at C5 and Magnuson, *Baseball's Drug Scandal*, TIME, Sept. 16, 1985, at 26-28.

44. *Rozelle Speaks*, USA Today, Nov. 18, 1985, at C1.

45. Forbes, *Rozelle: NFL May Push Drug Testing in Contract*, USA Today, Oct. 16, 1985, at C7.

46. Borges, *NFLPA Opposes Spot-Testing for Drug Use*, The Boston Globe, Jan. 24, 1986, at 55.

47. *Id.* The eight teams that tried to force their players to be tested for drug use were the Seattle Seahawks, St. Louis Cardinals, Buffalo Bills, New Orleans Saints, New York Jets, Tampa Bay Buccaneers, Detroit Lions, and Indianapolis Colts.

48. *Id.* The arbitrator's decision in this dispute listed five teams, the Cardinals, Jets, Colts, Buccaneers, and Saints, that attempted to test players. The decision also indicated that all of the players on the Colts, Saints, Cardinals, and Jets refused to take the urinalysis test, while

The NFLPA took the position that urinalysis and blood testing during the post-season physical examination violated the existing collective bargaining agreement.[49] Therefore, the players' refusal to submit to the tests was justified. The players' association filed an unfair labor practice charge on December 18, 1985, alleging that implementation of post-season drug tests also constituted a unilateral change in working conditions in violation of subsections 8(a)(1) and (5) of the NLRA. In addition, fining employees for asserting their rights amounted to a violation of subsections 8(a)(1) and (3) of the NLRA.[50]

Eight days later, on December 26, 1985, the NFLMC filed a non-injury grievance against the NFLPA for advising players not to submit to post-season testing.[51] The NFLMC contended that article XXXI, section 5 of the 1982 collective bargaining agreement permitted clubs to request post-season physical examinations.[52] According to management, the NFLPA violated article I, section 3, of the 1982 agreement by allegedly advising players not to cooperate with the complete post-season physical examinations authorized under article XXXI, section 5.[53] Article I, section 3 imposes on the union and the management council the obligation to exercise good faith efforts to ensure that both players and clubs comply with the terms of the agreement.

While these charges were pending, reports that the New England Patriots had a team-wide drug problem surfaced in Boston. Super Bowl XX was quickly overshadowed by a story in the Boston Globe on January 28, 1986, which estimated that twelve Patriots used drugs during the 1986 season.[54] At the insistence of Head Coach Raymond Berry, the players agreed to accept a team-wide voluntary drug testing program.[55] The program provided among other things that any recur-

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some Buccaneers took the test. Opinion and Decision, *In re* Arbitration between NFLMC and NFLPA, Re: Post-Season Physical Examinations 4 (Oct. 20, 1986) (Kagel, Arb.).

49. *Id.* at 3.

50. Charge Against NFLMC, NLRB Case No. 2-CA-21403 (Dec. 18, 1985) (filed by NFLPA).

51. NFLMC v. NFLPA, Non-Injury Grievance Concerning Post-Season Physical Examinations, Dec. 26, 1985.

52. *Id.*

53. *Id.* (citing 1982 COLLECTIVE BARGAINING AGREEMENT, *supra* note 19, art. I).

54. Super Bowl XX was played on January 26, 1986. The Chicago Bears defeated the New England Patriots 46-10. N.Y. Times, Jan. 27, 1986, at A1, col. 1. Two days later an article exposing an alleged drug problem on the New England Patriots appeared on the front page of the Boston Globe. Borges, *Drug Problem is Disclosed by Patriots; Dozen Involved*, Boston Globe, Jan. 28, 1986, at 1, 67.

55. *Id.* On January 27, 1986, the New England Patriots agreed to participate in a voluntary drug testing program.

rence by a rehabilitated player would result in an immediate one-year suspension without pay.[56]

The NFLPA's response to the Patriots' plan was predictable. The NFLPA publicly accused the Patriots of repudiating the drug testing provisions of the 1982 collective bargaining agreement[57] and, on January 29, filed an unfair labor practice charge.[58] The charge alleged that the Patriots violated subsections 8(a)(1) and (5) of the NLRA by attempting to implement more rigorous drug testing procedures than those contained in the 1982 agreement and by bypassing the union to deal directly with employees concerning important terms and conditions of employment.[59]

Meanwhile, Commissioner Rozelle continued to campaign for mandatory testing. At NFL meetings in March, 1986, Rozelle stressed the need for random drug testing to combat the drug problem. He felt the drug problem could affect the NFL's television revenues and gate receipts, and ultimately cripple the NFL financially.[60] He warned that if the union failed to agree to a tougher drug plan, he was prepared to bypass the NFLPA and implement his own plan including random testing.[61] Presumably, Commissioner Rozelle believed that his power as Commissioner to deal with problems affecting the integrity of the game authorized him to impose league-wide mandatory testing.[62]

The NFLPA publicly indicated that it would oppose any unilateral action by Commissioner Rozelle to institute random testing,[63] partly because random testing constituted an invasion of privacy.[64] More significantly, the union believed Commissioner Rozelle lacked author-

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56. Under the plan, the team would recommend a course of action for players with drug problems. The identity of those players would remain confidential. *Id.* Despite the team's promise of confidentiality, six Patriot players were identified in the Boston Globe as having drug problems and, as a result, the players' agreement to accept the plan collapsed on January 29. The six Patriot players were Irving Fryar, Stephen Starring, Tony Collins, Roland James, Raymond Clayborn, and Kenneth Sims. Neff & Sullivan, *supra* note 16, at 84.

57. N.Y. Times, Jan. 29, 1986, at B5, col. 1.

58. Charge Against the NFL Management Council and the New England Patriots, NLRB Case No. 2-CA-21476 (Jan. 29, 1986) (filed by NFLPA).

59. *Id.*

60. Forbes, *Rozelle Ready to Fight Drug Problem on His Own Terms*, USA Today, Mar. 11, 1986, at C5.

61. *Id.*

62. *Id.*

63. Wojciechowski, *Rozelle Says He's Ready to Impose Drug-Testing Plan on NFL Players*, L.A. Times, Mar. 11, 1986, at III-1, col. 1.

64. Forbes, *supra* note 60, at C5.

ity under the 1982 agreement to impose a league-wide program and that such an action would constitute a breach of the current drug policy contained in article XXXI.[65] Despite the union's position, Commissioner Rozelle, at a meeting with NFLPA representatives on July 1, 1986, indicated he felt compelled to exercise his authority under article VIII in order to improve the current NFL drug program.[66]

On July 7, Commissioner Rozelle publicly announced a new drug program for the NFL. The new program required every player to submit to two unscheduled urine tests during the regular season.[67] Commissioner Rozelle also announced his intention to establish a set of procedures under which players who tested positive could be immediately removed from the active roster. In extreme cases, players could be permanently banned from the NFL.[68] The NFLPA immediately filed injunctive motions in the District Court for the District of Columbia[69] under section 301 of the Labor Management Relations Act,[70] challenging Commissioner Rozelle's authority to implement the new program.[71] The dispute was submitted to arbitration.

C. *Recent Arbitration Decisions Regarding Drug Programs*

The NLRB did not hear these disputes. The NFLPA withdrew its unfair labor practice charge against the Patriots in June, 1986, after the Patriots publicly announced their decision not to implement the team-wide drug testing plan.[72] The NLRB deferred the post-season testing charge to arbitration.[73] Perhaps because the NFLPA knew the

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65. Wojciechowski, *supra* note 63, at III-1. Despite its rejection of management's proposal for random testing, and in response to a desire by the players themselves to implement a stricter policy on drugs, the NFLPA proposed a new plan on March 19, 1986 to deal with drug abuse. Under the plan, players who tested positive during their pre-season urinalysis would be subject to treatment and random testing. Second offenders would be subject to treatment and random testing and would also be fined one game's pay. A third offense would result in permanent suspension from the League, subject to review after one year. Both Rozelle and the NFLMC, reiterating their desire for random testing, publicly rejected the union's proposal. Weisman, *Drug Proposal Garners Support*, USA Today, Mar. 20, 1986, at C3.

66. Opinion and Award, Expedited Arbitration Pursuant to Article VII, *In re* Arbitration Among the NFLPA and the NFLMC and the NFL 18 (Oct. 25, 1986) (Kasher, Arb.).

67. *Id.* at 19.

68. *Id.* at 19-20.

69. NFLPA v. NFLMC & NFL, C.A. No. 86-1918, July 11, 1986.

70. 29 U.S.C. § 185 (1982).

71. Opinion and Award, Expedited Arbitration Pursuant to Article VII, *In re* Arbitration Among the NFLPA and the NFLMC and the NFL 2 (Oct. 25, 1986) (Kasher, Arb.).

72. Telephone interview with Timothy J. English, Staff Counsel, NFLPA (Apr. 1987).

73. *Id.* The Regional Director notified the NFLPA in a letter dated April 30, 1986 that it

NLRB would also defer to arbitration the dispute over Commissioner Rozelle's league-wide program, the NFLPA declined to file an unfair labor practice charge in that case. Arbitration decisions in the post-season testing and Rozelle cases were resolved in favor of the NFLPA in late October, 1986.[74]

Arbitration hearings were held on June 17, 1986, to determine management's right under the 1982 collective bargaining agreement to administer drug tests as part of the post-season physical examination. The NFLPA contended that the 1982 agreement authorized only two forms of drug tests: a mandatory drug test for all players during the pre-season physical, and testing upon reasonable cause.[75] In the union's opinion, the language and bargaining history of article XXXI as well as the "zipper clause" contained in article II, section 1 of the agreement precluded management from testing for drugs during the post-season examination.[76] The NFLMC argued that the language of article XXXI, section 5 did not exclude drug testing from the post-season physical examination.[77] In addition, management reserved, under the management rights provision in article I, section 4, all management rights except as specifically limited by the provisions of the 1982 agreement.[78]

The arbitrator issued an opinion on October 20, 1986. After reviewing the bargaining history between the parties, the arbitrator concluded that management could not implement post-season drug testing without violating the 1982 agreement.[79] The subject of drug testing was submitted to collective bargaining and the parties specifically agreed to pre-season and reasonable cause testing.[80] The arbitrator noted that at no time during the negotiations did the NFLMC seek to extend its right to test for drugs to post-season examinations.[81]

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was deferring the post-season urinalysis charge (NLRB Case No. 2-CA-21403) to arbitration. *Id.*

74. *See infra* notes 79-94 and accompanying text.

75. Opinion and Decision, *In re* Arbitration between NFLMC and NFLPA Re: Post-Season Physical Examinations 11 (Oct. 20, 1985) (Kagel, Arb.).

76. *Id.* at 11-13; 1982 COLLECTIVE BARGAINING AGREEMENT, *supra* note 19, art. II, § 1.

77. Opinion and Decision, *In re* Arbitration between NFMLC and NFLPA Re: Post-Season Physical Examinations 13 (Oct. 20, 1985) (Kagel, Arb.).

78. *Id.* at 10-11 & 13; *see also* 1982 COLLECTIVE BARGAINING AGREEMENT, *supra* note 19, art. I, § 4 (clubs have right to manage unless specifically limited by collective bargaining agreement).

79. Opinion and Decision, *In re* Arbitration between NFLMC and NFLPA Re: Post-Season Physical Examinations 33 (Oct. 20, 1985) (Kagel, Arb.).

80. *Id.* at 32.

81. *Id.*

The arbitrator also rejected the management council's argument that post-season testing was permissible under article I, section 4 of the 1982 agreement. Since the agreement specifically limited management's right to test, no residual rights remained with respect to drug testing. Therefore, the "management rights" provision did not apply.[82] The arbitrator did not address the underlying unfair labor practice charge.

Five days later, on October 25, 1986, the arbitrator reached a decision regarding Commissioner Rozelle's league-wide drug program. As with post-season testing, the arbitrator concluded that Commissioner Rozelle's provision for unscheduled testing could not be implemented without violating the 1982 agreement.[83] In 1982, the NFLPA had initially resisted language permitting testing of any kind.[84] Although the union ultimately conceded the pre-season and reasonable cause testing in article XXXI, that provision specifically precluded spot checking.[85]

The NFLMC argued that Commissioner Rozelle's proposal for two unscheduled tests did not conflict with this prohibition on spot checking since all players, as opposed to randomly selected players, would be subject to the unscheduled tests.[86] Relying on the bargaining history of the 1982 agreement and the language of article XXXI, the arbitrator rejected this argument.[87] The 1982 negotiations neither addressed nor contemplated unscheduled drug testing. Furthermore, the language of article XXXI was not broad enough to permit additional testing.[88] Thus, the arbitrator found that unscheduled testing conflicted with and was therefore superseded by the language of article XXXI.[89]

The arbitrator concluded, however, that Commissioner Rozelle had the power under article VIII to augment a pre-existing drug program if the augmented program did not contradict any provisions in the 1982 agreement.[90] Thus, several aspects of Commissioner Rozelle's program were enforceable because they did not contradict article XXXI. For example, the arbitrator indicated that Commissioner

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82. *Id.* at 33.

83. Opinion and Award, Expedited Arbitration Pursuant to Article VII, *In re* Arbitration Among the NFLPA and the NFLMC and the NFL 72 (Oct. 25, 1986) (Kasher, Arb.).

84. *Id.* at 70.

85. *Id.* at 70-71.

86. *Id.* at 71.

87. *Id.* at 71-72.

88. *Id.*

89. *Id.* at 72.

90. *Id.* at 72-76.

Rozelle had authority to address the specifics of aftercare for players who tested positive, the status of players hospitalized for drug treatment and their right to pay, and the extent to which players would be disciplined for improper drug involvement.[91]

To support this position, the arbitrator rejected the NFLPA's argument that the NFL could not unilaterally implement an augmented drug program without violating the NLRA.[92] In the arbitrator's opinion, the Commissioner historically retained certain "integrity of the game" authority.[93] Thus, the arbitrator felt that the NFLPA could not complain that the continued exercise of that authority violated the duty to bargain under the NLRA.[94]

Two aspects of these arbitration decisions are unsettling. First, the arbitrator's remarks concerning both the scope of Rozelle's "integrity of the game" authority and the merits of the NFLPA's unfair labor practice charge are unsubstantiated. The arbitrator cited absolutely no authority to support his position. In fact, the one dispute between the NFLPA and the NFL, questioning the scope of Commissioner power, suggests that the Commissioner's right under the collective bargaining agreement to discipline a player for conduct detrimental to the game does not empower him to unilaterally implement league-wide rules that affect the employment condition of players.[95]

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91. *Id.* at 67-68.

92. *Id.*

93. *Id.* at 67.

94. *Id.* at 68.

95. In 1972, the NFLPA filed an unfair labor practice charge challenging both the League's right and the Commissioner's power to unilaterally implement a rule providing for an automatic fine to be levied against any player leaving the bench area while a fight was in progress on the field. NFLMC & NFL, 203 N.L.R.B. 958 (1973). The Board dismissed the complaint, finding that the fine was implemented not by the owners but by the Commissioner and was as such a valid exercise of his "integrity of the game" power. *Id.* at 959.

The Eighth Circuit disagreed and remanded the case to the Board with instructions to adopt a remedy consistent with its opinion. NFLPA v. NLRB, 503 F.2d 12, 17 (8th Cir. 1974). The court found that the bench fine rule was adopted by the owners and, as a result, amounted to a unilateral change in conditions of employment. *Id.* at 16-17. Because the court based its decision on this finding that the owners implemented the rule, the court was not forced to determine the scope of the Commissioner's power. Yet, the court suggested that the Commissioner lacked the power to implement the bench fine rule. *Id.* at 17. The union had argued that the Commissioner's right under the Collective Bargaining Agreement (CBA) to fine a player for conduct detrimental to the game did not empower him to adopt and promulgate the league-wide bench fine rule. *Id.* at 14. Citing applicable provisions from the Bylaws and CBA, the court acknowledged that the union's position with respect to the scope of the Commissioner's power had merit. *Id.* at 16 n.3. The Commissioner had no authority to make changes in practices that affected the employment conditions of players. *Id.*

More important, the resolution of each of these disputes on contractual grounds left unanswered various questions concerning the scope of the parties' bargaining obligations under the NLRA with respect to drug testing programs. Thus, these decisions failed to eliminate uncertainty over management's right to refuse to discuss the topic of drug programs during collective bargaining, management's right to unilaterally implement its own program after an agreement has been reached, and the right of either party to use economic weapons or bargain to impasse in an effort to realize its position on the subject of drug testing. The answers to these questions depend upon whether the issue of drug programs constitutes a mandatory or non-mandatory subject of collective bargaining under the NLRA. This issue was ignored in each arbitration decision.[96]

III. Testing as Mandatory Versus Non-Mandatory Subject of Collective Bargaining

A. *Introduction*

One of the most controversial aspects of the drug testing programs proposed in professional sports involves management's right under the NLRA to unilaterally implement these programs. League commissioners and individual franchise owners have publicly argued that random drug testing is good for the industry.[97] This argument has in turn generated reactions from both unions and players concerning privacy rights,[98] the accuracy of the tests,[99] whether testing will deter drug use, and whether test results can be kept confidential.[100]

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96. Subsections 8(a)(5) and (b)(3) impose a duty on both employers and unions to "bargain collectively . . . ." 29 U.S.C. § 158(a)(5), (b)(3) (1982). Section 8 defines the duty to "bargain collectively" as the natural obligation to meet and confer "with respect to wages, hours, and other terms and conditions of employment." *Id.* § 158(d). These subjects are mandatory subjects of collective bargaining. Both employers and unions must bargain in good faith over these subjects. In addition, either party may bargain to impasse or resort to the use of economic weapons over a mandatory subject. *See infra* notes 102-07 and accompanying text; *see generally*, R. Gorman, Basic Text on Labor Law, 496-98 (1976). In the arbitration proceedings involving Rozelle's league-wide plan, the arbitrator concluded that the commissioner could unilaterally augment an existing program without violating the NLRA if the augmented program did not contradict the existing program. That decision, however, simply held that the commissioner historically had the power to make such unilateral changes. The arbitrator held neither that the owners had this same power nor that drug testing was a non-mandatory subject of collective bargaining. *See supra* notes 83-94, and accompanying text.

97. *See supra* note 26.

98. *See supra* note 16.

99. *See supra* note 15.

100. The MLBPA questioned whether drug testing would deter drug use and whether the

Drug testing may, as the owners contend, be good for the industry. Yet, neither the merits of drug testing nor the validity of any of the players' concerns is relevant to the legality of management-established programs.[101] Management's right to implement random drug testing without first bargaining with the union depends on the classification of drug programs as either a mandatory or a permissive subject of collective bargaining.

If drug programs fall within the scope of mandatory bargaining,[102] management will violate the NLRA if it unilaterally adopts a drug program without first bargaining with the union.[103] Both parties have an obligation to bargain over mandatory subjects, and a failure to do so constitutes a refusal to bargain under either subsection 8(a)(5) or 8(b)(3).[104] Either party also has the right, with respect to mandatory subjects, to insist on its position to impasse and even back its position with a strike or lockout.[105] Thus, both management and the union could, at the bargaining table, refuse a drug program proposed by its opponent and, at the same time, use economic weapons to pressure the other party to accept its own proposal.

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results of testing could be kept confidential. Brief of the Major League Baseball Players Ass'n (MLBPA) at 27-28, *In re* Arbitration between: MLBPA and the 26 Major League Clubs, Grievance No. 86-1 (Jan. 6, 1986). Confidentiality was an issue in the New England Patriots attempt to implement a team wide plan. *See supra* note 56.

101. The MLBPA noted the lack of legal significance of the merits of drug testing. Brief of the Major League Baseball Players Ass'n (MLBPA) at 27-28, *In re* Arbitration between: MLBPA and the 26 Major League Clubs, Grievance No. 86-1 (Jan. 6, 1986).

102. For a discussion of what subjects fall within the scope of mandatory bargaining, see Harper, *Leveling the Road From* Borg-Warner *to* First National Maintenance: *The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); *infra* notes 108-60 and accompanying text.

103. An employer who unilaterally changes an item subject to mandatory bargaining violates its duty to bargain under § 8(a)(5). *See, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962).

104. Section 8(a)(5) of the NLRA states that "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." 29 U.S.C. § 158(a)(5) (1982). Section 8(b)(3) states: "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a)." 29 U.S.C. § 158(b)(3) (1982). Section 9(a) states:

> [R]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive bargaining representative 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.

29 U.S.C. § 159(a) (1982).

105. *See* R. GORMAN, *supra* note 96, at 496.

Non-mandatory or permissive subjects may be proposed by either party. Yet, neither party is obligated to bargain over or discuss such subjects. The proponent of a non-mandatory subject can neither bargain to impasse nor resort to the use of economic weapons to obtain its demands.[106] In effect, management can unilaterally implement decisions falling outside the scope of mandatory bargaining and the union is precluded from either demanding bargaining over the matter or striking to compel management to modify its decision.

An employer's willingness to discuss non-mandatory terms during collective bargaining does not change its statutory obligations. Thus, even if an employer bargains over and agrees to a permissive term, that term is unenforceable under the NLRA. In other words, the employer can breach the contract without violating the NLRA.[107] Clearly, a determination that a subject is mandatory significantly impacts the bargaining relationship between the parties with respect to that particular subject.

B. *Scope of Mandatory Bargaining*

1. Statutory Language

The NLRA was designed to eliminate "obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining."[108] This policy is theoretically enforced by the unfair labor practice provisions of the Act.[109] Thus, an employer commits an unfair labor practice under section 8(a)(5) by refusing to bargain collectively, while a union's refusal to bargain violates section 8(b)(3).[110]

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106. *Id.*; *see also* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (party not obligated to bargain over nonmandatory subject).

107. An employer does not violate § 8(a)(5) by unilaterally changing, during the term of the contract, a provision agreed upon in the contract regarding non-mandatory subjects. Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

108. 29 U.S.C. § 151 (1982).

109. The sanctions under the Act are weak and the processing of unfair labor practices takes a long time; therefore, employers actually have an incentive to refuse to bargain in good faith in some situations. *See* Lock, *Section 10(j) of the National Labor Relations Act and the 1982 National Football League Players Strike: Wave that Flag*, 1985 ARIZ. ST. L.J. 113, 114-15; *see also* Lock, *Employer Unfair Labor Practices During the 1982 National Football League Strike: Help on the Way*, 6 U. BRIDGEPORT L. REV. 189, 190-93 (1985) (slow process of resolving unfair labor practice charges and short careers of professional athletes provide opportunity for management misconduct).

110. 29 U.S.C. § 158(a)(5), (b)(3) (1982).

The duty to bargain collectively is defined in section 8(d).[111] Under this provision, both employers and unions are obligated to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. Parties are free to bargain over any legal subject. Yet, Congress specifically limited the duty to bargain to those matters involving "wages, hours, and other terms and conditions of employment."[112]

The term "wages" has been construed broadly. It includes hourly pay rates, overtime pay, merit pay and incentive plans, and fringe benefits in the form of cash or cash equivalents, such as pensions, paid holidays and vacations, group health insurance, profit-sharing plans, and stock-purchase plans.[113] The statutory term "hours" includes the period of time during which employees work. Thus, employers must bargain over the particular hours of the day and days of the week that employees will be required to work.[114]

The scope of "other terms and conditions of employment" is not as clearly defined as "wages" and "hours." The original House bill for section 8(d) contained a specific listing of mandatory bargaining subjects.[115] Congress rejected that bill because it artificially limited the appropriate subjects of collective bargaining. As an alternative, Congress deliberately adopted the general language "other terms and conditions of employment."[116]

The Supreme Court interpreted this legislative history as evidence of a conscious congressional decision to give the NLRB broad latitude to define the phrase "terms and conditions of employment" in light of specific industrial practices.[117] Unfortunately, the NLRB has been un-

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111. *Id.* § 158(d) (1982).

112. *Id.*

113. *See* NLRB v. Compton-Highland Mills, Inc., 337 U.S. 217 (1948); NLRB v. Everbrite Elec. Signs, 562 F.2d 405 (7th Cir. 1977); NLRB v. Huttig Sash & Door Co., 377 F.2d 964 (8th Cir. 1967) (hourly pay rates); Tom Johnson, Inc., 154 N.L.R.B. 1352 (1965), *enforced*, 378 F.2d 342 (9th Cir. 1967) (overtime pay); Richfield Oil Corp. v. NLRB, 231 F.2d 717 (D.C. Cir. 1956) (stock-purchase plans); NLRB v. Century Cement Mfg. Co., 208 F.2d 84 (2d Cir. 1953) (merit pay and incentive plans); NLRB v. Black-Clawson Co., 210 F.2d 523 (6th Cir. 1954) (profit sharing plans); W. W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949) (group health insurance); Singer Mfg. Co. v. NLRB, 119 F.2d 131 (7th Cir.), *cert. denied*, 313 U.S. 595 (1942) (paid holidays and vacation). *See generally* R. GORMAN, *supra* note 96, at 498-502.

114. *See, e.g.*, Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676, 726-29 (1965); Gallen Kamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968) (hours of day and days of week during which employees work is mandatory subject).

115. H.R. 3020, 80th Cong., 1st Sess. § 2(11)(B), 93 CONG. REC. 3548 (1947), *reprinted in* 1 LEGISLATIVE HISTORY OF THE LMRA OF 1947, at 66-67 (1948).

116. H.R. CONF. REP. 510, 80th Cong., 1st Sess. 34-35 (1947).

117. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 675 (1981).

able to articulate any general principle clearly defining the scope of mandatory bargaining.[118] As a result, both the NLRB and lower courts frequently decide scope of bargaining cases through ad hoc balancing of employer and employee interests.[119] Not surprisingly, the lack of clear principles has resulted in inconsistent decisions and confusion between employees and employers over bargaining rights and obligations.[120]

2. Supreme Court Precedents

The Supreme Court has considered the scope of mandatory bargaining on three occasions.[121] On two of those occasions, the Court was forced to determine whether specific employer decisions having a direct impact on the continued employment of a group of employees fell within the scope of "other terms and conditions of employment."[122] The Court, like the NLRB, failed to articulate a clear, workable principle applicable to all scope of bargaining cases. Nonetheless, the Court's language in these two decisions provides some guidance for the NLRB and lower courts.

In *Fibreboard Paper Products Corp. v. NLRB*,[123] the employer unilaterally decided to subcontract maintenance work performed by unit employees. At the expiration of the labor contract, the employer terminated the maintenance employees. The NLRB held that the employer was obligated to bargain over both the decision to subcontract and the effects of that decision.[124] The Supreme Court, affirming the

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118. *See* Harper, *supra* note 102, at 1449.

119. *Id.* at 1449, 1451-56.

120. *Id.* at 1456.

121. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

122. *First National Maintenance* involved a decision by the employer to shut down part of his business, thereby eliminating jobs. 452 U.S. at 669-70; *see infra* text accompanying notes 129-44. *Fibreboard* involved a decision by the employer to subcontract work previously performed by unit employees. 379 U.S. at 204-97; see *infra* text accompanying notes 123-28. *Borg-Warner*, however, involved the question of whether an employer could condition an agreement upon the union's acceptance of two clauses: a "ballot clause" requiring an employee vote on the employer's last bargaining offer as a prerequisite to a strike; and a clause recognizing as bargaining agent a local unit of the United Automobile Workers rather than the international unit certified by the NLRB. 356 U.S. at 343-44. The Court held that the employer's insistence on these two clauses as a condition to an agreement was unlawful since these clauses were non-mandatory subjects of collective bargaining. *Id.* at 349-50.

123. *Fibreboard*, 379 U.S. at 204-07.

124. *Id.* at 208.

NLRB's decision, relied on several factors to find that the employer's decision to subcontract was a mandatory subject of bargaining.

The Court noted that employer decisions resulting in terminations fell within the broad meaning of "terms and conditions of employment." The Court stressed that the purposes of the NLRA were furthered by bringing matters "of vital concern to labor and management" within the bargaining framework established by Congress. Industrial practice indicated that subcontracting was a topic commonly contained in collective bargaining agreements, thus providing additional support for the decision.[125] Significantly, the Court noted that the employer's decision to subcontract neither altered the company's basic operation nor required any capital investment. Thus, requiring an employer to bargain over this matter "would not significantly abridge his freedom to manage the business."[126]

Justice Stewart, in his concurring opinion, interpreted conditions of employment less expansively than the majority. He argued that employers should have the right to unilaterally implement decisions that "are fundamental to the basic direction of a corporate enterprise or . . . impinge only indirectly upon employment security."[127] Decisions involving advertising expenditures, product design, financing, and sales have too remote and speculative an impact on job security. Distinguishing the employer's decision in *Fibreboard* to subcontract from decisions to invest in labor-saving machinery or terminate a business, Stewart stated:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.[128]

The Supreme Court considered the scope of mandatory bargaining again in *First National Maintenance Corp. v. NLRB*.[129] The employer in that case supplied maintenance and cleaning services to commercial customers in the New York City area.[130] A group of employees who

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125. *Id.* at 211-12.
126. *Id.* at 213.
127. *Id.* at 224 (Stewart, J., concurring).
128. *Id.*
129. 452 U.S. 666 (1981).
130. *Id.* at 668.

serviced a particular nursing home voted in a Board-sanctioned election to be represented by a union.[131] Without bargaining with the newly-elected union, the employer terminated its service to the nursing home and subsequently discharged all the employees.[132]

Although it found no anti-union animus, the NLRB held that the employer's decision to terminate its service and the effects of that decision were mandatory subjects of bargaining.[133] Thus, the employer violated section 8(a)(5) of the NLRA by failing to bargain in good faith over those decisions.[134] The employer appealed the NLRB's finding that the decision to terminate service was a term or condition of employment.[135] The Second Circuit upheld the NLRB's ruling. The Supreme Court held that an employer's decision to terminate part of its business for purely economic reasons was outside the scope of mandatory bargaining, and reversed the NLRB.[136]

The Court, in its analysis of the scope of mandatory bargaining, identified three basic types of management decisions. Certain decisions, such as those involving promotional expenditures, product design and financing arrangements, "have only an indirect and attenuated impact on the employment relationship" and thus fall outside the scope of mandatory bargaining.[137] Other decisions, such as those pertaining to work rules and layoffs, have a direct and almost exclusive impact on the employer-employee relationship. These types of decisions are mandatory subjects.[138] More troublesome for purposes of distinguishing mandatory from non-mandatory subjects are those decisions that directly impact on employment and are primarily economic decisions involving a change in the scope and direction of the enterprise. Decisions such as the one made by the employer in *First National Maintenance* to terminate part of a business fall into this category.[139]

The Court acknowledged that decisions of this nature necessarily implicate significant employee and employer interests. Nonetheless, the Court avoided weighing these competing interests. Instead, it stated that an employer should be required to bargain over such de-

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131. *Id.* at 669.
132. *Id.* at 669-70.
133. *Id.* at 670-72.
134. *Id.*
135. *Id.* at 672.
136. *Id.* at 686.
137. *Id.* at 676-77.
138. *Id.* at 677.
139. *Id.*

cisions only if the benefit to labor-management relations and the collective bargaining process outweighs the burden placed on an employer's ability to conduct business.[140]

The Court balanced the employer's "need for unencumbered decision making" with the benefit to labor-management relations. The Court recognized that a fundamental purpose of the Act was to promote industrial peace by bringing problems of vital concern to labor and management within the collective bargaining framework established by Congress.[141] Yet, the Court stressed that management had to be free from the constraints of the bargaining process to the extent necessary to run a profitable business.[142] The Court also noted that business exigencies frequently required employers to act with speed, flexibility, and secrecy.[143] Noting that the employer's decision in *First National Maintenance* represented a significant change in operations, the Court concluded that the employer's need to operate freely regarding an economic decision to terminate part of its business outweighed the incremental benefit that might be gained through union participation in making such a decision.[144]

C. *Analysis of Drug Programs in the Context of Professional Sports Under Existing Case Law*

1. Application of National Labor Relations Board and Lower Court Precedents

Neither *Fibreboard* nor *First National Maintenance* clearly defines the scope of mandatory bargaining. Fibreboard acknowledged that certain employer decisions fall outside the statutory phrase "terms and conditions." But the Court failed to articulate any clear rule under which to evaluate those matters most likely to remain within an employer's entrepreneurial prerogative, such as decisions concerning plant relocations, sales of business, and partial closings. *First National Maintenance*, on the other hand, established a rule for one class of employer decisions but failed to establish any clear principle applicable to other employer decisions.[145]

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140. *Id.* at 679.
141. *Id.* at 678-79.
142. *Id.*
143. *Id.* at 682-83.
144. *Id.* at 686.
145. For a similar critique of *Fibreboard* and *First Nat'l Maintenance*, see Harper, *supra* note 102, at 1453-56.

The NLRB recently interpreted *First National Maintenance* in *Otis Elevator.*[146] In *Otis*, the employer decided to transfer some of its work to another of its plants. Although the employer disregarded the union while making this relocation decision, the NLRB upheld the employer's unilateral action. In an extremely broad reading of *First National Maintenance*, the NLRB held that all decisions affecting the scope and direction of an enterprise are exempted from bargaining and from the *First National Maintenance* Court's balancing test.[147] In the NLRB's opinion, only those decisions in which labor costs are the determining factor would fall within the scope of mandatory bargaining.[148]

The NLRB's holding in *Otis* that decisions affecting the scope and direction of an enterprise are beyond the scope of bargaining is consistent with the Court's position in *First National Maintenance* and *Fibreboard.* Other aspects of the NLRB's opinion, however, appear to exceed the *First National Maintenance* and *Fibreboard* tests. For example, limiting the scope of mandatory bargaining to those matters involving labor costs could exclude decisions pertaining to work rules and layoffs as well as other matters having a direct or exclusive impact on the employer-employee relationship. Neither *First National Maintenance* nor *Fibreboard* supports such a result. In addition, a decision to transfer work does not necessarily affect the scope or direction of an enterprise. These aspects of the *Otis* decision reflect the difficulty in determining the scope of mandatory bargaining.

Despite the Court's inability to clearly define the scope of mandatory bargaining, the NLRB and lower courts have consistently held certain subjects to be within the meaning of "terms and conditions of employment."[149] At least with respect to these particular subjects, predictable rules have evolved. These rules appear to be consistent with the Court's balancing test in *First National Maintenance* as well as the legislative history of section 8(d) of the Act.

Both the NLRB and the courts have interpreted "terms and conditions of employment" to include most provisions that deal with the employer-employee relationship.[150] Thus, most rules that regulate how employees perform their work are considered terms and conditions of employment. Included in this category are several bargaining subjects

146. 269 N.L.R.B. 891 (1984).
147. *Id.* at 893.
148. *Id.* at 894.
149. *See infra* notes 151-60 and accompanying text.
150. R. GORMAN, *supra* note 96, at 503-06.

that bear some resemblance to the drug testing programs proposed in the professional sports industry.

For example, decisions involving employee health and safety protection on the job are clearly mandatory subjects of collective bargaining.[151] In his concurring opinion in *Fibreboard*, Justice Stewart stated: "what one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment."[152] Safety considerations are such an important condition of employment that an employer may not modify safety rules without first bargaining with the union even when the employer is obligated by law to conform its conduct to specific minimum safety standards.[153] Disciplinary rules are also generally mandatory subjects of bargaining. Thus, it is an unfair labor practice for an employer to unilaterally implement systems of discipline.[154] Similarly, an employer must bargain over the criteria for demotion or a change in status of its employees.[155]

The requirements of continued employment are perhaps the most literal of "terms and conditions of employment." Accordingly, employer decisions to terminate employees, like disciplinary rules, are mandatory subjects of bargaining.[156] An employer may not unilaterally establish the allowable causes of discharge or the grievance procedures under which employer decisions involving discharges will be reviewed.[157] In fact, the scope of "requirements of continued employment" is not limited to discharges for cause. An employer is generally obligated to bargain over other issues involving the tenure of its employees, including where and in what sequence layoffs occur and the age for forced retirement.[158]

In connection with disciplinary rules and terminations, various testing programs constitute "terms or conditions of employment" and are

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151. *See, e.g.*, Miller Brewing Co., 166 N.L.R.B. 831 (1967), *enforced* 408 F.2d 12 (9th Cir. 1969).

152. *Fibreboard*, 379 U.S. at 222.

153. NLRB v. Gulf Power Co., 384 F.2d 822, 824-25 (5th Cir. 1967).

154. *See, e.g.*, Robbins Door & Sash Co., 260 N.L.R.B. 659, 659 (1982) (modification of practices established by consistent pattern of conduct may constitute a change in terms and conditions of employment whether or not it is also a breach of contract).

155. *E.g.*, United States Gypsum Co., 155 N.L.R.B. 1216 (1965), *enforcement denied on other grounds*, 393 F.2d 883 (6th Cir. 1968).

156. *E.g.*, San Antonio Portland Cement Co., 277 N.L.R.B. No. 33 (1985).

157. *E.g.*, NLRB v. Boss Mfg. Co., 118 F.2d 187 (7th Cir. 1941).

158. *E.g.*, *First Nat'l Maintenance*, 452 U.S. at 677; Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971).

thus mandatory bargaining topics. For example, the NLRB held that an employer may not unilaterally institute a polygraph test requirement for its employees, if results of the test could be the basis for disciplinary action or if refusal to submit to testing could result in automatic discharge.[159] Likewise, an employer cannot unilaterally implement mandatory physical examinations for its employees as part of attendance control procedures either as a condition of continued employment or if the results of the examinations could be the basis for discharge.[160]

The NLRB's treatment of each of these subjects suggests that drug testing programs proposed by professional sports leagues constitute mandatory subjects of bargaining. Drug abuse in professional sports clearly implicates valid employee safety concerns. The use of drugs during an athletic contest endangers the safety of all players. For example, amphetamines would tend to make players more intense and more aggressive and, thus, would be hazardous to users as well as non-users. Former major league pitcher Doc Ellis, who under the influence of LSD pitched a no-hitter for the Pittsburgh Pirates, has publicly admitted that he became more aggressive and frequently threw at batters while on drugs.[161] Cocaine, which also increases a person's heart rate, could presumably have a similar effect on players. Injuries might also result from marijuana or any other drug that might diminish a player's concentration during the contest.

The most controversial element of the proposed drug programs has been mandatory random testing. In addition, these programs have typically incorporated a system of progressive penalties for first, second, and third time offenders. The penalties include temporary suspension, suspension without pay, and permanent suspension.[162]

The safety considerations associated with drug use, as well as the disciplinary and testing aspects of the drug programs in professional sports, suggest that these programs are mandatory bargaining topics. An alternative argument exists, however, to compel bargaining over drug programs. These programs appear to fall within the scope of mandatory bargaining under the Supreme Court's balancing test in *First National Maintenance.*

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159. Medicenter, Mid-South Hosp., 221 N.L.R.B. 670, 678 (1975).

160. CIBA-Geigy Pharmaceutical, 114 L.R.R.M. 3650, 3653 (3d Cir. 1983).

161. Letter from Doc Ellis to Ethan Lock (July 2, 1987) (on file at *University of Florida Law Review*).

162. Under the NBA's current drug program, first offenders are suspended with pay, second offenders are suspended without pay and third time offenders are suspended permanently. *See* DRUG AGREEMENT BETWEEN NBAPA AND NBA, app. A (Oct. 1983).

2. Application of Supreme Court Precedents

a. Categories of Management Decisions

Of the three categories of management decisions identified by the Court in *First National Maintenance*, the drug-testing programs proposed in professional sports more closely resemble that category of management decisions almost exclusively affecting the employer-employee relationship than the type of economic decision primarily affecting a change in the scope or direction of the enterprise. As noted above, the programs typically incorporate disciplinary measures affecting player job security and conditions of continued employment. In an effort to justify the implementation of random drug testing, management expressed a belief that drug use by players will ultimately undermine fan support and the financial survival of professional sports.[163] Presumably, management would categorize a program designed to eliminate drug use as an economic decision primarily affecting the scope and direction of the enterprise.

This categorization is untenable for two reasons. First, an attempt to eliminate drug use in professional sports hardly constitutes a change in the scope or direction of business in the same manner as do terminations, partial closings, or decisions to invest in labor-saving machinery. The institution of a league-wide drug testing program would neither change the basic operation of a professional sports league nor require a significant capital investment. Thus, a drug program simply does not appear to be the type of management decision that lies at the "core of entrepreneurial control."[164]

Second, and perhaps more important, a decision to implement a drug program does not appear to be the type of business exigency that must remain outside the bargaining process in order to enable management to run a profitable business.[165] Despite management's concern that drugs are threatening the economic survival of professional sports, no evidence exists to support the theory that drug use by professional athletes will have any short run economic impact on professional sports leagues. To the contrary, industry revenues have increased during the past decade.

Amphetamines, pain killers, and steroids have been a part of professional sports for many years.[166] More recently, street drugs have

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163. *See supra* note 60.

164. *See Fibreboard*, 379 U.S. at 223.

165. *See First Nat'l Maintenance*, 452 U.S. at 682-83.

166. The use of amphetamines, pain killers, and steroids in professional sports is well known.

also become part of the industry. In 1985, a federal investigation revealed widespread cocaine use among major league baseball players.[167] Rumors of cocaine use by NFL players also surfaced in 1985. Prior to the 1986 season, Cleveland Browns safety Don Rogers died of a cocaine overdose.[168] Stories of cocaine use in the NBA have been well publicized for years. In 1985, several players were suspended from NBA play because of their involvement with cocaine.[169] Nonetheless, professional sports franchises appear to be flourishing economically. Gate receipts and television ratings are strong and each of the three major professional sports leagues (NFL, MLB and NBA) has publicly discussed the possibility of expansion in the near future.[170] The tremendous increase in gate receipts and network and non-network television revenues during the past decade suggests that fans have been indifferent to professional athletes' use of drugs.[171] If eliminating drug use is actually fundamental to the survival or basic direction of professional sports leagues, these facts are difficult to explain.

Many NFL teams have dispensed steroids to players to enable them to gain weight and get stronger. The use of pain killers has been common in all sports to enable players to perform while injured. Likewise, amphetamines have been dispensed to increase intensity and improve performance. *See, e.g.*, Hanson, *Ex-User Sounds Warning*, USA Today, Jan. 23, 1987, at C6, col. 1.

167. In 1984 and 1985, more than 40 major league baseball players either admitted drug use or were implicated in police investigations. *Drug Case Roster*, USA Today, Sept. 6, 1985, at C5. In 1985, a federal investigation linked 13 players to cocaine use and revealed that major league baseball's drug connection extended into the clubhouse. Angell, *supra* note 12, at 48-65; Callahan, *Baseball's Drug Scandal*, TIME, Sept. 16, 1985, at 26-28; Celender, *Baseball's Drug Connection Widens*, USA Today, Sept. 10, 1985, at A1.

168. *See* Reilly, *supra* note 13, at 28-34.

169. *See, e.g.*, Richmond, *Richardson Flunks Drug Test, Banned from NBA*, Ariz. Republic, Feb. 2, 1986, at C-1; *Lucas Fails Drug Test, Is Released*, Ariz. Republic, Mar. 15, 1986, at G-3.

170. Baseball's drug problems were well publicized. Nonetheless, MLB realized record-breaking attendance in 1985 and 1986. Despite drug problems in the industry, all three major sports have publicly discussed plans to expand. *See, e.g.*, Forbes, *Rozelle Feeling More Comfortable Discussing Expansion*, USA Today, Dec. 3, 1985, at C4; Herberg, *Phoenix Fourth on List for Baseball Expansion*, Ariz. Republic, Dec. 7, 1985, at E-1, E-6.

171. Between 1977 and 1981, each NFL team received approximately $6 million per year from network television revenues. *See* WHY A PERCENTAGE OF GROSS? BECAUSE WE ARE THE GAME 11 (1981) (report to the members of the NFLPA) [hereinafter NFLPA REPORT]. The five year network agreement entered into in 1982 guaranteed each team approximately $14 million per year. *Id.* at 16. Similarly, Major League Baseball received approximately $41.5 million from network television in 1981, $58 million in 1983, and $160 million in 1984. Local and cable television rights also increased. In 1981, Major League Baseball teams received a total of

b. Analysis Under *First National Maintenance* Balancing Test — Benefits to Labor-Management Relations and Collective Bargaining

Drug testing programs also appear to fall within the scope of mandatory bargaining under the Supreme Court's balancing test in *First National Maintenance*. The *First National Maintenance* test requires management to bargain if the benefits to labor-management relations and the collective bargaining process outweigh the burden placed on the employers' ability to conduct business.[172] Admittedly, employers have a legitimate interest in controlling employees' drug use. Yet, the Court's language in *First National Maintenance* and the existence of other employer remedies to control the use of drugs suggest that the benefits derived from collective bargaining outweigh management's need to take unencumbered or unilateral actions.

The *First National Maintenance* court noted that the fundamental goal of the NLRA was to promote industrial peace.[173] Designating certain matters as "mandatory subjects of bargaining" helps achieve industrial peace by bringing problems of vital concern to labor and management within the bargaining framework established by Congress.[174] In the Court's opinion, collective bargaining results in better decisions for labor, management, and society as a whole. The Court's opinion presumes the subject proposed for discussion is amenable to resolution through the bargaining process.[175]

The *First National Maintenance* Court concluded that decisions "essential for the running of a profitable business" are not amenable to collective bargaining.[176] These types of decisions are excluded from collective bargaining to protect the employer's right to determine the scope and direction of its enterprise.[177] Unlike decisions affecting the scope or direction of an enterprise, however, drug programs require

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$48.4 million in local and cable television revenue. In 1984, teams received a total of almost $105 million. *See* Lock, *Salary Increases Under MLB's System of Final Offer Salary Arbitration*, 2 LAB. LAW. 801, 811 (1986) (citing various cases of broadcasting). The NFL has maintained near capacity attendance while MLB's attendance has steadily increased in recent years. In 1985, MLB set a single season attendance record by drawing 46,838,819 fans. That record was broken in 1986 when MLB drew 47,500,347 fans. *Attendance Mark*, USA Today, Oct. 7, 1986, at C1, col. 1.

172. *First Nat'l Maintenance*, 452 U.S. at 679.
173. *Id.* at 674.
174. *Id.* at 677-78.
175. *Id.* at 678.
176. *Id.* at 678-79.
177. *Id.* at 677.

neither swift nor unilateral action. As noted above, drug use by professional athletes appears to have had no immediate impact on industry revenues. In addition, the implementation of a drug program neither requires an investment of capital nor changes the basic direction of an enterprise.

At the same time, drug use is clearly a problem of vital concern to labor and management. Without minimizing management's interest in controlling drug use, it is inaccurate and patronizing to suggest that drug use by athletes is a "vital concern" only for management. Drug use by players clearly implicates legitimate health and safety concerns.

Drugs can also have a significant economic impact on players. Although average yearly salaries in professional sports exceed average salaries in most other industries,[178] professional athletes have relatively short careers. The average career in the NFL, for example, is approximately four and one-half years.[179] Drug use could conceivably shorten a player's career by contributing to injury, eroding the player's skills or subjecting the player to suspension or expulsion from the league. A one-year suspension or an injury that shortens a player's career by one year reduces an average career by almost twenty-five percent. Obviously, drug use can have a tremendous impact on a player's career earning potential. Thus, the subject of drugs is a "vital concern" for players.

In addition, current practice in the industry suggests that drug programs is a topic amenable to collective bargaining. In both *Fibreboard* and *First National Maintenance*, the Court acknowledged that current labor practice was not a "binding guide" for courts to determine the scope of mandatory bargaining.[180] Nonetheless, the Courts cited industry practice as an indication of what was feasible through collective bargaining. The *Fibreboard* Court noted that employer decisions to subcontract had long been viewed as matters particularly well-suited for resolution within the structure of collective bargaining. Furthermore, the industrial practice of bargaining over this type of decision demonstrated the "amenability of such subjects to the collective bargaining process."[181]

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178. The average MLB salary in 1984 was $329,408 (source: MLBPA). The average NFL salary in 1985 was $193,000 (source: NFLPA).

179. In 1981, the NFLPA estimated that the average NFL career was approximately 4.6 years. NFLPA REPORT, *supra* note 167, at 4.

180. *First Nat'l Maintenance*, 452 U.S. at 684.

181. *Fibreboard*, 379 U.S. at 210-15.

The Court in *First National Maintenance* also cited industry practice to support its finding that termination decisions fell outside the scope of mandatory bargaining. The Court noted that provisions giving unions the right to participate in the decisionmaking process concerning alteration of the scope of an enterprise were relatively rare. This evidence, in the Court's opinion, weighed against mandatory bargaining.[182]

In 1983, the NBA and the National Basketball Players' Association (NBPA) jointly drafted and adopted a drug program that incorporated testing procedures, counseling for players with drug problems, and a system of progressive discipline. That agreement is still in effect.[183] Likewise, the Major League Baseball Players' Association (MLBPA) and the Major League Baseball Players' Relations Committee (MLBPRC) adopted a joint drug agreement in 1984.[184] Even the NFL and NFLPA addressed the issue of drug use in the 1982 collective bargaining agreement.[185] MLB and NFL owners, dissatisfied with the agreements pertaining to drug use, have attempted to unilaterally replace these agreements with new drug programs.[186] Yet, the prior agreements, especially the NBA and NBPA agreement, suggest that the subject of drugs is amenable to collective bargaining.

c. Analysis Under *First National Maintenance* Balancing Test — Management's Interest

Under the *First National Maintenance* balancing test, the benefits to the collective bargaining process must be weighed against management's right to protect its investment and unilaterally determine the scope or direction of its enterprise.[187] Although drug use appears to have no short term impact on industry revenues, and drug programs do not affect the fundamental operation of an enterprise, employers have a legitimate interest in the quality of their employee's job performance. Whether that interest gives an employer the right to unilaterally adopt a drug testing program, however, is debatable.

The NLRA imposes a duty to bargain over many subjects about which employers have legitimate reasons for wanting to bargain. Thus,

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182. *First Nat'l Maintenance*, 452 U.S. at 684.

183. *See* DRUG AGREEMENT BETWEEN NBAPA AND NBA, app. A (Oct. 1983).

184. *See* JOINT DRUG AGREEMENT BETWEEN MLBPA AND MLB PLAYER RELATIONS COMMITTEE, app. B (May 24, 1984).

185. *See supra* note 38.

186. *See supra* notes 47, 55-56 & 64 (NFL) and notes 14 & 18 (MLB).

187. *First Nat'l Maintenance*, 452 U.S. at 679.

Fibreboard required the employer to bargain over a decision to "contract out" even though the employer had a legitimate economic interest in making its decision.[188] In *Medicenter*, the NLRB ruled that polygraph testing was a mandatory subject of bargaining, even though the employer had legitimate concerns over vandalism. The employer's interest in detecting and preventing illegal activity did not justify its refusal to bargain.[189] Similarly, the Third Circuit in *CIBA-Geigy Pharmaceutical* found that physical examinations were a mandatory subject despite employer claims that testing was necessary to meet production schedules.[190]

Even assuming that an employer's interest in maximizing job performance permits the employer to unilaterally adopt a drug program, the unique nature of the professional sports industry distinguishes sports franchise owners from employers in other industries. Within the context of professional sports, an owner's need for unilateral action with regard to drug testing is diminished by the availability of other remedies. Because of the collective nature of athletic contests, unions and players recognize that a player's value to any particular team depends not only on the player's skill level, but also on the nature of the skills and the player's attitude, conduct, age, and relationship with teammates.[191] Thus, the employment relationship in professional sports presumes that teams retain the discretion to make necessary personnel changes in search of the right combination of talent, attitude, and leadership to produce a winning team.[192]

Teams typically retain broad powers to terminate a player's employment under the Standard Player Contract. Paragraph 11 of the NFL Player Contract, for example, allows the team to terminate a player's contract at any time if, in the sole judgment of the team, the player's skill is unsatisfactory as compared with other players or if the player has engaged in personal conduct reasonably judged by the club to adversely affect or reflect on the team.[193] The standard MLB

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188. *Fibreboard*, 379 U.S. at 211.

189. *Medicenter*, 331 N.L.R.B. at 676.

190. *CIBA-Geigy*, 114 L.R.R.M. at 3635.

191. J. WEISTART, THE LAW OF SPORTS, 245-46 (1979).

192. *Id.* Two parties frequently agree that one party will have the discretion to make certain decisions affecting their contractual relationship. *See generally* A. CORBIN, CORBIN ON CONTRACTS §§ 644-46 (1960).

193. NFL PLAYER CONTRACT, §§ 11:

> Player understands that he is competing with other players for a position on Club's roster within the applicable player limits. If at any time, in the sole judgment of Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player

and NBA player contracts contain similar provisions.[194]

In light of this wide range of discretion, a player will not be able to challenge a team's decision to terminate the player for failure to observe club rules or for lack of skill. Since a player's performance or conduct need only be unsatisfactory in the sole judgment of the club, the team is not obligated to support personnel decisions with objective proof.[195] Each team may exercise unfettered discretion to terminate any players using or suspected of using drugs.

Admittedly, the use of drugs might be a league-wide problem that ultimately requires a league-wide solution. Nonetheless, since teams can unilaterally rid themselves of players with drug problems, owners need not take immediate, unilateral league-wide action. To the extent

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has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract.

Id.

194. Unlike NFL players, MLB players and NBA players have some salary protection if terminated for lack of skill.

The NBA contract allows the team to terminate the player if

> at any time, [the player] fail[s], in the sole opinion of the Club's management, to exhibit sufficient skill or competitive ability to qualify to continue as a member of the Club's team provided, however, that if this contract is terminated by the Club, in accordance with the provisions of this subparagraph, during the period from the fifty-sixth day after the first game of any schedule season of the Association through the end of such schedule season, the Player shall be entitled to receive his full salary for said season.

NBA UNIFORM PLAYER CONTRACT, ¶ 20(b)(2).

The MLB contract states:

> The Club may terminate this contract upon written notice to the Player (but only after requesting and obtaining waivers of this contract from all other Major League Clubs) if the Player shall at any time: fail, in the opinion of the Club's management, to exhibit sufficient skill or competitive ability to qualify or continue as a member of the Club's team.

MLB UNIFORM PLAYER'S CONTRACT, ¶ 7(b)(2).

> If this contract is terminated by the Club, the Player shall be entitled to termination pay under the circumstances and in the amounts set forth in Article VIII of the Basic Agreement between the Major League Clubs and the Major League Baseball Players Association, effective January 1, 1980.

MLB UNIFORM PLAYER'S CONTRACT, ¶ 7(c). Article VIII, § C states:

> [a] Player whose Contract is terminated by a Club during the championship season under paragraph 7(b)(2) of the Uniform Player's Contract for failure to exhibit sufficient skill or competitive ability, shall be entitled to receive termination pay from the Club in an amount equal to the unpaid balance of the full salary stipulated in paragraph 2 of his Contract for that season.

Article VIII, § C, Basic Agreement between MLB and MLBPA (1980).

195. J. WEISTART, *supra* note 191, at 244-47 (1979).

that owners perceive drug use as a public relations cancer likely to undermine fan support or destroy the league, each owner has a remedy with respect to individual drug users, pending negotiation with the union of a league-wide program.

An individual team owner will usually become aware of drug problems on the team before the fans or media do. Occasionally, however, a team owner might not learn of an individual player's problem until the public does. This undoubtedly has been true in the case of some player arrests. In either case, the owner can communicate the team's position on drug use by taking immediate action and terminating that player's contract. Thus, no business exigency exists to justify unilateral action by management.

Moreover, team owners historically delegate to the league commissioner significant authority over player discipline, disputes between players and teams, and inter-team controversies.[196] Although players' associations have, through collective bargaining, successfully reduced the scope of the commissioners' role in player-team disputes,[197] league commissioners have uniformly retained the right to fine or suspend players for conduct detrimental to the integrity of, or public confidence in, the sport.[198]

Paragraph 15 of the NFL Player Contract, for example, permits the commissioner to fine or suspend the player or terminate his contract if the player

> [a]ccepts a bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity; uses or provides other players with stimulants or other drugs for the purpose of attempting to enhance on-field performance; or is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football . . . .[199]

The procedural requirements for commissioner action under paragraph 15 are outlined in article VIII of the 1982 collective bargaining agreement.[200]

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196. *Id.* at 440-41.

197. *Id.* at 442. The Commissioner's power has, in many instances, been replaced by dispute resolution systems under which independent arbitrators resolve disputes.

198. *See, e.g.*, 1982 COLLECTIVE BARGAINING AGREEMENT, *supra* note 19, art. VIII (1982).

199. NFL PLAYER CONTRACT, ¶ 15.

200. 1982 COLLECTIVE BARGAINING AGREEMENT, *supra* note 19, art. VIII, §§ 1-3.

The NFL Commissioner, through the power granted to him under the integrity-of-the-game clause contained in the NFL Player Contract, appears to be well-suited to deal with isolated instances of misconduct that threaten the integrity of the game. In 1983, NFL Commissioner Rozelle suspended Baltimore Colts quarterback Art Schlichter for two years for gambling.[201] The same year, Rozelle suspended Ross Browner, Pete Johnson, E. J. Junior, and Greg Stemrick for four games because of their involvement with cocaine.[202] None of these suspensions was challenged by the NFLPA and all seemed to be appropriate situations for Commissioner Rozelle to invoke his powers under paragraph 15 of the Player Contract and article VIII of the collective bargaining agreement. Yet the appropriateness of commissioner action in these instances hardly legitimizes league-wide action by the commissioner. In fact, the ability of the commissioner to discipline known drug users further reduces the need for unilateral adoption of a league-wide drug program.

D. *Analysis of Drug Programs in Context of Professional Sports Under Product Market Theory*

1. Application of Product Market Theory

One year after the *First National Maintenance* decision, Michael Harper published an article in the Virginia Law Review that attempted to clarify the scope of mandatory bargaining.[203] The article reconciled the *First National Maintenance* decision with a clear but limited principle that could be predictably and uniformly applied to all bargaining cases. Harper proposed to exclude from compulsory bargaining all employer decisions that determine the nature, quantity, pricing, and marketing of products.[204]

To support his product market theory, Harper argued that prohibiting employees from exerting any direct control over the product market was consistent with the NLRA.[205] In addition, Harper cited a strong social policy, not subordinated by the NLRA, in favor of allowing consumers to decide which goods employers produce by expressing their preference in the marketplace.[206] Consumers, not employees,

201. Keteyian, *The Straight-Arrow Addict*, SPORTS ILLUSTRATED, Mar. 10, 1986, at 74-79.
202. *See supra* note 40.
203. Harper, *supra* note 102, at 1447.
204. *Id.* at 1450.
205. *Id.*
206. *Id.* at 1464.

should influence management's product market decisions.[207] Unlike the *First National Maintenance* test, Harper's product market theory was based on the desirability of insulating product market decisions from the collective bargaining process rather than weighing employer and collective bargaining interests.[208]

Whatever the merits of Harper's product market theory in the normal industrial setting, the theory conflicts with the purposes of the NLRA when applied to employees whose performance is the marketed product. For example, the NLRB and the courts have consistently held that safety concerns are conditions of employment within the meaning of the NLRA and, thus, are mandatory subjects of bargaining.[209] The product market theory, however, excludes safety issues from mandatory bargaining in situations where employee risk formed part of the product.[210] As a result, this theory would have a dramatic impact on the scope of collective bargaining in the professional sports industry.

The following examples of rules and rule changes illustrate the impact of the product market theory on bargaining in professional football. A current NFL rule prevents wide receivers from cutting inside after the play starts and blocking a defender in the back or the side.[211] The crack-back block, as this maneuver is called, is illegal because of the danger of serious injury if one player with a running start is permitted to blind side another player. Another league rule designed to prevent serious injury penalizes players for blocking below the waist on kickoffs.[212]

NFL rules also protect quarterbacks, kickers, and punt returners, presumably because they are vulnerable as stationary targets. Thus, an official should, according to league rules, end a play before a quarterback is actually tackled if he is "in the grasp" of a defender.[213] Punt returners can signal for a "fair catch" when receiving a punt, to eliminate the possibility of getting hit by a defender running full speed.[214] Likewise, a defender cannot collide with kickers or punters once they

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207. *Id.*
208. *Id.* at 1464 n.70.
209. *See supra* notes 151-53 and accompanying text.
210. Harper, *supra* note 102, at 1466.
211. OFFICIAL 1986 NATIONAL FOOTBALL LEAGUE RECORD AND FACT BOOK, DIGEST OF RULES 334-38 (1986).
212. *Id.* at 338.
213. *Id.* at 337.
214. *Id.* at 338.

have actually kicked the unblocked ball.[215] Finally, current rules only allow defensive backs to have contact with receivers within five yards of the line of scrimmage.[216] This rule replaced the old "bump and run" rule, which permitted defensive backs to hit receivers downfield as frequently as they wished until the ball was in the air.

Assume that, on the basis of a nationwide survey, the NFL concludes that fans want to see an increase in violence and aggressiveness on the field. Accordingly, the NFL unilaterally eliminates all rules protecting quarterbacks, kickers, and punt returners and legalizes the crack-back block and the bump and run. Harper suggests that the NLRB should not require football franchise owners to bargain over rule changes affecting the level of violence in football if violence is part of the product sold to fans.[217] Harper would argue that these rule changes are actually product design changes and should be excluded from mandatory bargaining regardless of the impact on player safety.

Arguably, all rule changes in professional sports are product design changes. Thus, under the product market theory, the owners could take the position that an increase in the length of games constitutes a change in the design of the product. Likewise, the NFL could unilaterally require all teams to install artificial turf either to increase the speed of the game or to enhance aesthetic appeal on television. This would be permissible despite the fact that artificial turf may increase the frequency and severity of player injuries. A literal application of the product market theory would exclude even absurd rules from the scope of mandatory bargaining. For example, the owners could adopt a rule preventing quarterbacks from wearing helmets, on the theory that recognition, identity, good looks, and competitiveness were part of the product.

Admittedly, management is unlikely to adopt an anti-helmet rule for quarterbacks. Nonetheless, the product theory excludes other, less absurd rule changes that management might adopt. These rule changes may have a significant impact on player safety. Harper offers no criteria upon which to limit employer discretion involving product design, regardless of the significance of the employee interest. Thus, the product market theory could, within the context of professional sports, eliminate from the scope of mandatory bargaining all subjects except wages and other economic benefits.

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215. *Id.* at 337-38.
216. *Id.* at 336.
217. Harper, *supra* note 102, at 1466.

Despite Harper's argument that consumers rather than employees should influence management's product decisions, nothing in the NLRA suggests that the interests of those employees whose performance is the marketed product should be subordinated to consumer or employer interests. Matters involving employee safety, systems of discipline, and conditions of continued employment are normally within the scope of mandatory bargaining.[218] Safety, discipline, and job tenure concerns are at least as critical to athletes as they are to industrial employees. Thus, sports franchise owners should, like other employers, be required to bargain over those matters. Harper provides little authority to support the position that any management group should be relieved of this obligation or, conversely, that any group of employees has fewer rights under the NLRA than normal industrial employees.

Additionally, Harper's product market theory is inconsistent with existing NLRB and court decisions within the sports industry. Although labor disputes and collective bargaining are currently an integral part of professional sports, the emergence of players' associations is a relatively new phenomenon.[219] Thus, applying federal labor laws to the sports industry has been a recent development. Nonetheless, there have been disputes involving the scope of mandatory bargaining. The resolution of these disputes suggests that neither the NLRB nor the courts has been willing to subordinate player interests to employer decisions that implicate both terms and conditions of employment, and product design changes.

2. Sports Industry Precedents

a. Bench Fine Rule and Installation of Artificial Turf Case

On March 25, 1971, the NFL owners adopted a new rule stating that "any player leaving the bench area while a fight is in progress

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218. *E.g.*, Atlas Microfilming, 267 N.L.R.B. 682 (1983); Robbins Door & Sash Co., 260 N.L.R.B. 659 (1982).

219. Unions and collective bargaining are relatively new phenomena in the sports industry. Although players' associations began to emerge in the 1950s, initially these associations were loosely operated and relatively weak compared to current associations. The MLBPA was formed in 1954 but did not have a full-time executive director until 1966 when it hired Marvin Miller. The National Basketball Players' Association, organized in the early 1950s, was an informal organization until 1962 when it hired Larry Fleisher as General Counsel. Although the National Hockey League Players' Association was formed in the mid 1950s, the National Hockey League did not formally recognize the association as the official bargaining representative of the players until 1967. The NFLPA was not formally recognized by the NFL until 1968. For a detailed history of collective bargaining in professional sports, see SOBEL, *supra* note 17, ch. 4.

on the field will be fined $200."[220] The Commissioner, who was charged with investigating violations of this rule and imposing fines, fined 106 players during the 1971 exhibition season for violating the "bench fine" rule. The union claimed the rule was improperly adopted, and filed a grievance with the Commissioner under the non-injury grievance clause of the collective bargaining agreement.[221] The Commissioner questioned the union's authority to challenge the fines. Subsequently, the union withdrew its grievance and filed an unfair labor practice charge, alleging that the NFLMC and its member clubs refused to bargain in violation of section 8(a)(5) by unilaterally implementing the new rule.[222]

The NFLPA filed another unfair labor practice charge against management in 1971. In January, 1971, the union became aware of a study suggesting that artificial turf might be responsible for an increasing number of injuries to football players.[223] The union subsequently sought management's cooperation in connection with a further study on the impact of artificial turf. On November 11, 1971, the union formally demanded both bargaining and a moratorium on future installations of artificial turf. In the meantime, five clubs installed artificial turf in 1971. In addition, the Kansas City Chiefs were scheduled to move, prior to the 1972 season, into a new stadium containing artificial turf. Two other clubs, the New York Giants and Buffalo Bills, announced plans for the installation of artificial turf in stadiums to be constructed in the future.

Management denied that it had an obligation to bargain about the installation of artificial turf during the term of the collective bargaining agreement. However, management agreed to engage in general discussions with the union in the interest of maintaining a good relationship.[224] The union rejected management's suggestion to refer the matter to the contractual joint committee, presumably because the joint committee had no authority to negotiate.[225] On December 10, 1971, the union filed an unfair labor practice charge alleging that management refused to bargain over the future installation of artificial turf.[226]

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220. NFLMC and Constituent Member Clubs of the NFL and NFLPA (I), 203 N.L.R.B. 958, 958 (1973).

221. *Id.*

222. NLRB Case No. 18-CA-3380.

223. NFLMC and Constituent Member Clubs of the NFL and NFLPA (I), 203 N.L.R.B. 958, 958 (1973).

224. *Id.*

225. *Id.* at 958-59.

226. *Id.* (charges filed in NLRB Case No. 18-CA-3437).

A complaint was issued on both charges on May 12, 1972, and hearings commenced before an administrative law judge on June 20, 1972.[227] The judge found that the owners' unilateral implementation of the bench fine rule violated section 8(a)(5) of the NLRA. However, the judge concluded that management's conduct concerning the artificial turf charge did not constitute a refusal to bargain, and he dismissed that portion of the complaint.[228] The judge's decision on the merits of these charges was less significant than his analysis of management's obligation to bargain over both topics.

At the hearing, management suggested that the installation of artificial turf was not a mandatory subject of bargaining, and rhetorically asked the judge: "If artificial turf is to be declared a mandatory subject of bargaining, would the dome of the astrodome likewise be a mandatory subject? If the earth below is mandatory, is the sky above, and what about the sides?"[229] The judge had little difficulty distinguishing artificial turf from floors of a plant. The ceilings, walls, and floors of a plant are usually so remotely connected to a worker's conditions of employment that these items are not typically mandatory subjects of bargaining.[230] The football playing surface, however, is clearly a condition of employment, especially if one surface is less conducive to injuries than other surfaces.[231] Similarly, the judge concluded that the bench fine rule was unquestionably a mandatory subject of bargaining. The fines represented a reduction in salary, even if only a conditional reduction for specified conduct.[232]

Both parties filed exceptions to the administrative law judge's decision. The NLRB heard oral argument on March 5, 1973, and issued a decision on May 30, 1973.[233] The NLRB found that the Commissioner, instead of the owners, implemented the bench fine rule, and thus dismissed that portion of the complaint.[234] The eighth circuit in reversing concluded that the owners adopted the rule and it constituted a unilateral change in a condition of employment.[235] Regarding the artificial turf charge, the NLRB agreed with the administrative law judge that the NFLMC had not refused to bargain over the installation of

227. *Id.* at 960.
228. *Id.* at 969.
229. *Id.* at 961.
230. *Id.* at 962.
231. *Id.*
232. *Id.* at 961-62.
233. *Id.* at 958.
234. *Id.* at 959.
235. NFLPA v. NLRB, 503 F.2d 12, 17 (8th Cir. 1974).

artificial turf.[236] The NLRB specifically stated, however, that artificial turf was a mandatory subject of bargaining.[237]

b. Overtime and Punt Rules Case

In the spring of 1974, the NFLMC unilaterally adopted ten new rules.[238] The NFLPA maintained that two of the new rules, the sudden death or overtime rule and the punt rule, involved conditions of employment. Therefore, management's unilateral adoption of those rules amounted to a refusal to bargain, in violation of section 8(a)(5).[239] The union filed an unfair labor practice charge and on June 9, 1975, the NLRB issued a consolidated complaint containing several unfair labor practice charges.[240] Hearings before an administrative law judge were held from August 11 through December 15, 1975.[241]

The NFLPA opposed the overtime and punt rules because of the impact these rules had on working hours and player safety.[242] The sudden death overtime rule, which eliminated tie games at the end of regulation play, extended the players' working hours and prolonged the period of time during which players were exposed to injury.[243] The league designed the punt rule to increase the number and proficiency of punt returns.[244] This rule prohibited players on the kicking team from going beyond the line of scrimmage until the ball was kicked, and increased the players' exposure to injury.[245]

Management, on the other hand, contended that these changes were made in response to fan interest for more exciting play.[246] In other words, the rules were adopted to improve the game's audience appeal. The NFLMC argued that the rule changes represented changes

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236. NFLMC and Constituent Member Clubs of the NFL and NFLPA (I), 203 N.L.R.B. 958, 959-60 (1973).

237. *Id.* at 959.

238. *See* H.R. REP. No. 1786, 94th Cong., 2d Sess., at 469 (1976).

239. After the rules were adopted, the NFLMC advised the NFLPA of its willingness to discuss the effects of any of the rules. *See* Administrative Law Judge's Opinion at 27-32, NFLMC and Constituent Member Clubs and NFLPA (II), NLRB Case No. 2-CA-13379 (June 30, 1976). For text of administrative law judge's opinion, see JD-405-76 New York or H.R. REP. No. 1786, 94th Cong., 2d Sess. 465-521 (1976). Unlike in *NFLMC (I)*, the parties entered into a settlement agreement as part of the collective bargaining agreement executed on March 1, 1977.

240. NLRB Case No. 2-CA-13379.

241. *Id.* at 466.

242. *Id.* at 486-87.

243. *Id.* at 487.

244. *Id.* at 486.

245. *Id.*

246. *Id.* at 487.

in the design or development of the product, and thus were exclusively a management prerogative.[247]

The administrative law judge issued a decision on June 30, 1976, and found that management's conduct did not constitute a refusal to bargain.[248] Although the rule changes were adopted in the spring of 1974, the judge noted that management had, in a letter dated May 24, invited the union to bargain over the effects of the rule changes.[249] Since the rules were not to be implemented until players went to training camp in July, the judge concluded that the players' association had ample opportunity to bargain before the rules were put into effect.[250] The judge did conclude, however, that the rule changes were mandatory bargaining subjects.[251]

The administrative law judge acknowledged that employers are not required to bargain over all decisions that have an impact on conditions of employment. Citing *Fibreboard*, the judge noted that the employer has complete control over those decisions involving a commitment of investment capital or a change in the basic scope or direction of the corporate enterprise.[252] In addition, the judge found some merit in the NFLMC's position that the playing rules were similar to the design of a product.[253]

Nonetheless, the administrative law judge cited the NLRB's earlier decision on the artificial turf issue and concluded that the length of time players perform as well as their exposure to injury were, like the type of surface on which they played, mandatory subjects of bargaining.[254] The judge admitted that this conclusion arguably deprived management of entrepreneurial control equal to that of other employers. Yet, the judge found that "the deprivation is one attributable to the requirements of the statute."[255]

c. Footwear Case

The scope of "terms and conditions of employment" was at issue in another unfair labor practice charge filed in 1979 by the North

247. *Id.*
248. *Id.* at 490.
249. *Id.* at 489-90.
250. *Id.* at 490.
251. *Id.* at 488.
252. *Id.*
253. *Id.* at 488-89.
254. *Id.* at 489.
255. *Id.*

American Soccer League Players' Association (NASLPA).[256] In that case, the NASLPA alleged that the North American Soccer League (NASL) violated its obligation to bargain with the exclusive bargaining representative of the players, by entering into contracts with individual players and unilaterally changing various conditions of employment.[257] Among those unilateral changes adopted by the league was a rule requiring players to obtain permission from their respective teams before wearing footwear other than that selected by the team.[258]

The NLRB issued complaints and requested temporary relief under section 10(j) pending the final disposition of the unfair labor practice charges.[259] The district court granted injunctive relief on behalf of the NASLPA and, on October 6, 1980, the Second Circuit affirmed the district court's order.[260] The NLRB has consistently held that unilateral changes concerning dress codes or uniform policies constitute changes in terms and conditions of employment.[261] Within the context of professional sports, a player's footwear, like the uniform, is arguably an aspect of the design of the product. Nonetheless, the NLRB and the district and circuit courts each concluded that the rule regarding footwear amounted to a unilateral change in a condition of employment.[262]

Decisions concerning artificial turf as well as rule changes such as overtime and punt return rules implicate employee safety concerns. Arguably, rules designed to limit fighting or restrict the type of footwear are less objectionable from an employee's standpoint. Nonetheless, even rules of this nature fall within the scope of mandatory bargaining. These cases clearly indicate that neither the NLRB nor the courts have been willing to subordinate player interests with respect to those changes in product design that implicate either safety or disciplinary concerns.

3. Product Image

Despite the above cases, management's interest in controlling drug use can be distinguished from its interest in playing surfaces and the rules of the game. A drug program is not part of product design in

256. Morio v. North Am. Soccer League, 501 F. Supp. 633, 637-38 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 217 (2d Cir. 1980).

257. *Id.* at 637.

258. *Id.*

259. *Id.* at 634.

260. Morio v. North Am. Soccer League, 632 F.2d 217, 218 (2d Cir. 1980).

261. *See, e.g.*, Transportation Enters., Inc., 250 N.L.R.B. 551 (1979).

262. *Morio*, 632 F.2d at 218.

the same manner that rules and playing surfaces represent aspects of product design. Drug use by players is arguably an aspect of product image rather than product design.

The exclusion from mandatory bargaining of those management decisions that affect the image of a product is perhaps the most appealing application of Harper's product market theory within the context of professional sports. Harper suggests that employer decisions concerning the identity and behavior of employees, like product design decisions, should remain outside the scope of mandatory bargaining when the identity and behavior of the employees define the marketed product.[263] Employers should not have to bargain over product image or quality. Employers should, according to Harper, be able to unilaterally set personnel standards that define the product.[264]

Authority exists to support the position that decisions that affect the image and quality of an employer's product should be excluded from the scope of mandatory bargaining. In *Newspaper Guild of Greater Philadelphia, Local 10, v. NLRB*,[265] a publisher attempted to unilaterally institute an ethics code that restricted its employees from participating in certain community or political activities and from receiving gifts from protected news sources. The stated purposes of the code were to maintain the paper's standards of integrity and objectivity and to protect its quality and credibility.[266] The union claimed that the code was a condition of employment and filed an unfair labor practice charge after management refused to bargain over the matter.[267]

The administrative law judge ruled that the code was a mandatory bargaining subject and ordered the employer to bargain.[268] The NLRB agreed that the employer had a duty to bargain over the penalty provisions of the code but held that the employer had no duty to bargain over the code's substantive provisions. The penalty provisions affected employment security and fell within the scope of mandatory bargaining. In the NLRB's opinion, however, the code itself represented the newspaper's attempt to preserve the quality of its publication. It was, therefore, a management prerogative.[269]

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263. Harper, *supra* note 102, at 1467.
264. *Id.* at 1467-68.
265. 636 F.2d 550 (D.C. Cir. 1980).
266. *Id.* at 555.
267. *Id.* at 556.
268. *Id.* at 557.
269. *Id.*

The D.C. Circuit Court of Appeals rejected the NLRB's distinction between a decision to institute a code and the penalties under the code. In its opinion, these matters were inseparable. Both were either mandatory or non-mandatory subjects of bargaining.[270] At least with respect to news publications, however, the court recognized the non-mandatory nature of image and quality concerns.[271] It found that credibility was a central element of the newspaper's ultimate product and, relying on Justice Stewart's concurring opinion in *Fibreboard*, concluded that the protection of a paper's editorial integrity lay "at the core of publishing control."[272]

In a footnote to its decision, the *Newspaper Guild* court specifically declined to consider whether credibility and integrity were as fundamental to the scope of commercial enterprises not possessing the special characteristics of a news publication.[273] Yet an argument of this nature is not untenable. Within the context of professional sports, professional athletes are clearly identified by the public with the product that is being marketed by professional sports leagues. Presumably, sports franchise owners would argue that drug use by professional athletes affects the quality and image of the product offered to the fans.

Ironically, management has contributed to the use of drugs in professional sports. Drugs and alcohol have for many years been associated with the industry. Breweries advertise heavily in professional sports. Beer is sold at most athletic stadiums and athletes frequently appear in beer commercials.[274] More significantly, teams have historically used and abused amphetamines, painkillers, cortisone, and steroids.[275] As recently as 1986, Commissioner Rozelle specifically stated that his proposed drug testing program would not include testing for steroids.[276]

In addition, management's attempts to publicly pressure players to accept random drug testing fosters the image of professional athletes as drug users. There have, of course, been several instances of drug abuse by individual athletes.[277] Nonetheless, many athletes do not use drugs, and resent both management's and the public's perception of

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270. *Id.* at 564.

271. *Id.* at 560.

272. *Id.*

273. *Id.* at 560 n.34.

274. Coors, Budweiser, and Miller advertise on NFL telecasts. Miller, in particular, uses professional athletes and ex-professional athletes in its commercials.

275. *See supra* note 166.

276. *See Drug Tests Will Help Clean Up Pro Sports*, USA Today, July 15, 1986, at 10A.

277. *See, e.g., supra* notes 40-42 & 56 and accompanying text.

athletes as drug abusers. Fans and the media interpret the players' refusal to accept testing as evidence that players either have something to hide or feel that drug abuse is not a serious problem.

Regardless of management's contribution to the presence of drugs in the industry and the public's perception of athletes as drug users, management clearly has a legitimate right to protect the image and quality of professional sports. Yet this right to protect its product does not necessarily give management the right to unilaterally implement a drug testing program. As noted above, management typically has the ability under the standard player contract to protect the image of the game by terminating drug users' contracts.[278] Additionally, drug use involves significant employee interests as well as image concerns. Thus, unilateral action is justified only when management must act immediately in order to protect its product. Since drug use in professional sports has had no immediate impact on industry revenues,[279] there appears to be no reason to relieve management of its obligation to bargain over this subject.

Finally, no evidence exists to suggest that drug testing will eliminate drug use in professional sports or change the image of professional athletes as drug users. The owners' argument that testing will deter drug use might have some validity. But cocaine leaves the body within a few days of use.[280] Thus, unless tests are conducted every few days, players with drug problems will be inclined to use drugs immediately after being tested.[281]

E. *Effects Bargaining*

Management's most persuasive argument to exclude drug programs from the scope of mandatory bargaining is that players' drug use affects the image and quality of the product offered to the market. Thus, drug testing is a matter that lies at the core of entrepreneurial control. As noted above, various factors, including the existence of other employee remedies, weaken the argument. Regardless of the validity of its argument, however, management may still have an obligation to bargain over the type of program currently proposed in professional sports. A determination that drug programs are not man-

278. *See, e.g., supra* notes 191-95 and accompanying text.

279. *See supra* notes 167 & 171 and accompanying text.

280. *See* Stille, *supra* note 9.

281. Bias was tested prior to the NBA draft in June; Rogers was tested at the Browns mini-camp in May as part of the team's pre-season physical.

datory bargaining subjects will not necessarily relieve management of its obligation to bargain over the effects of those programs.

The Court and the NLRB have held that an employer's right to take unilateral action with respect to non-mandatory bargaining subjects does not permit the employer to unilaterally control the effects of that action.[282] The NLRB's conclusion in *First National Maintenance* that the employer had an obligation to bargain over both its decision to terminate and the effects of that decision indicate that the NLRB recognized a distinction between these two types of employer decisions.[283] On appeal, the Supreme Court also recognized this distinction.[284] Although it held that the decision to close the plant was not a mandatory subject, the Court found that the employer did have an obligation to bargain over the effects of that decision.[285]

The Court cited its own language in *Fibreboard* where it observed that section 8(d) covered terminations of employment that resulted from closing an operation.[286] The Court also noted that the union must be given the opportunity to bargain over terminations resulting from closings as part of the effects bargaining mandated by section 8(a)(5).[287] Because it had a legitimate interest in matters of job security, the union was entitled to offer concessions, information, or alternatives to management in an attempt to forestall or prevent the termination of jobs.[288]

The NLRB reached a similar result in *Newspaper Guild*.[289] In that case, the NLRB found that the employer was obligated to bargain over the penalties imposed for violations of an ethics code even though the code itself was a non-mandatory bargaining subject.[290] The D.C. Circuit's reversal of the NLRB's holding suggests that management's obligations with respect to effects bargaining are no more clearly defined than its obligations under the language of the NLRA.[291]

The circuit court refused to distinguish for bargaining purposes the penalty provisions of the code from the code's substantive provisions. In its opinion, that distinction was "contrary to reason and at

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282. *First Nat'l Maintenance*, 452 U.S. at 681; *Otis*, 269 N.L.R.B. at 893-94.
283. *First Nat'l Maintenance*, 452 U.S. at 671.
284. *Id.* at 677.
285. *Id.* at 681.
286. *Id.*
287. *Id.* at 681-82.
288. *Id.* at 682.
289. Newspaper Guild, Local 10 v. NLRB, 636 F.2d 550 (D.C. Cir. 1980).
290. *Id.* at 557.
291. *Id.* at 564.

war with the practical considerations of collective bargaining."[292] As a practical matter, the Court reasoned that penalties could not be separated under the NLRA from the substantive provisions they were designed to enforce.[293]

Whether the *First National Maintenance* and *Newspaper Guild* decisions can be reconciled is unclear. Although a decision to terminate differs from product image or quality decisions, both cases involved employer decisions that fell outside the scope of mandatory bargaining. Similarly, significant employee interests were at stake in each case. On the other hand, for bargaining purposes, it could be far easier to separate the effects of a decision to terminate from the actual decision to terminate than to separate the penalties enforcing a set of rules from those rules.

A strong argument could be made that management should, at a minimum, have an obligation to bargain over the effects of a drug program. Determining the scope of "effects bargaining" presumably involves the same type of balancing test used by the Court in *First National Maintenance*. Once again, although the employer interests at stake may be significant, no evidence exists to suggest that management needs to take immediate, unilateral action to protect its product. At the same time, the penalties or "effects" under the proposed programs clearly implicate matters of "vital concern" to employees. Because professional athletes have such short careers, any type of suspension is an appropriate subject for collective bargaining. Thus, players should, at the very least, have the right to demand bargaining over the mechanics and penalties of a league-wide drug program.

IV. Board's Deferral Policy

As noted above in section II, the NLRB has not considered the issue of whether drug testing constitutes a mandatory or non-mandatory subject of collective bargaining.[294] In the context of professional sports, the NLRB's failure to consider this issue has resulted from its broad policy of deferring disputes to arbitration. The NLRB deferred to arbitration the unfair labor practice charge filed by the NFLPA involving efforts by individual teams to conduct post-season drug tests.[295] The NFLPA withdrew its charge against the New England

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292. *Id.* (quoting Capital Times Co., 223 N.L.R.B. 651 (1976) (Chairman Fanning, dissenting)).

293. *Id.*

294. *See First Nat'l Maintenance*, 452 U.S. at 674-79.

295. *See supra* notes 48-50 & 73 and accompanying text.

Patriots after the Patriots announced their decision not to implement a team-wide program.[296] In all likelihood, the NLRB would also have deferred this charge to arbitration had it not been withdrawn by the union. Finally, the NFLPA, aware of the NLRB's broad deferral policy, declined to file a charge with respect to Commissioner Rozelle's attempt to implement a league-wide program.[297]

Arbitration is a widely accepted mechanism for labor-management dispute resolution in the context of modern labor law. The NLRA encourages arbitration. Section 171(a) of the NLRA declares that "settlement of issues between employers and employees through collective bargaining may be advanced by . . . voluntary arbitration . . . ." Section 173(d) states that "final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[298] Accordingly, the Supreme Court's endorsement of arbitration as a mechanism for resolving disputes has caused the arbitration process to flourish.[299] More than ninety-six percent of all labor-management collective bargaining agreements incorporate some type of arbitration provisions.[300]

Since arbitration is commonly used to resolve contract disputes arising under collective bargaining agreements, arbitrators are frequently called upon to interpret contracts between parties. In some situations, however, a breach of the parties' collective bargaining agreement may also constitute a statutory unfair labor practice under the NLRA. Although the NLRB has the power to adjudicate unfair labor practice charges,[301] the NLRB has adopted broad deferral policies to deal with this overlapping jurisdictional problem. As a result, the unfair labor practice charge is frequently neither resolved nor addressed by the NLRB.

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

297. For a summary of each of these three disputes, see *supra* notes 47-94 and accompanying text.

298. 29 U.S.C. §§ 171(b), 173(d) (1982).

299. In 1960, the Supreme Court, in three cases that became known as the Steelworkers Trilogy, expressed approval of the use of arbitration in labor-management relations. *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 374 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

300. Fowler, *Arbitration, the Trilogy and Individual Rights: Developments Since* Alexander v. Gardner-Denver, 36 LAB. L.J. 173, 174 (1985); *see also*, Zifchak, *Agency Deferral to Private Arbitration of Employment Disputes*, 73 COLUM. L. REV. 1383, 1385 (1973).

301. 29 U.S.C.§ 153(a)-(d) (1982).

The issue of deferral arises when an alleged violation of the NLRA also constitutes an alleged breach of a provision in the collective bargaining agreement subject to arbitration. A NLRB decision to defer a dispute to arbitration occurs in one of two situations. First, if an arbitrator's award exists, the NLRB may choose to defer to the award and dismiss the unfair labor practice charge. Second, if the arbitration process has not begun or is not yet complete, the NLRB may decide to foreclose its process until arbitration is complete. The NLRB has adopted a separate deferral policy to deal with each situation.

Under the NLRB's current post arbitration deferral policy, it will not consider an unfair labor practice charge if an arbitrator has adequately considered the charge and the decision is not palpably wrong.[302] A charge is adequately considered if the contract and unfair labor practice issues are factually parallel and the arbitrator was presented with facts relevant to resolving the unfair labor practice charge.[303] A decision is palpably wrong only if there is no possible interpretation of the decision that is consistent with the NLRA.[304] The NLRB stated that it would not require the arbitrator's award to be totally consistent with NLRB precedent.[305] According to its policy of pre-arbitration deferral, the NLRB will apparently defer to an arbitration mechanism, if the mechanism clearly encompasses a dispute that arose in conjunction with an interpretation of the collective bargaining agreement and the charged party is willing to arbitrate the dispute.[306]

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302. Olin Corp., 268 N.L.R.B. 573, 574 (1985). The Board first articulated its policy of post arbitration deferral in Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). Under the *Spielberg* doctrine, the Board would defer to an existing arbitrator's award if the arbitration proceeding had been procedurally fair, all of the parties agreed to be bound and the arbitrator's decision was not clearly repugnant to the purpose of the policies of the Act. *Id.* at 1082. Since *Spielberg*, the Board has vacillated between an aggressive and reluctant deferral policy. *See* Mack & Bernstein, *NLRB Deferral to the Arbitration Process: The Arbitrator's Demanding Role*, 40 Arb. J. 33 (1985); Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355, 357-59 (1985). However, the Board recently readopted a strong deferral policy in *Olin*, 268 N.L.R.B. at 574. The "palpably wrong" standard appears to be consistent with the clearly "repugnant standard" articulated in *Spielberg*.

303. *Olin*, 268 N.L.R.B. at 574.

304. *Id.*

305. *Id.*; *see also* Peck, *supra* note 302, at 358.

306. United Technologies Corp., 268 N.L.R.B. 557, 558 (1984). The Board first enunciated its pre-arbitration deferral policy in Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). In *Collyer*, the Board stated that it would defer to the arbitration process when the dispute arose in the context of CBA interpretation. *Id.* at 841. In the Board's opinion, such disputes were "eminently" well suited for resolution by an arbitrator. *Id.* at 842. The Board also required that the arbitration process be procedurally fair. *Id.*

Various grounds justify the NLRB's willingness to defer to arbitration. For example, speed, efficiency, and flexibility are often cited as reasons for deferral.[307] Additionally, the arbitrator is presumed to have expertise in this area because of frequent contact with labor-management disputes and contracts.[308] Despite the NLRB's broad deferral policies, however, deferral is frequently inappropriate.

Admittedly, the typical arbitration mechanism is faster than the NLRB's machinery. Yet this justification for deferral is undermined if the victim of an unfair labor practice is willing to forego speed for an NLRB ruling. In addition, arbitrators, regardless of their contract expertise, do not necessarily have any particular expertise to enable them to construe public statutory rights. In fact, the arbitrator may avoid the potentially more volatile unfair labor practice issue altogether in an attempt to preserve the arbitrator's role.[309] Thus, the NLRB's position not to hold arbitrators strictly to NLRB precedent is disturbing. Because arbitrators often lack the expertise and incentive to resolve unfair labor practice charges, they should not be able to shape statutory rights or the future of national labor policy.

Regardless of the justifications for arbitration, deferral is clearly inappropriate if the unfair labor practice charge, left unresolved, will likely be the subject of a subsequent dispute between the parties. Arbitration is only appropriate to resolve disputes concerning existing agreements. It is an inappropriate mechanism for determining future bargaining obligations, and it should not be used as a substitute for collective bargaining.[310] Thus, the NLRB should not defer if the dispute is not covered by the contract and therefore involves the acquisition of new rights, if the unfair labor practice charge is likely to create confusion over the bargaining obligations of the parties in future negotiations, or if the charge is likely to arise again, regardless of the arbitrator's decision, either during the life of the contract or upon the expiration of the existing agreement. In fact, the NLRB effectively abdicates its statutory responsibility by deferring to arbitration in these situations.

As the NFLMC and NFLPA approach the upcoming negotiations for a new collective bargaining agreement, the NLRB's deferral policy

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The Board's pre-arbitration policy has, like its post-arbitration policy, changed from time to time. *See* Mack & Bernstein, *supra* note 302, at 34. Its most recent pre-arbitration deferral statement was articulated in *United Technologies*, 268 N.L.R.B. at 558-60.

307. *See, e.g.*, *United Technologies*, 268 N.L.R.B. at 558-60.

308. *See, e.g.*, Carey v. Westinghouse, 375 U.S. 261 (1964); *Collyer*, 192 N.L.R.B. at 842-43.

309. *See, e.g.*, *Collyer*, 192 N.L.R.B. at 846-50 (Member Fanning, dissenting).

310. *Id.*

appears questionable. Neither party can be certain whether the topic of drugs is a mandatory or non-mandatory subject of collective bargaining. The confusion over this issue could, depending on the parties' respective positions, be the focus of additional disputes. The NLRB should have anticipated the possibility of future disputes, addressed the underlying unfair labor practice charge, and eliminated this potential confusion.

V. Conclusion

During the past two years, drug abuse and drug testing have become two of the most publicized issues in professional sports. As the NFLMC and NFLPA approach negotiations for a new collective bargaining agreement, free agency and the appropriate allocation of industry revenues appear to be the primary focus of dispute between the parties. Nonetheless, the issue of drug testing could become a major issue or at least a bargaining chip in the negotiations.

Unfortunately, much uncertainty surrounds the bargaining rights and obligations of the parties with respect to a drug testing program. Neither party knows for certain whether management can unilaterally implement a drug program, bargain to impasse, use economic weapons, or condition an agreement upon the acceptance of a drug testing program. Resolution of these issues depends upon whether the topic of drug testing is categorized as a mandatory or non-mandatory subject of collective bargaining. Neither the NLRB nor the courts have addressed this issue.

The general language of section 8(d) of the NLRA, the Supreme Court, the NLRB, and the lower court holdings suggest that the topic of drug testing constitutes a mandatory subject of collective bargaining. Owners have a legitimate interest in determining the product offered to consumers and protecting the product's image. Yet, neither the NLRA nor existing case law authorizes unilateral employer action at the expense of legitimate employee interests if other remedies are available to protect the product and no business exigency exists to justify unilateral action.

Because the 1982 collective bargaining agreement addressed the topic of drug testing, management's subsequent attempts to unilaterally implement an expanded drug program allegedly constitute a breach of the 1982 agreement. The NLRB deferred the NFLPA's unfair labor practice charge to arbitration. As a result, each of the previous disputes between the NFLPA and NFLMC concerning drug testing was resolved on contractual grounds.

The NLRB has not addressed the issue of whether drug testing constitutes a mandatory or non-mandatory subject of collective bar-

gaining. As the current agreement expires, the NFLPA will undoubtedly challenge any management attempts to unilaterally implement a drug testing program or to refuse to bargain over the issue of drug testing. Hopefully, the NLRB will take such an opportunity to clarify the mandatory nature of a drug testing program.