Florida Law Review

Volume 32 | Issue 4 Article 3

July 1980

The Battle of the Superstars: Player Restraints for Professional Teams

Leslie Michelle Lava

THE BATTLE OF THE SUPERSTARS: PLAYER RESTRAINTS IN PROFESSIONAL TEAM SPORTS

INTRODUCTION

While professional athletes encounter their opponents on the playing field, similar confrontations have ensued in the courts between the federal antitrust[1] and labor[2] laws regarding contractual player restraints.[3] Historically, owners of professional athletic teams wrote or incorporated into the standard player contract devices that limited the movement of players among and within the athletic leagues.[4] Designed to provide continuity and parity of player talent between the clubs,[5] the typical restraints[6] included the reserve[7] or option[8]

1. Sherman Act, 15 U.S.C. §§1-7 (1976).

2. Clayton Act, 15 U.S.C. §§12-27, 44 (1976); Norris-LaGuardia Act, 29 U.S.C. §§101-15 (1976). *See Labor*, 33 ABA ANTITRUST L.J. 1, 38 (1966).

3. The term "player restraints" will be used to denote devices that limit the movement of players among and within the athletic leagues.

4. While the athletes argued that these restraints unreasonably prevented them from freely marketing their services, the owners contended the restrictions were essential for the sports industry to survive economically. Without the restraints, the wealthier clubs could hire the best players to the detriment of the poorer teams. This would lead to a decline in competition within the athletic league, which would then cause spectator support to decrease. *See* J. WEISTART & C. LOWELL, THE LAW OF SPORTS 447 (1979).

5. This need was recognized by the court in Metropolitan Exhibition Co. v. Ewing, 42 F. 198 (C.C.S.S.D.N.Y. 1890): "To this rule [the reserve rule], more than any other thing, does baseball, as a business, owe its present substantial standing. By preserving intact the strength of the team from year to year, it places the business of baseball on a permanent basis, and thus offers security to the investment of capital. The reserve rule itself is a usurpation of the player's rights, but it is perhaps made necessary by the peculiar nature of the ball business, and the player is indirectly compensated by the improved standing of the game." *Id.* at 203.

6. Additional restrictions beyond the scope of this note include the assignment clause, the prohibition on tampering rule and blacklisting. The assignment clause allows the original club to sell, exchange or assign the player's contract to any other professional club and requires the player to report to the assignee club within 48 hours after receiving notice. *See* J. WEISTART & C. LOWELL, *supra* note 4, at 291-93. *See generally* Note, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 585 (1953) [hereinafter cited as *Monopsony*]. The prohibition on tampering clause states that it is improper for an outsider to negotiate with or make an offer to a player whose rights are held by another club. *See, e.g.*, Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); Rottenberg, *The Baseball Player's Labor Market*, 64 J. POL. ECON. 242, 245 (1950). Finally, blacklisting is the permanent banning of a player from a league due to the violation of league rules. *See, e.g.*, Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961) (gambling on outcome of basketball games); Gardella v. Chandler, 79 F. Supp. 260 (S.D.N.Y. 1948) (playing in competitive baseball league), *rev'd*, 172 F.2d 402 (2d Cir. 1949); Leavell & Millard, *Trade Regulation and Professional Sports*, 26 MERCER L. REV. 603, 611-12 (1975); Note, *Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?*, 22 CATH. U. L. REV. 403, 417-18 (1973) [hereinafter cited as *Antitrust and Professional Sport*].

7. A reserve clause is a stipulation in the athlete's contract that binds the player perpetually to bargain solely with the club holding the contract. *See* Allison, *Professional Sports and the Antitrust Laws: Status of the Reserve System*, 25 BAYLOR L. REV. 1, 2-25 (1973); Sobel,

clause, the compensation rule,[9] the college player draft,[10] and the waiver of judicial recourse clause.[11]

Athletes often successfully asserted that these restrictions violated federal antitrust laws by preventing the free marketing of player services.[12] The increasing number of judicial victories for the athletes[13] forced the owners to engage in good faith, arms-length negotiations with the players' association concerning these restraints and all other aspects of player-management relations.[14] Consequently, when athletes challenged the product of these negotia-

---

The Emancipation of Professional Athletes, 3 WASH. ST. U. L. REV. 185 (1976); Note, *Reserve Clauses in Athletic Contracts*, 2 RUT.-CAM. L.J. 302 (1970); Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859, 862 (1971).

8. An option clause provides the club with the right to renew the player's contract for one additional year, often at a stated lower percentage of the salary. *See Antitrust and Professional Sport*, *supra* note 6, at 411-13; Comment, *The Sherman Act: Football's Player Controls — Are They Reasonable?*, 6 CAL. W. L. REV. 133, 141 (1969).

9. The compensation rule provides that after an athlete plays out his option, any club that then signs the free agent must compensate the original employer in the form of cash, player contracts or player draft choices. *See* Goldstein, *Out of Bounds Under the Sherman Act? Player Restraints in Professional Team Sports*, 4 PEPPERDINE L. REV. 285, 288-89 (1977).

10. The player draft system allows the teams to select, in reverse order of their league standings for the previous season, an equal number of graduating high school or college players. Once a club drafts a player, its right to contract with him is exclusive and often perpetual. *See* Leavell & Millard, *supra* note 6, at 610; Pierce, *Organized Professional Team Sports and the Antitrust Laws*, 43 CORNELL L. REV. 566, 602 (1958); Comment, *supra* note 8, at 133.

11. The nonreviewability clause provides that any unresolved disputes between the contracting parties will be resolved by the grievance procedures established in the collective bargaining agreement. The grievance procedures in the sports of baseball, soccer and football, however, vest the final decision in the league commissioner. This violates the principles of impartial arbitration embodied in the Federal Arbitration Act, 9 U.S.C. §§1-14 (1976). *See, e.g.*, Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

12. 15 U.S.C. §1 (1976) provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal. . . ." 15 U.S.C. §2 (1976) provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony. . . ."

13. For basketball *see, e.g.*, Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977). *But see* Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969); Saunders v. National Basketball Ass'n, 348 F. Supp. 649 (N.D. Ill. 1972). For football *see, e.g.*, Kapp v. National Football League, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); Smith v. Pro Football, Inc., 420 F. Supp. 738 (D.C. 1976), *modified*, 593 F.2d 1173 (D.C. 1978); Mackey v. National Football League, 407 F. Supp. 1000 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert dismissed*, 434 U.S. 801 (1977). *But see* Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37 (Civ. App. Tex. 1961). For hockey *see, e.g.*, Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972). *But see* Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972).

14. National Labor Relations Act, 29 U.S.C. §158(d) (1976), provides that the duty to bargain encompasses "the mutual obligation . . . to meet at reasonable times and confer in

tions in court, federal labor laws granted the owners immunity from the antitrust laws[15] and precluded further judicial review.[16]

This note examines the historical and analytical framework of the federal antitrust and labor laws. It then explains how the antitrust laws circumscribed the contractual restraints in four major professional team sports: baseball, basketball, football, and soccer. The effect of the labor laws and the collective bargaining agreement on the athlete's ability to challege these restrictions is then discussed.[17] Finally, the note will recommend an analytical approach for courts scrutinizing the controls on the player's mobility.

THE ANTITRUST PERSPECTIVE

The enactment of the federal antitrust laws, embodied in the Sherman Act,[18] expressed the national belief that "preserving free and unfettered competition" was the most effective and productive method to regulate economic activity.[19] While the language of the Sherman Act was broad enough to render nearly every type of agreement between businessmen illegal, judicial interpretation of the Act proscribed only those agreements which unreasonably restrained trade.[20] Thus, there evolved the "rule of reason" test which required a judicial inquiry into the history and nature of the restraint, its effect, and the reason for its imposition.[21] If the restraint was found to suppress or destroy competition

---

good faith with respect to wages, hours, and other terms and conditions of employment, of the negotiation of an Agreement." *See, e.g.*, NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1951), *cert. denied*, 346 U.S. 887 (1953).

15. The protection of the labor exemption arises from various federal statutes including: Clayton Act §6, 15 U.S.C. §17 (1976); Clayton Act §20, 29 U.S.C. §52 (1976); and Norris-LaGuardia Act, 29 U.S.C. §§102, 104, 113c (1976). *See, e.g.*, United Mine Workers v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797 (1944); United States v. Hutcheson, 312 U.S. 219 (1941).

16. The confusion concerning whether the courts should apply antitrust or labor laws arises because first, the labor exemption doctrine is not clearly defined, and second, the line demarcating these two areas is not clearly drawn by Congress or the courts. *See generally* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971); Lowell, *Collective Bargaining and the Professional Team Sport Industry*, 38 LAW & CONTEMP. PROB. 3 (1974); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976); Note, *Flood in the Land of Antitrust: Another Look at Professional Athletics, the Antitrust Laws and the Labor Law Exemption*, 7 IND. L. REV. 541 (1974) [hereinafter cited as *Flood in the Land of Antitrust*]; Note, *The Balance of Power in Professional Sports*, 22 MAINE L. REV. 459 (1970) [hereinafter cited as *Balance of Power*].

17. *See generally* Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

18. 15 U.S.C. §§1-7 (1976). For the text of the Sherman Act, §§1, 2, see note 12 *supra*.

19. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). *See generally* Comment, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. IND. & COM. L. REV. 737, 740 (1971).

20. *See, e.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

21. Chicago Bd. of Trade v. United States, 246 U.S. at 231.

rather than promote it, the agreement violated the Sherman Act.[22] If an industry could demonstrate a legitimate business purpose for the restraint, however, the courts would usually uphold its legality.[23]

As the courts gained experience with antitrust problems arising under the Sherman Act, they consistently found certain types of agreements unreasonable and anticompetitive. These agreements were held illegal per se; there was no inquiry into their purported justification as required under the rule of reason standard.[24] Among the activities declared illegal per se were division of markets,[25] concerted refusals to deal,[26] price fixing,[27] and group boycotts.[28]

THE LABOR PERSPECTIVE

The statutory labor exemption from the antitrust laws originated in provisions of the Clayton Act[29] and the Norris-LaGuardia Act.[30] These sections declared that labor unions were not combinations or conspiracies in restraint of trade and specifically exempted certain union activities, including secondary picketing and group boycotts, from the coverage of the antitrust laws.[31] While these activities were inherently anticompetitive, they were favored by federal labor policy if unilaterally undertaken by a union in furtherance of its own interests.[32] Thus, the statutory exemption did not extend to concerted agreements between unions and non-labor groups.

Nonetheless, to correlate the policy of free competition in the business

22. *See, e.g.*, United States v. Yellow Cab Co., 332 U.S. 218 (1947) (exclusive contracts for transportation service); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930) (refusal to contract except on standard form).

23. *See, e.g.*, Molinas v. National Basketball Ass'n, 190 F. Supp. 241, 244 (S.D.N.Y. 1961) (blacklisting upheld since used to protect integrity of the organization).

24. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pac. Ry. Co. v. United States, 356 U.S. at 5.

25. Division of markets between competitors refers to sellers that agree not to invade each others' sales territories. *See, e.g.*, United States v. Topco Assoc., Inc., 405 U.S. 596 (1972); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

26. Concerted refusal to deal is an agreement by two or more persons either not to do business with other individuals or to deal with them only on specific terms. *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959); Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531 (1958).

27. Price fixing is an agreement tending to fix prices between parties in the same level of competition. *See, e.g.*, United States v. Paramount Pictures, 334 U.S. 131 (1948); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

28. A group boycott is a refusal to deal or the inducement of others not to deal or have business relations with tradesmen. *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1947); Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. REV. 569, 580 n.49 (1964).

29. 15 U.S.C. §17 (1976); 29 U.S.C. §52 (1976).

30. 29 U.S.C. §§104, 105, 113 (1976).

31. *See, e.g.*, Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 621-22 (1975).

32. *See, e.g.*, United States v. Hutcheson, 312 U.S. 219 (1941); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

market with the policy favoring collective bargaining under the National Labor Relations Act (NLRA),[33] the United States Supreme Court created a limited nonstatutory exemption applicable to certain union-employer agreements.[34] These agreements were exempted from antitrust scrutiny if they were the product of good faith, arms-length negotiations[35] between the employer and the employee's union concerning mandatory subjects of bargaining which included wages, hours, and conditions of employment.[36] In reality, the union's activities were restraints of trade per se because they precluded individual bargaining. Therefore, before the union could raise the exemption as a defense to the application of the antitrust laws, it had to demonstrate that it represented the majority employee interest as exclusive bargaining agent,[37] without combining with non-labor groups.[38]

Although historically the nonstatutory labor exemption was asserted solely by unions, non-labor groups also availed themselves of the exemption.[39] The courts recognized that a failure to extend the immunity to employers would discourage good faith bargaining on the part of management.[40] Thus, because the nonstatutory exemption was based on the national policy favoring collective bargaining, and because the exemption extended to agreements, the benefits

33. 29 U.S.C. §§151-168 (1976).

34. Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621-22 (1975); Amalgamated Meat Cutters & Butchers Workmen, Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965).

35. The concept of good faith bargaining encompasses a willingness to enter into negotiations with an open and fair mind and with a sincere desire to find a basis of agreement. *See, e.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941). *See generally* J. WEISTART & C. LOWELL, *supra* note 4, at 803-806.

36. 29 U.S.C. §158(d) (1976). The Act further provides that the failure by either party to bargain in good faith constitutes an unfair labor practice. 29 U.S.C. §§158(a)(5)(employer), 8(b)(3)(union)(1976).

37. The duty of fair representation requires a union to serve as the sole spokesman of employee interests without acting in its own self-interest and to pay proper deference to minority interests. This duty was further described by the Court in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944): "The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and is to act for and not against those whom it represents." *Id.* at 202. *See* Wellington, *Union Democracy and Fair Representation: Fair Representation in a Federal System*, 67 YALE L.J. 1327 (1958). This statutory duty is breached upon a showing that the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967).

38. In determining whether there is an illegal concert of action with non-labor groups, the court will look not to the collective bargaining agreement itself, but to some collateral agreement between the employer and the union in which they agree that the union's power will be used to bring about a direct market restraint. *See, e.g.*, United States v. Hutcheson, 312 U.S. 219 (1941); Allen-Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797 (1944).

39. Amalgamated Meat Cutters & Butchers Workmen, Local 189 v. Jewel Tea Co., 381 U.S. 676, 729-30 (1965); National Ass'n of Broadcast Employees & Technicians v. International Alliance of Theatrical Stage Employees, 488 F.2d 124 (9th Cir. 1973).

40. *See, e.g.*, Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n.14 (3rd Cir. 1974); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 499 (E.D. Pa. 1972).

of the exemption extended to both parties to the agreement. Antitrust laws were thereby sacrificed in favor of policies protecting union organizational and bargaining activity, and policies insuring industrial peace without judicial interference.[41] Without such assurance of the collective bargaining agreement's finality, each side would be unwilling to provide trade-offs, thereby making an eventual agreement between the parties more difficult to achieve.[42]

Judicial determination that the labor exemption applied guaranteed complete immunity from antitrust attack.[43] No further inquiry was needed into the economic justifications of the restraints or the complaining party's injuries. Instead, any changes in the restraints had to be resolved at the bargaining table.

In the event of unresolved disputes between the parties, the courts and the National Labor Relations Board (NLRB) deferred to arbitration proceedings provided for in the collective bargaining agreement.[44] The courts intervened only to determine whether the parties were bound to arbitrate, the extent of the arbitration,[45] and whether the arbitration award drew its essence from the collective bargaining agreement.[46] The NLRB had jurisdiction under the

41. In the interests of producing industrial stability, Congress has attempted to mandate the finality of collective bargaining agreements in its design of federal labor laws. *See, e.g.*, Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622 (1975); United Mine Workers v. Pennington, 381 U.S. 657, 664 (1965).

42. The argument that antitrust review might undermine the institution of collective bargaining was adopted by the NFL Management Council during congressional hearings on the Rozelle Rule. See text accompanying notes 162-164 *infra*. As Sargent Karch, Executive Director of the NFL Management Council stated: "Anyone who knowns anything about collective bargaining knows that it can work effectively only through a process of hard-nosed bargaining. Both sides know that they can be hurt by a failure to reach agreement—and the football experience shows this. But hard bargaining is never going to be productive when either of the parties uses alternative forums for pursuing its collective bargaining interests. In football, the player union attempts to deal with collective bargaining issues, simultaneously and alternatively before Federal agencies and courts and in congressional committees. So long as they are willing and able to resort to these forums, the incentive to agreement is nullified. The alternatives offer an excuse for not finally resolving the issues at the bargaining table. . . ." *Hearings Before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor*, 94th Cong., 1st Sess., 51-55 (1975).

43. *See, e.g.*, McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978), *rev'd*, 600 F.2d 1193 (6th Cir. 1979).

44. Federal labor laws make arbitration, rather than the courts, the favored mechanism for dispute-resolution because arbitration is more efficient in handling labor disputes and producing industrial peace. It is assumed that when the parties contract for a system of binding arbitration, they intend a private, extrajudicial interpretation without resort to alternative forums for review. *See, e.g.*, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). *See generally* Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 U.C.L.A. L. REV. 360 (1962); Symposium: *Arbitration and the Courts*, 58 NW. U. L. REV. 466 (1963).

45. Because the duty to arbitrate under a collective bargaining agreement is of contractual origin, the compulsory submission to arbitration cannot precede the judicial determination that the agreement created such a duty. *See, e.g.*, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557-58 (1964); Kansas City Royals Baseball Corp. v. Major League Baseball Players' Ass'n, 409 F. Supp. 233, 238 (W.D. Mo.), *aff'd*, 532 F.2d 615 (8th Cir. 1976).

46. *See, e.g.*, United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593, 597 (1960); Kansas City Royals Baseball Corp. v. Major League Baseball Players' Ass'n, 532 F.2d 615, 621 (8th Cir. 1976). Case law corresponds with the United States Arbitration Act, 9 U.S.C. §10

NLRA solely to determine whether there were violations of the unfair labor practice[47] or the representation provisions[48] of the Act. If violations were found, the Board could require the offender to cease and desist from engaging in the illegal conduct and to begin bargaining in good faith.[49]

JUDICIAL INTERPRETATION: ANTITRUST OR LABOR LAW?

Professional athletes in baseball, basketball, football, hockey, and soccer have been treated differently by the courts in their efforts to abolish player restraints.[50] The antitrust laws, however, generally provided the first opportunity for the athlete to challenge these restraints.[51] The applicability of the Sherman

---

(1976), by providing several examples where the district court may vacate an arbitration award. See note 241 *infra*.

47. 29 U.S.C. §158 (1976) (list of unfair labor practices).

48. *Id.* at §159.

49. *Id.* at §160(c). *See generally* Lowell, *supra* note 16, at 5.

50. See cases cited at note 13 *supra*. Additional professional sports are subject to antitrust review, but beyond the scope of this note. *See, e.g.*, United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955); Deesen v. Professional Golfers Ass'n of America, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966); National Wrestling Alliance v. Myers, 325 F.2d 768 (8th Cir. 1963); Drysdale v. Florida Team Tennis, Inc., 410 F. Supp. 843 (W.D. Pa. 1976); Murdock v. City of Jacksonville, 361 F. Supp. 1083 (M.D. Fla. 1973); Blalock v. Ladies Professional Golfers Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973); Heldman v. United States Lawn Tennis Ass'n, 354 F. Supp. 1241 (S.D.N.Y. 1973); STP Corp. v. United States Auto Club, Inc., 286 F. Supp. 146 (S.D. Ind. 1968); United States v. United States Trotting Ass'n, [1960] Trade Case (CCH) ¶69,761 (S.D. Ohio June 20, 1960). *See generally* Comment, *Constitutional Law — Interstate Commerce — Boxing Exhibitions and Theatrical Productions Under the Sherman Antitrust Act*, 35 B.U. L. REV. 447 (1955); Comment, *Antitrust — Monopolies — Boxing as Trade or Commerce Within the Sherman Act*, 1 HOWARD L.J. 281 (1955); Comment, *Antitrust Law — Sherman Act — Application to Professional Boxing*, 23 GEO. WASH. L. REV. 606 (1954); Comment, *Constitutional Law — Boxing and Interstate Commerce*, 26 MISS. L.J. 271 (1955); Comment, *Monopolis — Live Presentations of Local Exhibitions as Constituting Trade or Commerce Within the Sherman Act*, 9 SW. L.J. 369 (1955); Comment, *Constitutional Law — Promotion of Professional Boxing Contests Constitutes "Commerce" Within the Scope of the Sherman Act*, 29 TEMP. L.Q. 103 (1955); Comment, *Monopolies — Sherman Anti-Trust Act — Multistate Promotion of Professional Championship Boxing Contests*, 29 TUL. L. REV. 793 (1955).

51. Collateral issues relating to athletics that are controlled by antitrust laws, but are beyond the coverage of this note, include: (1) restraints on owners seeking to move their franchises. *See* NFL Constitution and By-Laws §4.3, requiring the prior approval of not less than three-fourths or 20 of the 28 member clubs of the league before a team moves to a different geographical location. The failure of the Oakland Raiders to obtain this approval prior to making final arrangements for the franchise's shift to Los Angeles has generated eight lawsuits challenging this by-law. *See* Los Angeles Times, Mar. 30, 1980, Pt. I, at 3, col. 1. (2) restraints on potential owners attempting to acquire franchises. *See, e.g.*, Levin v. National Basketball Ass'n, 385 F. Supp. 149 (S.D.N.Y. 1974); Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956). *See generally* Note, *supra* note 6, at 418. (3) restraints upon stadium leasing. *See, e.g.*, Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir.), *cert. denied*, 404 U.S. 1047 (1971); Peto v. Madison Square Garden Corp., [1958] Trade Case (CCH) ¶69,106 (S.D.N.Y. July 11, 1958). (4) restraints upon amateur athletes. *See, e.g.*, Amateur Softball Ass'n of America v. United States, 467 F.2d 312 (10th Cir. 1972); Tondas v. Amateur Hockey Ass'n of United States, 438 F. Supp. 310 (W.D.N.Y. 1977);

Act[52] to the sports industry was presumed although antitrust policy encouraged competition by economically independent units,[53] and the athletic leagues required a certain amount of cooperation among competitors to survive.[54] At this early stage, the labor exemption did not apply because the contractual restraints were in effect prior to the sports industry's use of collective bargaining. Today, however, collective bargaining agreements exist in professional baseball,[55] basketball,[56] football,[57] and hockey,[58] bringing each sport within the possible protection of the labor laws.[59]

Baseball

The reserve clause was first introduced into athletic contracts in 1887[60] when the National League of Base-Ball Clubs and the American Association of Base-Ball Clubs agreed to a provision affording teams the right to reserve a stated number of players.[61] The effect of the rule was to reduce a team's operating ex-

Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295 (D. Mass. 1975); Buckton v. National Collegiate Athletic Ass'n, 366 F. Supp. 1152 (D. Mass. 1973).

52. 15 U.S.C. §§1-7 (1976).

53. *See, e.g.*, National Society of Professional Engin'rs v. United States, 435 U.S. 679 (1978).

54. *See, e.g.*, Kapp v. National Football League, 390 F. Supp. 73, 79, *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). *See generally* Gromley, *Baseball and the Anti-Trust Laws*, 34 NEB. L. REV. 597, 609 (1955); Pierce, *supra* note 10, at 566; Topkis, *Monopoly in Professional Sports*, 58 YALE L.J. 691, 700 (1949); *Monopsony*, *supra* note 6, at 405-06; Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418, 419 (1967).

55. Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and the Major League Baseball Players' Association (1976), *cited in* J. WEISTART & C. LOWELL, *supra* note 4, at 523 n.286 [hereinafter cited as Basic Agreement]. See text accompanying notes 88-95 *infra*.

56. Collective Bargaining Agreement Between the National Basketball Association and the National Basketball Players' Association (1976) [hereinafter cited as NBA Collective Bargaining]. See text accompanying notes 143-147 *infra*.

57. Collective Bargaining Agreement Between the National Football League Management Council and the National Football League Players' Association (1977) [hereinafter cited as NFL Collective Bargaining]. See text accompanying notes 197-201 *infra*.

58. Collective Bargaining Agreement Between the National Hockey League Management Council and the National Hockey League Players' Association (1977). The initial existence of two competitive hockey leagues, the World Hockey Association and the National Hockey League, allowed professional hockey players to control the owners and the scope of the contractual restraints the clubs inserted into the collective bargaining agreement. The merger of these two leagues at the beginning of the 1979-80 season, however, terminated this control because the athlete no longer could gain competitive advantage over one league by threatening to move to the other. Thus hockey players currently are subjected to a collective bargaining agreement similar to that used in basketball (one year option clause provision, see text accompanying notes 144-145 *infra*) and football (compensation clause section, see text accompanying notes 199-201 *infra*).

59. *See* 15 U.S.C. §17 (1976); 29 U.S.C. §52 (1976); 29 U.S.C. §§102, 104, 113(c) (1976).

60. A limited reserve rule was adopted in 1879 when the seven surviving teams of the National League secretly agreed to each reserve five players for the approaching season. This agreement, however, was not incorporated into player contracts. *Subcommittee on Study of Monopoly Power of the Committee of the Judiciary, Organized Baseball, H.R. Rep. No. 2002*, 82d Cong., 2d Sess. 17, 22 (1952) [hereinafter cited as *Hearings*].

61. The text of this reserve rule is reprinted in Metropolitan Exhibition Co. v. Ewing, 42 F. 198, 200 (S.D.N.Y. 1890).

penses by decreasing salaries[62] and to balance inter-club strength by restricting the flow of superior players.[63]

While the wording of the reserve clause soon changed, its effect on the athlete did not.[64] The player signing the standard player contract with the reserve clause agreed to be bound in perpetuity to the same team. The clause provided that if the player did not come to terms with his team for the upcoming season, the team could renew the contract at a twenty percent cut in salary. In addition, the contract contained an assignment clause, in which the club retained the right to assign the player's contract to another club, which acquired an exclusive right to deal with the athlete. The sanctions imposed on the player for breaching his contract included injunctions to prevent contract "jumping"[65] and blacklisting by other clubs.[66]

No judicial relief was available to the athlete because a series of United States Supreme Court decisions held that baseball, unlike other professional sports,[67] was immune from the scrutiny of antitrust laws.[68] Beginning in 1922 in *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base-Ball Clubs*,[69] the Court held that the "business" of giving exhibitions of baseball was purely a state affair and did not involve interstate commerce. The Court also

---

62. Prior to the introduction of the reserve clause, fierce bidding wars for players existed between teams in the National League. Wealthier clubs located in populous urban areas paid larger salaries than the poorer clubs and thereby attracted the best players. But while players' salaries increased, fan support decreased due to the boredom from constantly witnessing the dominance of the same teams. As a result, by 1879, 8 of the 15 teams that comprised the National League went bankrupt. *Hearings*, *supra* note 60, at 18-22.

63. The disparity of power between professional baseball teams was apparent in 1875 when the Boston Red Stockings captured the professional baseball championship with a record of 71 wins and 8 losses, while the Brooklyn Atlantics finished last in the division with 2 wins and 42 losses. *Id.* at 17.

64. The dilemma confronting the athlete as a result of this clause was recognized in American League Baseball Club of Chicago v. Chase, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914): "If a baseball player . . . desires to be employed at the work for which he is qualified . . . he must submit to dominion over his personal freedom and the control of his services by sale, transfer, or exchange, without his consent, or abandon his vocation and seek employment at some other kind of labor." *Id.* at 465, 149 N.Y.S. at 19.

65. *See, e.g.*, Martin v. National League Baseball Club, 174 F.2d 917 (2d Cir. 1949); Philadelphia Baseball Club v. Lajoie, 202 Pa. 210, 215, 51 A. 973, 973 (1902). For a discussion on the inappropriateness of the injunctive remedy, see Comment, *Professional Athletic Contracts and the Injunctive Dilemma*, 8 J. MAR. J. OF PROC. & PRAC. 437 (1975).

66. *See, e.g.*, Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949).

67. *See, e.g.*, Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971); Radovich v. National Football League, 352 U.S. 445 (1957); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

68. There are two recognized categories of federal antitrust exemptions: activities expressly exempted by statute, including labor unions under the Clayton and Norris-LaGuardia Acts, and activities falling outside the scope of trade or commerce within the meaning of the Sherman Act. Thus the exemption of the sport of baseball is an anomaly. *See generally Labor*, *supra* note 2; Comment, *supra* note 19.

69. 259 U.S. 200 (1922). In *Federal Base Ball*, the plaintiff, a club in a league competing with the National League, alleged that the defendants enticed all the franchises to desert the competitor and join the National League. *Id.*

concluded that the activity was not "commerce" because it was unrelated to production[70] and therefore outside the purview of the antitrust laws.[71]

The next thirty years substantially weakened these two arguments, primarily due to the multistate expansion of the baseball industry.[72] Nonetheless, the Supreme Court affirmed its reliance on *Federal Base Ball* in 1953 in *Toolson v. New York Yankees, Inc.*,[73] a consolidation of cases in which players sought to challenge the baseball reserve system through the application of the Sherman Act. The Court noted that baseball had developed on the understanding that it was not subject to antitrust legislation.[74] This congressional inaction indicated to the Court that Congress intended baseball to be immune from antitrust regulation.[75]

The Supreme Court was given a third chance to go to bat for the players in 1972 in *Flood v. Kuhn*[76] and again struck out. The Court reaffirmed *Federal Base Ball* and *Toolson* because it felt that Congress had acquiesced in the exemption for baseball's reserve system.[77] Disagreement with the Court's holding

70. *Id.* at 209.

71. *But see* Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949). In *Gardella*, 18 major league players, including Daniel Gardella of the New York Giants, violated their respective reserve clauses by signing with the Mexican Baseball League. As a result, Commissioner Albert "Happy" Chandler suspended all the players from organized baseball. The appellate court reversed the dismissal of the case, holding that baseball was sufficiently engaged in interstate commerce to subject it to antitrust scrutiny (due to the teams traveling between states and the contractual rights in radio and television). The appellate court likened the reserve clause to peonage and noted "it is of no moment that . . . [the players] are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery." *Id.* at 410. While the appellate court remanded the case with instructions to determine whether Gardella's allegations were true, settlement precluded any further judicial action. *Hearings, supra* note 60, at 83-84. *See generally* Eckler, *Baseball — Sport or Commerce?*, 17 U. CHI. L. REV. 56 (1949); Note, *The Monopoly in Baseball*, 18 U. CIN. L. REV. 203 (1949); Comment, *Effect of Gardella on Treble Damage Suit*, 44 ILL. L. REV. 493 (1949).

72. In addition, the threshold for finding an effect on interstate commerce had been reduced. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 511 (1940); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Also, for purposes of the Sherman Act, "commerce" had been extended to include personal services. *See, e.g.*, United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); American Medical Ass'n v. United States, 317 U.S. 519 (1943). *See generally* Neville, *Baseball and the Antitrust Laws*, 16 FORDHAM L. REV. 208, 215 (1947).

73. 346 U.S. 356 (1953). Toolson, a minor leaguer in the New York Yankee organization, alleged that the reserve system prevented him from reaching the major leagues. *See* Note, *Baseball — An Exception to the Antitrust Laws*, 18 U. PITT. L. REV. 131 (1956).

74. 346 U.S. at 357.

75. *But see* Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970) (congressional silence did not prevent the Court from overruling its own statutory interpretation).

76. 407 U.S. 258 (1972). In *Flood*, Curt Flood alleged that, due to baseball's reserve system, he was given no opportunity to negotiate his trade from the St. Louis Cardinals to the Philadelphia Phillies. *See* Keeffe, *The Flood Case at Ebbtide*, 59 A.B.A.J. 91 (1973); Morris, *In the Wake of the Flood*, 38 LAW & CONTEMP. PROB. 85 (1973).

77. 407 U.S. at 284-85. In delivering the opinion for the divided Court (5-3), Justice Blackmun reached the followiing conclusions: "1. Professional baseball is a business and it is engaged in interstate commerce. 2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. . . . 3.

was to be remedied through congressional action.[78] The Court further noted that because the sport of baseball was exempt from antitrust scrutiny, the issue whether the reserve system was a mandatory subject of collective bargaining and thus protected by the labor exemption was moot.[79]

Precluded from challenging baseball's player restraints with the antitrust laws,[80] Andy Messersmith and David McNally turned to arbitration,[81] the grievance procedure established by the 1973 collective bargaining agreement. The athletes contended that they were free agents at the end of their option year,[82] while the owners argued that when the club renewed the contract, it renewed all terms perpetually, including the term giving a club the right to renew the option clause. But the arbitrator[83] interpreted the language of the players' contract to provide a limited right of renewal because of the personal nature of the employment relationship.[84] Unbound by a perpetual reserve clause, Messersmith and McNally were ruled free agents.

In affirming the arbitrator's decision, the Eighth Circuit in *Kansas City Royals Baseball Corp. v. Major League Players' Association*[85] noted that although the sport of baseball was exempt from the purview of the antitrust laws, the industry affected commerce and was therefore subject to other federal laws, including national labor laws. Under the labor laws the role of the courts was strictly limited to determining whether the arbitrator's decision drew its essence

---

Even though others might regard this [baseball's exemption] as 'unrealistic, inconsistent, or illogical,' . . . the aberration is an established one. . . . 4. Other professional sports operating interstate — football, boxing, basketball, and, presumably, hockey and golf — are not so exempt." *Id.* at 282-83.

78. *Id.* at 285. *See, e.g.*, 15 U.S.C. §§1291-94 (1976) (member clubs of a league engaged in one of the organized professional team sports allowed to pool their individual television rights for sale by the league as a package).

79. *Id.*

80. *See* State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1, *cert. denied*, 385 U.S. 990 (1966) (denied applicability of state antitrust laws to professional baseball). *See also* Note, *Constitutional Law — Preemption — Baseball's Immunity from State Antitrust Law*, 13 WAYNE L. REV. 417 (1967).

81. National & American Leagues of Professional Baseball Clubs v. Major League Baseball Players' Ass'n (John A. Messersmith and David A. McNally), Grievance Nos. 75-27 & 75-28, Decision No. 29 at 1-2 (Dec. 23, 1975, opinion of Impartial Chairman, Peter Seitz), *cited in* J. WEISTART & C. LOWELL, *supra* note 4, at 517 n.247.

82. Messersmith completed the period of performance required under his contract with the Los Angeles Dodgers and then played one additional year without signing a new contract. This forced the Dodgers to renew the contract unilaterally by exercising the option clause. Thus at the end of the option year, Messersmith contended he was a free agent. McNally, retiring in the middle of his option year from the Montreal Expos, argued that he was a free agent at the end of that year. *Id.* at 1.

83. The cases were heard by a three-member arbitration panel which included representatives selected separately by each side. Seitz cast the deciding vote and wrote the arbitration opinion. *Id.* at 2.

84. Seitz noted that this interpretation was supported by judicial holdings concerning the option clause in basketball. *See, e.g.*, Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969); Central N.Y. Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 181 N.E.2d 506 (Ct. C. P. Cuyahoga Co. 1961).

85. 532 F.2d 615 (8th Cir. 1976).

from the collective bargaining agreement.[86] Finding this requirement met, the court rejected the owners' contention that the arbitrator erred by failing to give greater weight to baseball's historical use of the perpetual reserve system.[87] The court found this evidence irrelevant because it predated the collective bargaining relationship between the players' association and the owners.

This decision changed the status of the reserve clause and other player restraints, and the changes culminated in the 1976 collective bargaining agreement.[88] While the owners were forced to mitigate the restrictions on their employees' professional mobility, the players were also forced to make concessions. Thus, although the Eighth Circuit in *Kansas City Royals* upheld the arbitrator's decision that a player became a free agent after playing out his contract and the option year season, the players agreed that after six years with their original club, they became free agents and could negotiate with a maximum of twelve clubs in the free agent draft.[89] When the agent signed with a new club, the losing team was entitled to compensation in the form of an amateur draft choice.

Additionally, by signing the uniform player contract, the player and club agreed to be bound by consistent provisions in the uniform player contract, the Major League Agreement,[90] the Major League Rules,[91] and the Professional Baseball Rules.[92] These provisions further restrained the athlete in the areas of tampering,[93] assignment[94] and waiver of recourse to the courts.[95]

---

86. 532 F.2d at 621.

87. In the past, reserve clause questions were submitted to arbitration with little objection from the owners. *See, e.g.*, American & Nat'l Leagues of Professional Baseball Clubs v. Major League Baseball Players Ass'n, 59 Cal. App. 3d 493, 130 Cal. Rptr. 626 (1976), where the court affirmed the arbitration panel's holding that James "Catfish" Hunter was a free agent due to a breach of contract by the Oakland As. Each team in the league was then allowed to try to sign Hunter; the result was his signing with the New York Yankees for a reported $3.75 million long-term contract. *See generally* Goldstein, *supra* note 9, at 288 n.10.

88. Basic Agreement, *supra* note 55, at art. XVII.

89. Although the player technically became a free agent, his former team retained negotiation rights. Once signed by either the former club or a new franchise, the player was contractually bound to the team for a minimum of five years unless he was traded or sold.

90. *See* THE BASEBALL BLUE BOOK 501 (1979).

91. *Id.* at 507.

92. *Id.* at 601.

93. *Id.* at 514. Major League Rules 3(g), Professional Baseball Rules 3(g) precludes negotiations or deals concerning employment between a player and any clubs with which he is not under contract, unless there is express authorization from the original club. For an example of sanctions due to the violation of this provision, *see* Atlanta Nat'l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213 (N.D. Ga. 1977).

94. THE BASEBALL BLUE BOOK 538 (1979). Uniform Player's Contract §6(a) allows a club to assign an existing contract with a player, thereby contractually binding the athlete to report to the assignee within 72 hours. The Major League Rules 9(f)-(h) and the Professional Baseball Rules 9(f)-(h) place limitations on the clause, however, so that a player with an aggregate of seven years service or five years of active service in one or both Major Leagues can not have his contract assigned to another major league club without his written approval.

95. THE BASEBALL BLUE BOOK 505 (1979). Major League Agreement, art. VII, §2 provides: "The Major Leagues and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed

The enforceability of the waiver clause, granting the baseball commissioner the sole and exclusive right to decide disputes, was upheld in *Charles O. Finley & Co. v. Kuhn.*[96] Noting that the clause manifested the intent of the contracting parties to insulate the commissioner's decisions from judicial review, the Seventh Circuit held that the waiver was not against public policy because it was negotiated between parties of equal bargaining strength.[97] The court provided two narrow exceptions to this general rule of nonreviewability, however, and allowed a court to intervene where the rules of the association contravened state or federal laws or the association's bylaws, or where the association failed to provide due process of law.[98]

Although the Professional Baseball Rules are in effect until 1983[99] and the Major League Agreement until 1985,[100] the 1976 basic agreement expired on December 31, 1979, resulting in renewed disputes between the players' association and the owners primarily concerning the free agency provisions. The owners sought a compensation clause that would allow a team losing veteran free agent players, drafted by eight or more clubs, to receive an amateur draft pick and a player from the "unprotected list"[101] of the signing club. The players' association viewed such a clause as a step backward from the gains under the 1976 agreement.[102] It feared that such a rule would restrict the market and result in the type of limited free agency system available to professional football players.[103]

After ninety-two spring exhibition games were cancelled and the date of a regular season strike was approaching, the players' association and the owners agreed that the 1980 free agency draft would be conducted under the minimum compensation rules provided in the 1976 agreement.[104] Additionally, they agreed that a joint committee comprised of two players and two club officials would study the compensation question and issue a report by January 1, 1981. If the players and owners were then unable to reach a final agreement, the owners could unilaterally adopt the initial compensation proposal. The players would have the option to accept the owners' version of compensation or to strike.[105]

The courts were never amenable to the baseball player's right to challenge

---

in their favor." *Id. But see* Atlanta Nat'l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213 (N.D. Ga. 1977).

96. 569 F.2d 527 (7th Cir.), *cert. denied,* 439 U.S. 876 (1978). The court also affirmed the commisioner's authority to disapprove the assignments of the contracts of Joseph Rudi and Rollie Fingers to the Boston Red Sox and Vida Blue to the New York Yankees because these moves were "inconsistent with the best interests of baseball." *Id.* at 531.

97. *Id.* at 543-44.

98. *Id.* at 544.

99. *See* THE BASEBALL BLUE BOOK 601 (1979) (Professional Baseball Agreement, art I, §2).

100. *Id.* at 506 (Major League Agreement, art. VII).

101. The concept of an "unprotected list" allows a team losing a player through free agency to select a player from the roster of the team that signs him after that team has listed 15 of its 40 men as untouchable. Miami Herald, Apr. 6, 1980, §C, at 5, col. 1.

102. San Diego Union, Mar. 24, 1980, §C, at 1, col. 2.

103. See text accompanying notes 199-201 *infra.*

104. See text accompanying note 88 *supra.*

105. Kaplan, *No Strike is a Real Ball,* SPORTS ILLUSTRATED, June 2, 1980, at 48.

player restraints as unreasonable burdens on trade.[106] Nonetheless, the restraints themselves could be relaxed through the application of federal labor laws in the courts or before the NLRB, which had exercised jurisdiction over baseball for the first time in 1969.[107] The effect of *Charles O. Finley & Co.*[108] and the waiver of judicial recourse clause, however, is to require both sides to reach a compromise at the bargaining table, referring any unresolved disputes to an arbitrator. At this stage, the courts serve to decide only the issue of arbitrability, deferring to the national labor policy of allowing the contracting parties to resolve the labor dispute free from judicial interference.[109]

When the arbitrator's award is challenged, however, the courts must exercise jurisdiction and apply a two-tiered analysis. First, the courts must determine whether the nonrecourse clause in the disputed agreement was the result of free negotiations by parties occupying equal bargaining positions. Factors to be considered include the concessions sought and won by each side and the history of the bargaining relationship between the parties. Where such equality is lacking, the courts can resolve the dispute and reinstate the proper balance between league stability and player mobility. Where the court finds the clause was sufficiently bargained for by the contracting parties, however, the commissioner has the exclusive right to decide the dispute. Nonetheless, at this second level, the court has the power to determine whether the arbitrator's decision was the result of fraud, bias or misconduct, or whether the award draws its essence from the collective bargaining agreement.[110] Additionally, the court can overturn the arbitrator's award after finding that one of the *Charles O. Finley & Co.* exceptions to nonreviewability exists.[111]

Basketball

Courts initially held that the professional sport of basketball, unlike baseball, was subject to the federal antitrust laws.[112] This judicial control forced the basketball industry to revise radically the traditional restraint mechanisms, as reflected in the 1976 collective bargaining agreement between the owners and the players' union in the National Basketball Association (NBA).[113]

Basketball's renewal clause initially provided the team with a perpetual

106. See text accompanying notes 67-78 *supra*.

107. American League of Professional Baseball Clubs & Ass'n of Nat'l Baseball League Umpires, 180 N.L.R.B. 190 (1969). The Board recognized the unilateral power of the owners and thereby afforded baseball and other sports the protections available in the NLRA to promote collective bargaining. *See Balance of Power*, *supra* note 16, at 477.

108. Charles O. Finley & Co. v. Kuhn, 569 F.2d at 527. See text accompanying notes 96-98 *supra*.

109. See text accompanying notes 44-46 *supra*.

110. See text accompanying notes 45-46 *supra*.

111. See text accompanying note 98 *supra*.

112. Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956). The court found the multistate business of professional basketball, coupled with the sale of rights to televise and broadcast the games for interstate transmission, constituted trade or commerce among the states within the purview of the antitrust laws. *Id.* at 155.

113. NBA Collective Bargaining, *supra* note 56.

right to the player's services.[114] Interpretation of the uniform player contract in *Central New York Basketball, Inc. v. Barnett*,[115] however, found the clause unreasonably restrictive.[116] In its place, the court substituted the less restrictive option clause, which provided that at the end of the mutually-agreed upon term of the contract, the club had the right to renew the contract for only one additional year.[117]

In addition to this clause, basketball contracts contained the compensation or indemnity rule[118] which provided that any team signing an athlete who played out his option must compensate the original team in accordance with its demands.[119] Failure to meet these demands resulted in the basketball commissioner determining the amount to be paid as compensation. Absent any compensation to the original club, the league's rules required all professional teams to boycott the player.[120]

The greatest judicial catalyst for mitigating the player restraints[121] was a preliminary ruling in *Robertson v. National Basketball Association*.[122] Although the suit was filed to enjoin the proposed NBA-American Basketball Association (ABA) merger,[123] it also sought to bar the NBA college draft sys-

---

114. For a restatement of this clause, *see* Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979, 981 (M.D.N.C. 1969).

115. 19 Ohio Op. 2d 130, 181 N.E.2d 506 (Ct. C.P. Cuyahoga Co. 1961) (enjoining players from jumping from the National Basketball Association to the American Basketball Association).

116. *Id.* Basketball's renewal clause has been given differing interpretations by the courts. In two state court proceedings, the clause was specifically found not to give the club a perpetual right to the player. Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 675-78, 80 Cal. Rptr, 240, 243-45 (1969); Central N.Y. Basketball, Inc. v. Barnett, 19 Ohio Op. 2d at 133, 181 N.E.2d at 509-10. In federal antitrust proceedings, however, the clause was stricken due to the club's perpetual right of renewal. *See* Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 891-96 (1975).

117. Central New York Basketball, Inc. v. Barnett, 19 Ohio Op. 2d at 133, 181 N.E.2d at 510.

118. Robertson v. National Basketball Ass'n, 556 F.2d 682, 686 n.4 (2d Cir. 1977).

119. *Id.*

120. *Id.*

121. Preliminary antitrust challenges in the courts resulted in the employers relaxing player restraints in two respects. First, in Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 478 (9th Cir. 1969), the district court upheld contracts for future services entered into with one club while still under employment with the original club. Second, as a result of Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1066 (D.C. Ca. 1971), the owners established the hardship college player draft, allowing players from underprivileged backgrounds to be drafted prior to college graduation. *But see* Molinas v. National Basketball Ass'n, 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961) (blacklisting of player for betting on games did not violate antitrust laws); Saunders v. National Basketball Ass'n, 348 F. Supp. 649, 654 (N.D. Ill. 1972) (alleged continuing boycott that denied athlete the opportunity to prove his eligibility did not violate antitrust laws).

122. 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

123. *Id.* at 892. The NBA Players' Association succeeded in obtaining an injunction barring merger negotiations. The court concluded that this merger would be a restraint of trade due to the total elimination of competition between the two leagues for the services of athletes. *Id.*

tem,[124] reserve clause,[125] and uniform player contract[126] as unreasonable restraints of trade. The NBA initially alleged that the district court lacked jurisdiction to consider these issues.[127] It argued that primary jurisdiction to determine whether the bargaining subjects could be classified as conditions of employment and, therefore, exempt from antitrust scutiny, lay with the NLRB.[128] In rejecting this claim, the court noted that the antitrust issues were not within the "special competence" of the NLRB since the courts also had experience in classifying bargaining subjects.[129]

Because basketball, unlike baseball,[130] was accountable to antitrust inquiry, the court considered whether the plaintiffs had standing to assert the claims under the Sherman Act or whether the labor exemption immunized the defendants from this regulation.[131] The court held that the plaintiffs had standing because the risks the restraints posed to the ideals of free competition outweighed the maintenance of the labor-management relationship.[132] Furthermore, because the restrictions were nonmandatory subjects of collective bargaining[133] and were imposed by unilateral employer action, the labor exemption was not available to grant antitrust immunity.[134] The court reasoned that even

124. At the time this suit was filed, the college draft allowed each club an equal number of player selections in reverse order of their end-of-season league standings. The club then acquired the exclusive and perpetual right to negotiate with that player. *Id.* at 874 n.7.

125. The players contended that the reserve clause afforded the owners a perpetual and unilateral right to renew the uniform player's contract. Prior to 1971, the contract could be renewed with a 25% salary reduction. *Id.*

126. The uniform player's contract granted a club the right to assign a player's contract and provided sanctions in the event the athlete subsequently refused to play, including injunctions to prevent contract jumping. *Id.*

127. *Id.* at 876.

128. *Id.* at 876 n.15. The defendants contended that the NLRB must determine whether the contracting parties to the collective bargaining agreement were under a duty to negotiate in good faith, as required by 29 U.S.C. §158(a)(5) (1976).

129. 389 F. Supp. at 877. In addition, the district court noted that even if the antitrust action could be framed as a refusal to bargain charge, there was no guarantee of Board action. *Id.*

130. See text accompanying notes 67-78 *supra.*

131. The district court initially questioned the application of the labor exemption to the defendants because, historically, the exemption was intended to protect only union activities, not those of the employer. The court ultimately conceded, however, that a one-way grant of antitrust immunity, available solely to the unions, would prevent full and robust bargaining over employee demands. But the Court found congressional intent to apply the exception only to labor unions. 389 F. Supp. at 885-86 n.31. See text accompanying notes 34-40 *supra.*

132. 389 F. Supp. at 882-84. The district court noted that it was difficult "to conceive of any theory or set of circumstances pursuant to which the college draft, blacklisting, boycotts and refusals to deal could be saved from Sherman Act condemnation, even if defendants were able to prove at trial their highly dubious contention that these restraints were adopted at the behest of the Players' Association." *Id.* at 895.

133. *Id.* at 890. The court found that although the reserve clause and the player draft affected the employment relationship, they did not constitute "terms and conditions of employment" as defined by National Labor Relations Act §8(d), 29 U.S.C. §158(d) (1976).

134. 389 F. Supp. at 884. The applicable test to determine whether the imposition of the restrictions was a mutual decision, and thus subject to antitrust immunity, involved inquiry into the parties' bargaining history and whether the disputed practices "were ever the subject of serious, intensive, arms-length collective bargaining." *Id.* at 895, quoting Philadelphia

if the challenged practices were classified as mandatory subjects, immunity still would not be extended because bona fide, arms-length negotiations were lacking.[135]

Since the employer's conduct failed to merit immunity, the court considered the nature and extent of the restraint and whether it violated the antitrust laws under the per se[136] or rule of reason standard.[137] In holding that the owner's behavior constituted a substantive antitrust violation,[138] the court found that the player draft, uniform player contract, and reserve clause were analogous to devices which were per se violations. These included group boycotts, because the NBA refused to deal with the players except through uniform restrictive practices,[139] and price fixing, because the restrictions allowed competing teams to eliminate competition in the hiring of players and inevitably to lower the cost of doing business.[140] Additionally, because less restrictive alternatives were available to the league to check player mobility, the court found that even the rule of reason standard would not save the draft and reserve clause from illegality.[141]

Shortly after this decision, which allowed the plaintiffs to bring a class action,[142] the NBA management reached an out-of-court settlement with the players' association through the implementation of the 1976 collective bargaining agreement.[143] Supplanting the league's prior player restraints, the agreement affords an athlete greater mobility within the basketball league than within any other professional team sport. Under the new agreement, at the end of the stated term of a contract that covers at least two seasons, the club no longer has a unilateral right to renew a player's contract.[144] Rather, the player becomes a

---

World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 499 (E.D. Pa. 1972).

135. 389 F. Supp. at 890 n.41.

136. See text accompanying notes 24-28 *supra*.

137. See text accompanying notes 21-23 *supra*.

138. In a subsequent pretrial motion, the district court stated: "While that earlier opinion made clear the court's belief that the restraints in controversy are illegal under the antitrust laws . . . no final determination as to the invalidity of the provisions and practices in question was made. . . . Accordingly, defendants are not barred from raising all possible defenses to plaintiff's action, including one based on the economic necessity of retaining the challenged restraints. Plaintiffs . . . are free to move to strike the rule of reason defense once all pretrial discovery has been concluded. . . ." Robertson v. National Basketball Ass'n, [1975] Trade Case (CCH) ¶60,448 at 67,003-04 (S.D.N.Y. 1975).

139. 389 F. Supp. at 893.

140. *Id.* In addition, the court viewed the draft and reserve system as devices creating illegal horizontal territorial allocations and product market divisions. *Id.*

141. *Id.* at 892-93. The court noted, however, that some degree of inherently anticompetitive economic cooperation may be essential for the survival of ostensibly competitive professional sports leagues. Thus, under the proper circumstances, reasonable restraints might be insulated from the reach of the antitrust laws. *Id.* at 892.

142. The class was comprised of the approximately 365 players who were active players for member clubs of the NBA. *Id.* at 903.

143. NBA Collective Bargaining, *supra* note 56.

144. While the NBA Uniform Player Contract covering the rookie or veteran of two or more seasons omits the option clause, the contract covering the rookie of a single season contains the following provision in paragraph 22: "The Club shall have the option to renew

free agent and may negotiate with any team although the original contracting club retains a right of first refusal.[145] In 1980, the indemnity system will be eliminated and the club signing a free agent will not be required to compensate the original employer.[146] The agreement also changes the nature of the rights which a club acquires through the college player draft. Instead of perpetually retaining the right to sign the athlete, the club is allowed one year in which to sign the player, after which the athlete returns to the draft and is eligible to be drafted by any club.[147]

While this collective bargaining agreement is the most liberal measure adopted by a professional sport, it does not loosen all the restrictions. Basketball players are still subject to the tampering provision,[148] assignment clause,[149] and waiver of judicial recourse rule,[150] as are their counterparts in baseball.[151] In addition, no-trade clauses are prohibited in contracts arising under the recent collective bargaining agreement which was accepted in September, 1980 by the owners and players' association.[152]

---

and extend this contract for an additional period of one year. Such option shall be exercisable only once and may be exercised by the Club's mailing to the Player . . . an Option Exercise Notice. . . . If the Club exercises its option as provided for herein, this contract shall be deemed renewed and extended for an additional period of one year. The compensation payable to the Player with respect to such additional period shall not be less than the compensation payable with respect to the one year period covered by this contract . . . and all other non-monetary terms contained in this contract shall be applicable in such additional period." This is the only area in which the two contracts differ.

145. *See* Robertson v. National Basketball Ass'n, 556 F.2d at 682; New York Times, Feb. 3, 1976, at 25, col. 6.

146. *See* Robertson v. National Basketball Ass'n, 556 F.2d at 682; Washington Post, Feb. 4, 1976, §D, at 1, col. 7.

147. If the player still does not sign after the second draft, he becomes a free agent and may sign with any club. Robertson v. National Basketball Ass'n, 556 F.2d at 682.

148. The NBA Uniform Player Contract, para. 19, provides that a player agrees that during the term of his contract, he will not directly or indirectly "entice, induce, persuade or attempt to entice, induce or persuade any player or coach" already under contract with the NBA to enter into negotiations for their future services. Breach of this paragraph is punishable by a fine imposed by the NBA commissioner, payable out of the athlete's salary. *Id.*

149. *Id.* at para. 10, granting a club the right to sell, exchange, assign or transfer the player's contract. In the event the contract is assigned, paragraph 12 requires the player to report to the assignee club within 48 hours of receiving notice, or else be suspended by the acquiring club.

150. In the event of any dispute arising between the player and the owner over a material obligation of the club, the player must follow the grievance procedures outlined in the NBA Uniform Player Contract, para. 20(a). The player must first notify the club and the association in writing of the alleged dispute. If the problem is not resolved within five days, the dispute will be referred to an impartial arbitrator in accordance with the current agreement in effect between the NBA and the NBA Players' Association. In the event of any dispute relating to any matter arising under the contract, paragraph 21 provides that the dispute will be resolved in accordance with the grievance and arbitration procedure established in the collective bargaining agreement. *See* Erving v. Virginia Squires Basketball Club, 349 F. Supp. 716 (E.D.N.Y.), *aff'd*, 468 F.2d 1064 (2d Cir. 1972) (arbitration clause in contract required both parties to arbitrate any disputes, that decision being final, binding and conclusive).

151. See text accompanying notes 92-95 *supra*.

152. Gainesville Sun, Feb. 3, 1980, at §D, at 3, col. 1 (discussing the Collective Bargaining

Football

Option clauses initially were utilized in professional football contracts to withstand the scrutiny of the antitrust laws applicable as a result of *Radovich v. National Football League*.[153] Analogous to basketball's option clause,[154] this provision in the standard player contract[155] allowed a club to unilaterally extend the contract for an additional year at a ten percent reduction in salary. At the end of that year, the player became a free agent[156] and could negotiate with any club.[157] When this clause was challenged in 1961,[158] a Texas district court held that the provision did not violate antitrust laws because it was not so unreasonable or harsh as to be unenforceable in equity.[159]

The "reasonable" option clause,[160] however, was coupled in 1963 with another provision, known as the "ransom"[161] or Rozelle Rule.[162] This Rule re-

---

Agreement Between the National Basketball Association and the National Basketball Players' Association (1980)).

153. 352 U.S. 445 (1957). The Court recognized that radio and television transmissions were an integral part of the football business, and therefore, met the commerce requirement of the Sherman Act. *See generally* Keith, *Developments in the Application of Antitrust Laws to Professional Team Sports*, 10 HASTINGS L.J. 119 (1958); Note, *Professional Football Held Within the Purview of the Sherman Act*, 57 COLUM. L. REV. 725 (1957); Note, *Anti-trust Laws — Sherman Anti-trust Act — Professional Sports*, 36 N.C. L. REV. 315 (1958); Comment, *Federal Antitrust Laws — Monopolies — Professional Football*, 62 DICK. L. REV. 96 (1957); Comment, *Anti-Trust Laws — Interstate Commerce — Professional Football*, 11 SW. L.J. 516 (1957).

154. See text accompanying note 117 *supra*.

155. NFL Standard Player Contract, para. 10(a).

156. During this era of player restraints, few players ever played out their option successfully since owners would pay large salaries or offer "no cut" contracts and other "extras" to insure that the player remained with the team. Interview with William O'Neal, past agent for University of Florida football players in the college draft, January 24, 1980.

157. Often the free agent's services were unmarketable because teams would respect the perpetual rights of the past owner so that they would receive the same treatment if the situation was reversed. Clubs further recognized that any attempt to raid another club's players would raise salaries and thereby defeat the very purpose of the reserve clause. *See* Pierce, *supra* note 10, at 604; Comment, *supra* note 8, at 143.

158. Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37 (Tex. Civ. App. 1961) (contract jumping).

159. *Id.* at 47. *But see* Paramount Famous Lasky Corp. v. United States, 282 U.S. at 30 (refusal by motion picture industry to deal with other than a standard form contract violated the Sherman Act as an unreasonable restraint of trade).

160. Commentators have criticized the option clause for several reasons including: first, when the athlete played out his option, he did this at a 10% salary cut plus the loss of any bonus payments; and second, there was no assurance that the athlete could find employment with another club after playing out his option year, unless he was a superstar. *See generally* Alyluia, *Professional Sports Contracts and the Players' Association*, 5 MANITOBA L.J. 359 (1973); *Balance of Power*, *supra* note 16, at 468.

161. *See, e.g.*, Kapp v. National Football League, 390 F. Supp. 73, 82 (N.D. Cal. 1974) (effect of the Rule was to restrain a player from pursuing his occupation among the clubs of a league holding a monopoly on professional football), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

162. Due to the vast power given the commissioner to settle compensation disputes, the Rule was named after Pete Rozelle, the present commissioner of the National Football League. For a discussion of the history of the Rozelle Rule, *see* Mackey v. National Football League, 407 F. Supp. 1000, 1003 (D. Minn. 1975).

quired the team which had lost the athlete playing out his option to be compensated by the player's new team.[163] Compensation was in the form of cash, player contracts or draft choices.[164] Together, these provisions restrained the bargaining opportunities the free agent supposedly possessed because the original employer could financially pressure other teams to prevent them from doing business with the athlete. Such power constituted a secondary boycott declared illegal per se in areas outside the sports industry.[165]

An additional restraint upon the football player's freedom to select an employer was the college draft.[166] As in basketball, the athlete could not be drafted until his college eligibility expired. After the player was drafted, however, the team acquired a perpetual and exclusive right to negotiate with the athlete.[167]

In opposition to these developments, the federal courts, using the antitrust laws, emancipated the football players to a greater extent than athletes in other sports. In a preliminary ruling in *Kapp v. National Football League*,[168] the district court held that certain league rules, including the Rozelle Rule, the player draft, and the prohibition on tampering, were unreasonable restraints of trade.[169] In reaching this conclusion, the court recognized that while the monopolistic combinations engaged in by the National Football League (NFL)

---

163. *See* NFL Constitution and By-Laws, art. XII, §12.1(H) (1968).

164. In 1968, David Parks played out his option with the San Francisco 49'ers and negotiated a contract with the New Orleans Saints. When the teams were unable to agree on compensation, the commissioner forced the Saints to surrender their first round draft choices for 1968 and 1969. Shrake, *A Rich Man is Odd Man Out*, SPORTS ILLUSTRATED, Dec. 9, 1968, at 65, 66.

165. *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). See Anderson, *The Sherman Act and Professional Sports Associations' Use of Eligibility Rules*, 47 NEB. L. REV. 82 (1968); McCormick, *Group Boycotts — Per Se or Not Per Se, That is the Question*, 7 SETON HALL L. REV. 703 (1976).

166. Prior to the college football draft, four wealthy teams — the Chicago Bears, Green Bay Packers, Washington Redskins and New York Giants — controlled the best players in the league and won almost all the championships. Between 1933-1945, these teams won a total of 252 games and lost 59. After the draft was adopted, between 1945-1956, these teams won 133 games and lost 136. Attendance at professional games also increased, making possible increased players' salaries. *Organized Professional Team Sports: Hearings Before the Antitrust Subcommittee of the House Judiciary Committee*, 85th Cong., 1st Sess., 2725-28 (1957). For a discussion of the history of the player draft, see Smith v. Pro-Football, Inc., 593 F.2d 1173, 1195 (D.C. Cir. 1979).

167. In areas outside the athletic industry, however, such monopolistic practices constituted violations of the antitrust laws. *See, e.g.*, United States v. Griffith, 334 U.S. 100 (1948) (such monopolistic practices declared illegal per se violations of the antitrust laws); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 218 (9th Cir. 1964) (monopolistic power included power to exclude competition wholly, or to permit competition solely on terms dictated by the monopoly).

168. 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). Joseph Kapp alleged that he had been improperly boycotted by the league because he had refused to sign a standard player contract. *Id.* at 75.

169. 390 F. Supp. at 82. Ironically, when the case was submitted to the jury on the issue of Kapp's damages, the jury decided that Kapp had not actually been injured, and therefore, was entitled to no recovery. The basis of this decision was the fact that although Kapp never signed a standard contract, he had assented to a memorandum outlining a $600,000 agreement and indicated he would sign the contract. New York Times, Apr. 4, 1976, §5, at 1, col. 1.

would be per se antitrust violations in other businesses,[170] the uniqueness of the sports industry required the application of the rule of reason standard.[171] The court rejected the owners' defense that the labor exemption precluded any antitrust attack and held instead that the restraints were not the product of collective bargaining.[172] The court suggested, moreover, that even if the requisite collective bargaining had been present, the league would not prevail for public policy reasons because the exemption could not immunize employer-employee agreements that unreasonably restricted the choice of employment.[173]

The *Kapp* court undertook a two-tiered analysis of the reasonableness of the restraints on the football player's mobility, similar to that of the *Robertson*[174] court in the basketball industry. In *Kapp*, however, the court concluded that the contractual restrictions on the employee's right to pursue his trade with other employers were so patently unreasonable[175] that it was unnecessary to determine whether they were mandatory subjects of collective bargaining or whether the agreement itself had been the object of genuine negotiations.[176] Rather, the court focused on the need to limit the number of antitrust violations the contracting parties could agree to,[177] thereby maintaining the proper balance between the ideals of free competition and the economic survival of the sports industry.

It was not until *Mackey v. National Football League*,[178] however, that the merits of the Rozelle Rule were fully litigated.[179] In affirming the district

170. 390 F. Supp. at 81. "[W]hen two or more club employers agree through league rules that individual player-employees, who violate such individual club-employee contracts will be in effect boycotted by *all* member club-employers, the situation goes beyond mere employer-employee contracting and falls within the antitrust law *per se* prohibition of *combinations* not to deal. . . ." *Id.*

171. *Id.* Factors the court considered were the nature of the business, the duration of the restraint, and whether the restriction afforded fair protection to the interests of the employer without imposing undue hardship on the employee.

172. *Id.* at 85-86.

173. *Id.* at 86.

174. See text accompanying notes 130-137 *supra*.

175. 390 F. Supp. at 82. The court found that the conceivable effect of the Rozelle Rule was to perpetually restrain a player from pursuing his occupation among the franchises of the NFL, while the effect of the player draft was to permit a perpetual boycott of a draft prospect if the drafting club failed to contract with the athlete. *Id.*

176. *Id.* at 86.

177. *Id.* Thus despite the broad exemption from antitrust laws of collective bargaining agreements dealing with wages, hours, and other conditions of employment, for public policy reasons, the exemption would not immunize those agreements that unreasonably restricted the employee's right to freely market his talents.

178. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). In *Mackey*, 16 present and former NFL players asserted that the league's Rozelle Rule constituted an illegal constraint on their right to freely contract for their services.

179. Prior to the filing of the *Mackey* litigation, the Rozelle Rule was attacked when Commissioner Rozelle intervened in a compensation dispute and awarded the original team a veteran player as compensation rather than draft choices or a recently signed rookie. The court issued a temporary restraining order preventing the league from requiring the veteran, Cullen Bryant, to report to the club. The court held that the Rule, in conjunction with the uniform contract and the option clause, violated the Sherman Act. Further litigation was prevented, however, when Rozelle withdrew his offer, instead requiring compensation to be in

court's preliminary injunction against further application of the Rule,[180] the Eighth Circuit reconciled competing antitrust and labor policies. The court developed a three-pronged test to determine whether the nonstatutory labor exemption applied to the labor-management agreement. The exemption applied if first, the restraint on trade affected only the parties to the collective bargaining relationship;[181] second, the restriction was classifiable as a mandatory subject of collective bargaining;[182] and third, the agreement was the product of bona fide, arms-length negotiations.[183]

In applying the test, the *Mackey* court noted that the Rozelle Rule had no appreciable impact upon competing leagues or others outside the bargaining unit.[184] The court also held that the Rule was a condition of employment[185] and therefore a mandatory subject of collective bargaining. But the league's claim of immunity failed due to the lack of bona fide, arms-length dealing between the union and the owners.[186] Thus, the labor policies in favor of collective bargaining would not be furthered by a judicial grant of immunity from antitrust attack.

Turning to the antitrust issues, the Eighth Circuit agreed that the Rozelle Rule violated the antitrust laws,[187] but rejected the application of the per se standard.[188] Rather the court found that the unique economics of a sports league required a more extensive inquiry into the reasonableness of the practice.[189] Under the rule of reason standard, therefore, the court found that the Rule was unreasonably broad in its application, lacked procedural safeguards, had unlimited duration, and substantially restricted the player's freedom of movement.[190] Furthermore, the Rule's elimination would not affect the quality of play and the competitive balance between clubs within the league because all teams would be affected equally by the Rule's removal.[191] Finally,

---

the form of future draft choices. Bryant v. National Football League, No. CV 75-2543 (C.D. Cal. July 30, 1975). *See* Los Angeles Times, July 31, 1975, §3, at 1, col. 1.

180. 543 F.2d at 623.

181. *Id.* at 614. Where a restraint directly affects parties outside the bargaining relationship, the result is substantial anticompetitive effects that cannot be justified by federal labor policy. *See, e.g.*, Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 625-26 (1975).

182. 543 F.2d at 623. *See* National Labor Relations Act, 29 U.S.C. §158(d) (1976).

183. 543 F.2d at 623.

184. *Id.* at 615.

185. *Id.* The Rule constituted a condition of employment because it restricted a player's ability to move from one team to another and depressed player salaries.

186. *Id.* at 616. The court found that the players received no quid pro quo for the Rule's imposition which had remained unchanged in form since it was unilaterally promulgated by the clubs in 1963. *Id.*

187. *Id.* at 618.

188. *Id.* at 620. The district court had held that the Rule constituted a *per se* violation of the antitrust laws because it was a concerted refusal to deal, a group boycott, and contrary to public policy. Mackey v. National Football League, 407 F. Supp. 1000, 1007 (D. Minn. 1975).

189. 543 F.2d at 620-22.

190. *Id.* at 621.

191. *Id.* While the court recognized that the NFL had a strong and unique interest in maintaining competitive balance among its teams, it found that the Rozelle Rule had no

if the quality of play subsequently decreased, other reasonable, legal means existed to improve quality, including special incentives, multi-year contracts, and a competition committee.[192]

In conclusion, the court cautioned that this holding did not mean that every restraint was an antitrust violation[193] or that the nonstatutory labor exemption could not apply where a collective bargaining agreement was reached.[194] Instead, the court noted that the issue of the proper balance between the player's interest in mobility and the club's interest in competition was best resolved at the bargaining table.[195] But where there was no negotiated resolution, as in the instant case, a judicial attempt at restoring equilibrium between the parties was required.

These decisions[196] resulted in renewed collective bargaining between the NFL owners and the players' association, which culminated in an agreement effective until July, 1982.[197] This agreement relaxes several of the traditional restraints, including the option clause[198] and the compensation rule.[199] Veteran players are released from the renewal clause on completion of their fourth year of service and are allowed to become a free agent when the contract expires. Under the right of first refusal clause, however, a team can still retain the player by matching the salary offered by a new team.[200] If the salary offer is not matched, the original employer is entitled to compensation in the form of valuable draft choices commensurate with the free agent's new salary.[201]

---

material effect on this balance. *See generally* Canes, *The Social Benefits of Restrictions on Team Quality*, GOVERNMENT AND THE SPORTS BUSINESS 81 (R. Noll ed. 1974).

192. 543 F.2d at 621.

193. *Id.* at 623. The court noted that to protect the mutual interests of the players and the teams, some reasonable restrictions relating to player transfers may be necessary. *Id.*

194. *Id.*

195. *Id.*

196. While the *Mackey* litigation was pending, James McCoy (Yazoo) Smith was also challenging the NFL on the validity of the college player draft. Smith, a first-round draft pick by the Washington Redskins whose career prematurely ended after suffering a neck injury, alleged the draft prevented his negotiating a contract that would have contained adequate guarantees against loss of earnings due to injury. The appellate court found that the draft was thrust upon a weak players' union by the owners such that the labor exemption would not grant immunity from antitrust review. Further, under the rule of reason standard, applicable due to the uniqueness of the sports industry, the draft virtually eliminated economic competition among buyers for the seller's services, thereby violating the Sherman Act. Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978).

197. NFL Collective Bargaining, *supra* note 57.

198. *Id.* art. XIV, §1; NFL Standard Player Contract, para. 17. Additionally, any one year contract signed by a rookie player must have an option clause that can be exercised by the club at no less than 90% of the player's salary in the previous year, excluding any signing or reporting bonus. NFL Collective Bargaining, *supra* note 57, art. XIV, §§2, 3.

199. NFL Collective Bargaining, *supra* note 57, art. XV, §§4-12.

200. *Id.* §4. The original employer acquires a right of first refusal on any offer which the player receives from another club if the player was given a qualifying offer complying with minimum salary requirements set out in the agreement. If this right is exercised, the player and his old club will be deemed to have entered into a binding agreement. For example, the original club acquires a right of first refusal if a player with less than four years of league service was given a combined salary and bonus offer of $30,000 or more. *Id.* §10.

201. *Id.* §§11-12. The original club is entitled to compensation only if the player's qualify-

While restraints on the professional football player's mobility have abated,[202] other concessions probably will be sought from the owners in the future. One issue likely to reach the bargaining table is the compensation rule, which grants the original employer the right of first refusal.[203] While the owners argue that the clause is a prerequisite to league stability and continuity, the union contends that after an athlete plays out his option, he should be free to price himself on the open market.[204]

Soccer

Professional soccer in the United States is a "rookie" in organizational development, public recognition,[205] and judicial scrutiny. Organizationally, outdoor soccer consists of twenty-four teams in the North American Soccer League (NASL) and eight teams in the American Soccer League (ASL), while indoor soccer has ten NASL teams and ten clubs in the Major Indoor Soccer League (MISL).[206]

Although they are relative newcomers to the athletic industry, these leagues rival the established professional sports in their control over the soccer player's intra- and interleague mobility. The club-player agreement for the NASL subjects the athlete to sundry contractual restrictions[207] including the option

ing offer satisfies minimum salary limits established in the agreement. For example, if a player of less than seven years service receives a qualifying offer of less than $50,000, the veteran free agent club does not qualify for compensation. But where the offer is for $100,000, the new employer is obligated to give the former employer its first round selection choice in the next player draft.

202. The NFL Collective Bargaining Agreement additionally covers the college player draft, granting the club that selects the athlete exclusive negotiation rights for one year; and the waiver of recourse clause, providing that the players' association will not sue the NFL or any of its clubs, but rather will comply with established grievance procedures and subject the dispute to arbitration by the player-club relations committee. *Id.* arts. III, VII, XIII. Further, the NFL Constitution and By-Laws subject the football player to the additional restraints of the tampering provision, the assignment clause and the eligibility requirement. Constitution and By-Laws of the National Football League (1976) (1979 Supplement).

203. Interview with Phil Krueger, Assistant to the President of the Tampa Bay Buccaneers of the National Football League in Tampa, Fla. (January 25, 1980).

204. While 139 NFL players became free agents on February 1, 1980 when their contracts expired with their original clubs, it was expected that few would move to other teams due to the operation of the compensation and right of first refusal provisions in the collective bargaining agreement. Gainesville Sun, Feb. 1, 1980, §D, at 1, col. 6.

205. Soccer in the United States has only recently attracted spectator support, for although the 1978 soccer season was the most successful in North American Soccer League history, only one of the 24 franchises showed a profit. Further, the amount of this support depended upon the team's geographical location. While the New York Cosmos could draw 70,000 fans anxious to see Pelé and the Tampa Bay Rowdies have averaged over 40,000 spectators over the last three seasons, other teams, such as the Memphis Rogues, drew 7,137 fans per game during the 1979 season. Indoor soccer has become popular quickly, however, with the St. Louis Steamers averaging a crowd of 13,523 per game. Interview with Ken Adams, NASL players' agent, in Tampa, Fla. (January 25, 1980); Tampa Tribune, Jan. 25, 1980, §C, at 1, col. 1.

206. Reed, *They Get Their Kicks on a Hockey Rink*, SPORTS ILLUSTRATED, Feb. 18, 1980, at 22.

207. In addition to the restrictions outlined in the text, the North American Soccer

clause,[208] allowing the club the unilateral right to renew the player's contract for an additional two years beyond the contractual terms, and a compensation rule,[209] similar to that employed in the football industry.[210] The agreement also contains a settlement of disputes clause,[211] which refers disputes between the club and the player to the league commissioner for final and binding arbitration.[212]

For several reasons, soccer players lack the opportunity afforded other professional athletes to challenge these restrictions. First, the antitrust laws have yet to be applied to soccer in the United States.[213] It seems likely, however, that soccer will be deemed commerce within the purview of the Sherman Act due to its international character and the sale of radio and television rights for interstate transmission of games.[214]

Moreover, the newly formed players' association possesses insignificant bargaining power. The leagues were unionized at the close of 1979[215] when the Fifth Circuit recognized the players' association[216] as the collective bargaining agent for all players, except those on Canadian teams.[217] The union's weakness, however, could work to the athlete's advantage. The player already has a competitive edge over the owners due to the dual structure[218] of the industry. If the

League Club-Player Agreement [hereinafter cited as Club-Player Agreement] contains the assignment clause, granting a club the right to assign the player's contract at any time, thereby requiring the athlete to report to the assignee club within 72 hours, Club Player Agreement, art. IV, §4.1; and the college player draft, providing a club with exclusive rights to negotiate with the selected player. *Id.* art. V, §5.2.

208. *Id.* art. VII, §7.1. The clause additionally provides that during the two option year seasons, the athlete will receive a 5% increase in the salary of the previous season. Regardless of the athletic prowess of the player, no club will sign an athlete without the protection of the option clause to bind the player to the club. The clause also grants a team the right to loan the athlete to another team during the offseason. Interview with Ken Adams, *supra* note 205.

209. When the free agent signs with another club, that club must compensate the original employer with cash, draft choices or player contracts. Interview with Ken Adams, *supra* note 205.

210. See text accompanying notes 199-201 *supra*.

211. Club-Player Agreement, *supra* note 307, art. V, §5.2.

212. *But see* note 11 *supra*.

213. *But see* Eastham v. Newcastle United Football Club, Ltd. [1963], 3 W.L.R. 574 (C.A.), *noted in* 27 MODERN L. REV. 210 (1964). See text accompanying notes 220-225 *infra*.

214. Reed, *supra* note 202, at 29. These factors were singled out by a Massachusetts district court in holding the hockey industry subject to the antitrust laws. Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 265 (D. Mass.), *rev'd on other grounds*, 472 F.2d 127 (1st Cir. 1972).

215. The MISL rules require that at least 12 of the 16 players on a team be North American. In 1979, therefore, union representatives were successful in promoting the idea of a players' union because they suggested the union would work to "Americanize" the league. NASL rules, however, require only 5 members of a team's 14-man roster to be North American. When the union representatives told the soccer players about the union's intent to remove the foreign players from the league through the revocation of visas, the players went on strike for one game. Thus, while the United States Labor Department recognizes the NASL players' union, the athletes do not. Interview with Ken Adams, *supra* note 205.

216. North American Soccer League v. NLRB, 613 F.2d 1379 (5th Cir. 1980).

217. *Id.* at 1380; San Diego Union, Mar. 22, 1980, §C, at 3, col. 1.

218. This additional leverage for the athlete, due to a dual industrial structure, also initially existed in the hockey industry. See note 58 *supra*.

owners were able to impose unreasonable restraints on the athletes, a player could challenge these restrictions in the courts under the antitrust laws. The owners could not avoid this judicial scrutiny merely by raising the nonstatutory labor exemption as a defense because the contracting parties occupied unequal bargaining positions and were unable to engage in bona fide, arms-length negotiations.[219]

The applicability of antitrust laws to the soccer industry has been tested in England in *Eastern v. Newcastle United Football Club, Ltd.*[220] There, a British court held that professional soccer's "retain system," in which a professional soccer player whose contract had expired was nonetheless "retained" by his original team, constituted an unreasonable restraint of trade.[221] The court noted that the system went further than was reasonably necessary to protect the owner's interest in his players[222] because the wealthier clubs still acquired the better athletes[223] to the sport's detriment.[224] The court stated that the system was established for the employers' benefit which caused the employers' negotiating strength to be disproportionate to that of the players.[225]

In the United States, where the soccer industry is constantly growing and changing, it is likely these issues will be the subject of judicial interpretation. Any uniqueness in the sport, however, should not preclude the courts from applying the same standards and tests applicable in professional basketball[226] and football[227] litigation. In addition, the overriding judicial concern should be to maintain the proper balance between the player's freedom to compete and the owner's need to maintain league stability.

THE FINAL SCORE

What the future holds for the athlete's mobility and for the sports industry's economic survival rests with the courts[228] and the approach they adopt in applying the divergent federal antitrust and labor policies to professional athletics.[229]

---

219. See text accompanying notes 33-42 *supra.*

220. 3 W.L.R. 573 (C.A.).

221. *Id.* at 583.

222. *Id.* at 580. The availability of less restrictive alternatives has also been a factor for striking down player mobility restraints in judicial decisions in the United States. *See, e.g.,* Mackey v. National Football League, 543 F.2d at 621; Robertson v. National Basketball Ass'n, 389 F. Supp. at 892.

223. 3 W.L.R. at 580.

224. *Id.*

225. *Id.* at 582.

226. See text accompanying notes 130-141 *supra.*

227. See text accompanying notes 181-192 *supra.*

228. The Labor Management Relations Act §301, 29 U.S.C. §185 (1976), provides that an individual union member may bring a suit in federal district court for violations of a labor contract by the union or employer. *See generally Flood in the Land of Antitrust, supra* note 16, at 562.

229. *Compare* Flood v. Kuhn, 407 U.S. 258 (1972) *with* Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd,* 586 F.2d 644 (9th Cir. 1978), *cert. denied,* 441 U.S. 907 (1979) *and* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

To reconcile these policies in a unique industry,[230] the courts must adopt a cautious approach before exercising jurisdiction. Regardless of the sport, player restraint, injury, or degree of collective bargaining involved, if the injured party fails to resort to established arbitration proceedings first, the courts must limit their jurisdiction to determining whether the parties are bound to arbitrate and the scope of arbitration.[231] By deferring to arbitration, the player seeks vindication via internal, not external proceedings, thereby preserving the finality of the bargaining agreement and insuring the effectiveness of negotiations.[232]

Only after this avenue of relief has failed should the court consider exercising jurisdiction. The court's decision must also take into account whether the sport involved is baseball, whether there is a controlling collective bargaining agreement, and whether any legal barriers exist to restrain the court's actions. Possible barriers to judicial review include the incorporation of a waiver of judicial recourse clause into the bargaining agreement[233] and the availability of the nonstatutory labor exemption defense.[234]

Where the litigation concerns a player restraint in baseball, a recognized anomaly prevails since baseball is outside the purview of the antitrust laws.[235] The courts have generally adopted a two-tiered analysis to determine the existence and scope of jurisdiction. The sole barrier to jurisdiction is the inclusion of the nonreviewability clause in the current player-management agreement.[236] At the first level, the court must determine whether the clause was the product of free negotiations by parties of equal bargaining position.[237] The court should consider the bargaining history between the contracting parties as well as any trade-offs the athletes received in exchange for the imposition of the restraint.[238] If the court finds forceful negotiations were lacking, it must exercise jurisdiction under the federal labor laws[239] in order to restore proper equilibrium between player mobility and league stability. But if arms-length bargaining was undertaken in good faith by both sides, then the clause is operative and the commissioner has the exclusive right to decide the dispute.[240]

Nonetheless, at the second level of analysis, the court still has the authority

230. Athletics is the only business in which its component parts, the clubs, must compete and cooperate in order to economically survive. *See* authorities cited in note 54 *supra*.

231. See text accompanying notes 44-46 *supra*.

232. See text accompanying notes 41-42 *supra*.

233. See note 11 *supra*.

234. See text accompanying notes 33-40 *supra*.

235. See text accompanying notes 67-78 *supra*. As noted by the Supreme Court, legislative, not judicial, resolution is required to remove this inconsistency. Flood v. Kuhn, 407 U.S. at 285.

236. See note 95 *supra*. But see note 11 *supra*.

237. Charles O. Finley & Co. v. Kuhn, 569 F.2d at 543.

238. Only recently has meaningful good faith bargaining become more than an ideal in professional team sports. In 1973, for example, baseball player representatives proposed that the reserve clause restriction be lifted when a player reached age 65. Major league baseball owners refused to discuss this proposal, however, because to do so "would constitute a foot in the door." Keeffe, *supra* note 76, at 92.

239. See text accompanying notes 84-85 *supra*.

240. See text accompanying notes 96-97 *supra*.

to intervene where there is a finding that the arbitrator's decision was the result of fraud, bias or misconduct, or that the award failed to draw its essence from the collective bargaining agreement.[241] Additionally, the court can intervene where it finds the major leagues and their constituent clubs failed to provide due process of law or otherwise contravened state or federal laws.[242]

If the litigation concerns a restraint imposed on a professional basketball,[243] football,[244] or hockey[245] player, the court must consider the applicability of the antitrust laws and the nonstatutory labor exemption to the labor-management agreement. Applying the two-tiered *Mackey*[246] analysis, the court must primarily determine whether the plaintiff has standing under the Sherman Act[247] or whether the labor exemption operates to remove the restriction from antitrust scrutiny.[248] The defendant will be granted immunity where the court finds, first, the restraint on trade affected only parties to the collective bargaining relationship; second, the restraint was a mandatory subject of collective bargaining;[249] and third, the collective bargaining agreement was the product of bona fide, arms-length negotiations.

If one of these three requirements is found lacking and the employer is denied immunity,[250] the second level of analysis requires the court to determine whether the player restraint constitutes a substantive antitrust violation under the per se[251] or rule of reason[252] standard. Ideally, the court will apply the rule of reason standard rather than summarily labeling the restraint illegal per se.[253] Unlike other industries where any new entrant into the business market may be

241. The United States Arbitration Act, 9 U.S.C. §10 (1976), allows a district court to vacate an arbitration award where it finds that the award was procured by corrupt or fraudulent means; or where the arbitrator was guilty of misconduct, includinig refusing to postpone a hearing or denying to hear material evidence; or where the arbitrator's powers were exceeded or imperfectly executed so that a mutual, final, and definite award on the submitted subject matter was not made.

242. Charles O. Finley & Co. v. Kuhn, 569 F.2d at 544.

243. Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956) (basketball industry subject to antitrust laws). See note 112 *supra*.

244. Radovich v. National Football League, 352 U.S. 445 (1957) (business of football subject to the Sherman Act). See note 153 *supra*.

245. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972); Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 265 (D. Mass. 1972) (hockey industry subject to antitrust review).

246. Mackey v. National Football League, 543 F.2d at 606. See text accompanying notes 180-192 *supra*.

247. See text accompanying notes 18-23 *supra*.

248. See text accompanying notes 33-43 *supra*.

249. 29 U.S.C. §158(d) (1976). See note 14 *supra*.

250. *See, e.g.*, Mackey v. National Football League, 543 F.2d at 616. *But see* McCourt v. California Sports, Inc., 600 F.2d 1193, 1202-03 (6th Cir. 1979) (the finding that the *Mackey* standards were met precluded any further judicial injuiry into the reasonableness of the restraint due to the immediate protection from the antitrust laws provided by the nonstatutory labor exemption).

251. See text accompanying notes 24-28 *supra*.

252. See text accompanying notes 21-23 *supra*.

253. *See, e.g.*, Mackey v. National Football League, 543 F.2d at 620-22; Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1979); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 457, 518 (E.D. Pa. 1972).

considered an undesirable adversary, a sporting event requires an adversary. Additionally, the sports industry requires cooperation between these adversaries to insure parity of player talent between the clubs,[254] spectator support, and the industry's economic survival.[255] Thus, players and owners recognize that reasonable player restraints are necessary for the industry to function.[256] Under the rule of reason standard, therefore, the court considers the nature of the business and the restraint involved, whether the restraint genuinely promotes the ends asserted to justify it, and whether these benefits can be obtained through less restrictive alternatives.[257] Through this two-tiered analysis, the court checks both the reasonableness of the restraint mechanisms and the effectiveness of the bargaining process.

In the final analysis, however, it is the exceptionally talented players, or the superstars, that suffer the most under the process of collective bargaining, regardless of the quality of negotiations or the sport.[258] These players have the greatest interest in seeing competition for their services maximized and player restraints minimized.[259] Once the players' association is certified as the players' collective bargaining agent, however, the individual employees no longer have complete freedom to bargain on their own.[260] The athlete may bargain individually only where the collective bargaining agreement authorizes the individual player to negotiate contractual terms that exceed but do not derogate from those in the collective agreement.[261] If the player and the employer negotiate additional items outside the collective bargaining setting, the employer is subject to an unfair labor practice charge for failing to bargain collectively with union representatives.[262]

Moreover, while these representatives are sympathetic to the claims of the superstar, they also have a duty to fairly represent the collective employee unit[263] which consists of average to marginally skilled players. For these athletes, the mobility restrictions have little impact because their talents are not in great

254. *See* Leavell & Millard, *supra* note 6, at 604-05; Note, *supra* note 6, at 405; Note, *supra* note 54, at 419.

255. *See, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1979), where the appellate court recognized that: "No NFL team, in short, is interested in driving another team out of business, whether in the counting-house or on the football field, for if the League fails, no one team can survive." For further discussion of this paradox, see sources cited in note 54 *supra*. *But see* Los Angeles Memorial Colliseum Comm'n v. National Football League, 468 F. Supp. 154 (C.D. Cal. 1979) (NFL teams are not joint ventures).

256. *See generally Monopsony*, *supra* note 6, at 628.

257. *See, e.g.*, Mackey v. National Football League, 543 F.2d at 620-22.

258. *See* Note, *Player Control Mechanisms in Professional Team Sports*, 34 U. PITT. L. REV. 645, 669 (1973).

259. To challenge the imposition of contractual devices designed to limit the athlete's mobility, exceptionally talented players, including Curt Flood in baseball and Rick Barry, Spencer Haywood and Oscar Robertson in basketball, have sought relief in the courts.

260. *See, e.g.*, NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 200 (1944).

261. *See, e.g.*, J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944). The individual contract so negotiated is subsidiary to the collective agreement and may not waive its benefits. *Id.* at 336.

262. National Labor Relations Act §8(a)(5), 29 U.S.C. §158(a)(5) (1979). *See, e.g.*, National Licorice Co. v. NLRB, 309 U.S. 350, 357-59 (1940).

263. On the union's duty of fair representation, see note 37 *supra*.

demand and there are relatively few opportunities for inter- or intraleague movement. Consequently, they may be willing to accept restraints in return for other concessions, particularly higher minimum salaries and increased job security. Thus, while a few superstars may be disadvantaged by restraints on their mobility, enough players may be willing to accept them to control the union's definition of its self-interest.[264]

The collective employee unit can obtain relief from a restraint in the collective bargaining agreement which was agreed to without receiving concessions from the owners. The failure to receive adequate trade-offs demonstrates that either the players' association is not fairly representing the bargaining unit or that it stands in a relatively weak bargaining position. If the former applies, the players have a cause of action against the union under the NLRA,[265] while if the latter applies, the restraint must withstand antitrust scrutiny in the courts without the protection of the nonstatutory labor exemption.[266] The superstar's grievance, however, is barred by the exemption if the players' association fairly represented the majority interest in bona fide dealings with the management.[267]

The disgruntled superstar has several alternative remedies. First, under section 7 of the NLRA,[268] the athlete may refuse to work to coerce the club owner to accede to the player's demand.[269] In an economic strike, however, the employer may hire replacements and need not reemploy the striker.[270] Further, since only a minority of the athletes would be on strike, its effectiveness may be limited.

A more plausible alternative for the superstar is to file a claim under section 1 of the Sherman Act,[271] alleging injury due to the operation of an unreasonable restraint on trade or commerce. To prevent this action from being barred by the nonstatutory labor exemption defense, the athlete must additionally prove that at least one of the *Mackey*[272] prerequisites, necessary for the exemption to be granted, is not fulfilled.

To avoid the nonstatutory labor exemption, three arguments are available to the superstar. First, the player can argue that the restraint has an impact on parties outside the collective bargaining relationship.[273] Depending on the court's definition of the bargaining unit,[274] the superstar may be classified as a

---

264. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 190 (1967); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 201-02 (1944). *See generally* J. WEISTART & C. LOWELL, *supra* note 4, at 543-47.

265. 29 U.S.C. §158(b)(3) (1976).

266. *See, e.g.*, Mackey v. National Football League, 543 F.2d at 606.

267. See text accompanying notes 263-264 *supra*.

268. 29 U.S.C. §158 (1976). *See generally* Lowell, *supra* note 16, at 36.

269. *See, e.g.*, Jeffrey-DeWitt Insulator Co. v. NLRB, 91 F.2d 134, 138 (4th Cir.), *cert. denied*, 302 U.S. 731 (1937).

270. *See, e.g.*, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938).

271. 15 U.S.C. §1 (1976). See note 12 *supra*.

272. Mackey v. National Football League, 543 F.2d at 606. See text accompanying notes 181-183 *supra*.

273. This position was successfully argued by the World Hockey Association in Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 457, 499 (E.D. Pa. 1972).

274. The initial determination of the appropriate unit for collective bargaining purposes.

third party outside the bargaining unit and therefore entitled to antitrust protection. Historically, however, the superstar has been included in this unit.[275]

Second, the athlete can attempt to convince the court that the restraint was imposed without good faith bargaining between the players' union and the owners. Although the superstar may not have been fairly represented, if the union fairly represented the majority interest[276] and did not treat the superstar arbitrarily, discriminatorily, or in bad faith,[277] the court will find that there has been bona fide negotiations and the exemption will apply.

Finally, the athlete can argue that the grant of immunity should fail for public policy reasons. By providing a special exemption from Sherman Act regulations,[278] the Supreme Court attempted to balance the policies of the antitrust laws, designed to promote free and unfettered competition in the marketplace, against the labor laws, enacted to improve the working conditions of laborers and reduce industrial strife through collective bargaining.[279] Today's superstar, however, is able to draw a salary of one million dollars per season[280] and no longer can be classified as a mere laborer in the business. Rather, he has become the commercial entity. Thus, this is the type of free enterprise that the Sherman Act was enacted to protect, unfettered by the labor law exemption.

A different avenue open to the superstar in his quest to market his talents freely involves the formation of a separate bargaining unit[281] with an agent representing the skilled athletes.[282] The demands of the superstar could be heard through this agent. While a superstar union has not been tested in the context of professional sports,[283] the NLRB may be reluctant to permit severance from the union[284] because the bargaining position of the majority employee group

---

however, is to be agreed on by the contracting parties. If they fail to agree, the NLRB makes the determination. National Labor Relations Act §9(b), 29 U.S.C. §159(b) (1976).

275. *See* Lowell, *supra* note 16, at 14.

276. See text accompanying note 37 *supra*.

277. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

278. See text accompanying notes 33-43 *supra*.

279. *See, e.g.*, Allen Bradley Co. v. Local 3, Int'l Bhd. of Electrical Workers, 325 U.S. 797, 809-10 (1945).

280. Prior to the 1979 baseball season, David Parker, the right fielder of the Pittsburgh Pirates, signed a contract for $1 million per year for four years. In addition to Parker, 14 other baseball players are scheduled to draw $600,000 or more in salary for the 1980 season, and 90 players will be earning over $300,000. Miami Herald, Apr. 7, 1980, §C, at 1, col. 1.

281. *See* Jacobs & Winter, *supra* note 16, at 9-10; Lowell, *supra* note 16, at 21-23.

282. 29 U.S.C. §159(a) (1976) precludes the existence of two separate representatives within the same bargaining unit. Thus, once the majority votes to be represented by a union, the elected representative becomes the exclusive representative for purposes of collective bargaining.

283. In other industries, however, the NLRB has consistently denied a union's petition to separately represent a sub-group of employees made up of fewer than all employees in the union. *See, e.g.*, A.B. Hirschfield Press, Inc., 140 NLRB 212 (1962); Grand Rapids Gen. Motors, 131 NLRB 439, 440 (1961); Jahn-Tyler Printing & Publishing Co., 112 NLRB 167 (1955).

284. In Mallinckrodt Chem. Works, 162 NLRB 387 (1966), the Board said it would consider the following factors in craft severances cases: whether a tradition of separate representation exists; the general history of collective bargaining in the industry and in the specific employer-employee relationship; whether the employees established and maintained their

may be undermined.[285] Besides this problem, the exceptional athletes will have to overcome the difficulties of defining a superstar and dealing with a constantly fluctuating membership.[286]

A final alternative is to broaden the areas over which an athlete can bargain individually with management.[287] The scope of this right undoubtedly will be limited, however, to prevent the undermining of the exclusive representative and to protect the employer from an unfair labor practice charge for dealing with an entity other than the bargaining unit.[288]

Presently, the superstar's mobility is subordinated to the good of the team. As a result, where the union fairly represents the majority interest, the talented player is foreclosed from even having his grievance judicially reviewed. A more equitable solution is for the courts to consider the athletic status of the plaintiff and whether he was effectively represented in bargaining negotiations before summarily applying the nonstatutory labor exemption. Through this approach, the superstar has a forum to air his grievances and the proper balance between the federal antitrust and labor laws is preserved.

CONCLUSION

Players reluctantly agree with owners that due to the necessary cooperative spirit between competitors in the sports industry, reasonable restraints on the mobility of an athlete are necessary to the industry's economic survival. Difficulties arise, however, in attempting to agree on restrictions that will fairly balance player mobility and league stability.

In the context of the reserve system, for example, the experiences of the sport of basketball show that a league will not necessarily fail if the players are given more economic freedom through an option clause, unburdened by the compensation rule.[289] But although basketball players enjoy greater freedom to negotiate than their counterparts in other sports, they are still subject to other restraint mechanisms, including the assignment clause and the no tampering provision.

Thus, the athlete must have a forum for checking the actions of the owners in their attempts to restrain his professional mobility. Whether it is at the bargaining table, through the actions of a strong players' association, or in the courts, through the reconciliation of competing federal antitrust and labor policies, the overriding goal must be to attain an equilibrium between the player's right to freely market his services and the sports industry's right to continuity and stability. Only in this manner can professional team athletics expect to endure.

LESLIE MICHELE LAVA

separate identity; and the qualifications of the union seeking to "carve-out" a separate unit. *Id.* at 397.

285. The inclusion of the superstars in the bargaining unit forces the owners to concede to many player benefits including minimum salaries and travel allowances. *See* Jacobs & Winter, *supra* note 16, at 9.

286. *See* Lowell, *supra* note 16, at 23.

287. See note 260 *supra*.

288. National Labor Relations Act §8(a)(5), 29 U.S.C. §158(a)(5) (1976).

289. See text accompanying notes 143-146 *supra*.