CHAPTER 4 · LABOR LAW AND PROFESSIONAL SPORTS

Introduction

The election of Franklin D. Roosevelt and the advent of the New Deal brought a period of strong governmental support for organized labor and the institution of collective bargaining. The National Industrial Recovery Act (NIRA), passed in 1933, included a section guaranteeing the right of employees "to organize and bargain collectively through representatives of their own choosing, and ... free from the interference, restraint or coercion of employers of labor...." The NIRA was invalidated by the Supreme Court in the infamous *Schecter Poultry* case[1] but Congress responded swiftly by passing the Wagner Act, now known as the National Labor Relations Act.

The passage of the Wagner Act represented the end of more than a century of essentially judicially created labor relations law. By 1935, organized labor had been in existence in America for more than a century, and the judicial reaction to the activities of unions had resulted in a patchwork of legal doctrines governing their activities. During the first forty years of the nineteenth century, American courts often embraced the proposition that any concerted employee action, even to raise wages, was indictable as a criminal conspiracy, even though the purpose of the action and the means used would be legal if undertaken by individuals.

The use of criminal sanctions, especially for peaceful labor activity, engendered overwhelmingly adverse public reaction. After *Commonwealth v. Hunt*,[2] in which the conspiracy doctrine was narrowed to require either an illegal purpose or resort to illegal means, the use of the conspiracy doctrine and the imposition of criminal sanctions to control the activities of unions waned and the use of civil remedies to regulate union activity increased.

Acting without legislative guidance, state and federal judges were inclined to decide labor cases according to their own views which were often hostile to unions' use of economic power. Under tort doctrine, an intentional injury inflicted through the use of economic pressure — universally present in the case of a strike — was unlawful unless the court found it justified by the self-interest of the union. In addition, even if the objectives were found to be legitimate, economic pressure by organized labor could be exerted only through means receiving judicial approval. In addition, the Sherman Act[3], which prohibited "all contracts, combinations or conspiracies in restraint of trade", furnished another vehicle for restraining union activity since virtually all concerted activities could be characterized as combinations restraining trade. Both tort and Sherman Act doctrines were used to enjoin union activities such as picketing, recognition strikes, secondary boycotts and other weapons of economic conflict. The use of the labor injunction became widespread. The suit for damages was unsatisfactory to employers seeking relief against union activities. The injunction, on the other hand, provided prompt temporary restraint of the activity complained of and often was sufficient to curb the momentum of a strike or other concerted activity. Procedural as well as substantive inequities in the use of the labor injunction, however, resulted in widespread criticism.

By the 1930's, it was abundantly clear that the courts had not provided a coherent scheme for regulating organized labor and its activities. And, with the Great Depression came the idea that the growth

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1 *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935). In *Schecter*, the Court held, *inter alia*, that Congress had exceeded its powers under the Commerce Clause because "the poultry [processed by the company] had come to a permanent rest within the State" and was, accordingly, no longer "in" interstate commerce.

2 4 Metc. (Mass.) 111 (1842).

3 15 U.S.C. 1-7.

of organized labor could enhance the bargaining power of employees, raise their purchasing power and add impetus toward revitalizing the economy. It was in this context that Congress passed the Wagner Act. That statute made many of the same acts which had been condemned under criminal and civil conspiracy theories not only legal but protected by federal law.

Section 1: The NLRA

The heart of the National Labor Relations Act is Section 7. It states:

Rights of Employees

> § 7 · Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8 of the statute implements Section 7 by listing specific employer unfair labor practices. The subsections of Section 8 are described in greater detail later in this Chapter. As a general matter, however, Section 8(a)(1), the most comprehensive of the subsections, prohibits employer interference with the rights guaranteed to employees in Section 7; Section 8(a)(2) is designed to curb the use of so-called "company unions" — employer sponsored or favored organizations; Section 8(a)(3), in the main, prohibits discrimination against employees for engaging in union activities and Section 8(a)(4) forbids discrimination against employees for testifying or bringing charges to the National Labor Relations Board. Finally, Section 8(a)(5) requires employers to bargain collectively with the representative selected by the employees.

The cases arising in the sports law context have focused primarily on Sections 8(a)(1), (3) and (5). Accordingly, the cases set forth herein include only such allegations and do not address alleged violations of Sections 8(a)(2) or (4) of the Act.

Section 9 of the NLRA establishes the procedures by which employees can select whether or not to be represented by a union and how that union is selected. The statute also created the NLRB to administer and interpret the unfair labor practice and representation provisions of the act. The original statute contained no provisions limiting union acts. However, by 1947, concern about abuses of union power resulted in the Taft-Hartley amendments to the statute. They added, *inter alia*, Section 8(b) and its subsections, designed to address certain undesirable union tactics such as the secondary boycott,[4] strikes over work assignments and other activities. Although the activities of unions have come under scrutiny in the sports law context, they have not produced a significant body of case law.

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[4] The secondary boycott has been defined as the application of economic pressure upon a person with whom the union has no dispute in order to induce that person to cease doing business with another employer with whom the union does have a dispute. COX, BOK & GORMAN, LABOR LAW, CASES AND MATERIALS (Foundation Press, 10th ed.) at 617.

A. Coverage of the NLRA

The student may recall that between the Supreme Court's decision in *Federal Baseball*[5] in 1922 and its decision fifty years later in *Flood v. Kuhn*,[6] the judicial finding that baseball was not engaged in interstate commerce, and thus was immune from the antitrust laws, was undisturbed. The following cases address the interstate commerce issue, as well as other matters surrounding the establishment of a Union in professional sports from the labor law perspective.

AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND ASSOCIATION OF NATIONAL BASEBALL LEAGUE UMPIRES

180 N.L.R.B. No. 30, 72 L.R.R.M. 1545 (1969)

From the Board's Opinion

The Petitioner seeks an election in a unit of umpires employed by the American League of Professional Baseball Clubs. The Employer, while conceding the Board's constitutional and statutory power to exercise jurisdiction herein, nevertheless urges the Board, as a matter of policy, not to asset jurisdiction pursuant to Section 14(c) of the Act.

The Employer is a nonprofit membership association consisting of 12 member clubs located in 10 states and the District of Columbia. Operating pursuant to a constitution adopted and executed by the 12 member clubs, the Employer is engaged in the business of staging baseball exhibitions and, with its counterpart the National League of Professional Baseball Clubs, constitutes what is commonly known as "major league baseball." The Employer currently employs, among other persons, the 24 umpires requested herein, and one umpire-in-chief.

The Board's jurisdiction under the Act is based upon the commerce clause of the Constitution, and is coextensive with the reach of that clause. In 1922 the Supreme Court in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, although characterizing baseball as a "business", ruled that it was not interstate in nature, and therefore was beyond the reach of the nation's antitrust laws. However, subsequent Supreme Court decisions appear to proceed on the assumption that baseball, like the other major professional sports, is now an industry in or affecting interstate commerce, and that baseball's current antitrust exemption has been preserved merely as a matter of judicial *stare decisis*. Thus, in both the *Toolson* and *Radovich* decisions the Supreme Court specifically stated that baseball's antitrust status was a matter for Congress to resolve, implying thereby that Congress has the power under the commerce clause to regulate the baseball industry. Since professional football and boxing have been held to be in interstate commerce and thus subject to the antitrust laws, it can no longer be seriously contended that the Court still considers baseball alone to be outside of interstate commerce. Congressional deliberations regarding the relationship of baseball and other professional team sports to the antitrust laws likewise reflect a Congressional assumption that such sports are subject to regulation under the commerce clause. It is, incidentally, noteworthy that these deliberations reveal Congressional concern for the rights of employees such as players to bargain collectively and engage in concerted activities. Additionally, legal scholars have agreed, and neither the parties nor those participating as *amici* dispute, that professional sports are in or affect interstate commerce, and as such are subject to the Board's

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[5] 259 U.S. 200 (1922).

[6] 407 U.S. 276 (1972).

jurisdiction. Therefore, on the basis of the above, we find that professional baseball is an industry in or affecting commerce, and as such is subject to Board jurisdiction under the Act.

[Effect on Commerce]

Section 14(c)(1) of the National Labor Relations Act, as amended, permits the Board to decline jurisdiction over labor disputes involving any "class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction...." The Employer and other employers contend that because of baseball's internal self-regulation, a labor dispute involving The American League of Professional Baseball Clubs is not likely to have any substantial effect on interstate commerce; and that application of the National Labor Relations Act to this Employer is contrary to national labor policy because Congress has sanctioned baseball's internal self-regulation. The Employer also contends that effective and uniform regulations of baseball's labor relations problems is not possible through Board processes because of the sport's international aspects.

The Petitioner and other employee representatives contend, on the other hand, that Section 14(c) precludes the Board from declining jurisdiction, as any labor dispute arising in this industry will potentially affect millions of dollars of interstate commerce and have nationwide impact. They assert that baseball's self-regulation is controlled entirely by employers, and therefore has not and will not prevent labor disputes from occurring in this industry. Additionally, it is submitted that Congressional intent does not preclude, and national labor policy requires, Board jurisdiction — for without a national forum for uniform resolution of disputes, the industry might be subject to many different labor laws depending upon the State in which any particular dispute arises.

We have carefully considered the positions of the parties, and the *amicus* briefs, and we find that it will best effectuate the mandates of the Act, as well as national labor policy, to assert jurisdiction over this Employer. We reach this decision for the following reasons:

Baseball's system for internal self-regulation of disputes involving umpires is made up of the Uniform Umpires Contract, the Major League Agreement, and the Major league Rules which provide, among other things, for final resolution of disputes through arbitration by the Commissioner. The system appears to have been designed almost entirely by employers and owners, and the final arbiter of internal disputes does not appear to be a neutral third party freely chosen by both sides, but rather an individual appointed solely by the member club owners themselves. We do not believe that such a system is likely either to prevent labor disputes from arising in the future, or, having once arisen, to resolve them in a manner susceptible or conducive to voluntary compliance by all parties involved. Moreover, it is patently contrary to the letter and spirit of the Act for the Board to defer its undoubted jurisdiction to decide unfair labor practices to a disputes settlement system established unilaterally by an employer or group of employers. Finally, although the instant case involves only umpires employed by the League, professional baseball clubs employ, in addition to players, clubhouse attendants, bat boys, watchmen, scouts, ticket sellers, ushers, gatemen, trainers, janitors, office clericals, batting practice pitchers, stilemen, publicity, and advertising men, grounds keepers and maintenance men. As to these other categories, there is no "self-regulation" at all. This consideration is of all the more consequence for of those employees in professional baseball whose interests are likely to call the Board's processes into play, the great majority are in the latter-named classifications.

We can find, neither in the statute nor in its legislative history, any expression of a Congressional intent that disputes between employers and employees in this industry should be removed from the scheme of the National Labor Relations Act. In 1935, 1947, and again in 1959, Congress examined the nation's labor policy as reflected in the National Labor Relations Act; and Congress has consistently affirmed the Act's basic policy, as expressed in Section 1, of encouraging collective bargaining by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." Nowhere in Congress' deliberations is there any indication that these basic rights are not to be extended to employees employed in professional baseball or any other professional sport. We do

not agree that Congress, by refusing to pass legislation subjecting the sport to the anti-trust laws when it considered the regulation of baseball and other sports under the antitrust statutes, sanctioned a governmentwide policy of "non-involvement" in all matters pertaining to baseball. Indeed, to the extent that Congressional deliberations on the antitrust question has reference to the issue before us, it indicates agreement that players' rights to bargain collectively and engage in concerted activities are to be protected rather than limited.

There is persuasive reason to believe that future labor disputes — should they arise in this industry — will be national in scope, radiating their impact far beyond individual State boundaries. As stated above, the Employer and its members are located and conduct business in 10 states and the District of Columbia. The stipulated commerce data establishes that millions of dollars of interstate commerce are involved in its normal business operations. The nature of the industry is such that great reliance is placed upon interstate travel. Necessarily, then, we are not here confronted with the sort of small, primarily intrastate employer over which the Board declines jurisdiction because of failure to meet its prevailing monetary standards. Moreover, it is apparent that the Employer, whose operations are so clearly national in scope, ought not have its labor relations problems subject to diverse state labor laws.

The Employer's final contention, that Board processes are unsuited to regulate effectively baseball's international aspects, clearly lacks merit, as many if not most of the industries subject to the Act have similar international features.

Accordingly, we find that the effect on interstate commerce of a labor dispute involving professional baseball is not so insubstantial as to require withholding assertion of the Board's jurisdiction, under Section 14(c) of the Act, over Employers in that industry, as a class. As the annual gross revenues of this Employer are in excess of all of our prevailing monetary standards, we find that the Employer is engaged in an industry affecting commerce, and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. The Employer at the hearing denied that the Petitioner was a labor organization within the meaning of Section 2(5) of the Act. The record shows, however, that the Petitioner is an organization in which employees participate, and which exists for the purpose of dealing with employers concerning wages and other conditions of employment. Accordingly, we find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[Umpires as Supervisors]

4. The Employer contends that the petition should be dismissed on the ground that the umpires sought to be represented are supervisors as defined in Section 2(11) of the Act. It is not contended that umpires have authority to hire, fire, transfer, discharge, recall, promote, assign, or reward. We think it equally apparent that umpires do not "discipline" or "direct" the work force according to the common meaning of those terms as used in the Act.

The record indicates that an umpire's basic responsibility is to insure that each baseball game is played in conformance with the predetermined rules of the game. Thus, the umpire does not discipline except to the extent he may remove a participant from the game for violation of these rules. Testimony shows that after such a removal the umpire merely reports the incident to his superiors, and does not himself fine, suspend, or even recommend such action. As a final arbiter on the field, the umpire necessarily makes decisions which may favor one team over another, and which may determine to some extent the movements of various players, managers, and other personnel on the ball field. The umpire does not, however, direct the work force in the same manner and for the same reasons as a foreman in an industrial setting. As every fan is aware, the umpire does not — through the use of independent judgment — tell a player how to bat, how to field, to work harder or exert more effort, nor can he tell a manager

which players to play or where to play them. Thus, the umpire merely sees to it that the game is played in compliance with the rules. It is the manager and not the umpire who directs the employees in their pursuit of victory.

Accordingly, we find that the umpires are not supervisors, and thus the Employer's motion to dismiss on this ground is hereby denied. We further find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All persons employed as umpires in the American League of Professional Baseball Clubs, but excluding all other employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below....

Dissenting Opinion

Member JENKINS, dissenting

My colleagues advance as a reason for asserting jurisdiction herein the absence of a Congressional intent to resolve labor disputes in baseball in a different manner from that established in the NLRA. In my opinion, the question is not whether Congress intended that disputes between employers and employees in the professional baseball industry should be resolved in the same or in a different manner from that established for other industries covered by the Act, but whether Congress, in enacting the NLRA, intended to include such disputes within the reach of the Board's jurisdiction at all. If any inference is to be drawn from Congressional silence on the matter, a very compelling reason exists for nonassertion of jurisdiction.

* * *

Whether fortuitous or otherwise, professional baseball's unique and favored status had already gained judicial approval long before enactment of the NLRA. It is irrefutable, therefore, that Congress in 1935 harbored no intent to include the labor relations of professional baseball within the reach of the Board's jurisdiction. And while the Supreme Court has since rejected the narrow conception of commerce on which *Federal Baseball* was premised, in large measure prior to any amendments to the Act, my colleagues point to no legislative history in the subsequent amendments to the Act which would support a legislative intent thereafter to include baseball's labor relations within the reach of the Act. Indeed, it would appear that in the present posture, an amendment expressly including the baseball industry within the Act would be required to warrant the Board's assertion of jurisdiction.

* * *

Even assuming in agreement with my colleagues that professional baseball is subject to the Board's jurisdiction, and further, that the Board has the discretion under Section 14(c)(1) of the Act to assert or decline jurisdiction. I am of the opinion that no compelling reasons exist for exercising that discretion to assert jurisdiction in the instant case. There is no showing that this industry is racked with the kinds of labor disputes which are likely to constitute a burden on commerce. Nor am I satisfied that the majority's conclusion, that baseball's "commissioner" system for internal self-regulation of disputes is not likely to prevent such burden or disruption of commerce, constitutes a ground for our taking jurisdiction over the industry. Indeed, I question the propriety of prejudging baseball's arbitral system in this representation proceeding, particularly in view of the fact that the matter has not been litigated and in the absence of an issue which calls for a close scrutiny of the efficacy of that system based on facts spread on the record. In any event, the pendency of a single ULP charge, even assuming it arose as a direct result of the failure of baseball's arbitral system, is hardly ground for discrediting that system any more than it is for rejecting arbitration procedures in any industry. Moreover, my colleagues appear to shoot wide of the mark when they note that other employees, such as clubhouse attendants, bat boys, watchmen, scouts, ticket sellers,

ushers, gatemen, trainers, janitors, grounds keepers and maintenancemen, are not covered by baseball's arbitral system. Unlike umpires, these employees appear to be directly employed by the individual baseball clubs and it appears that their labor relations would be so handled. While baseball players are likewise hired directly by the individual clubs, the entire league has an interest in the relations between the players and their employers because of the very nature of the game and the need to maintain competition. Thus, there is an urgent need for ultimately settling problems dealing with the players on a league level while no such need is apparent in the case of stadium-oriented employees. Furthermore, it appears from the record that some of the latter employees are already represented by labor organizations in single-employer units and presumably have their own dispute settlement procedures. Finally, there is no showing that any labor disputes of national importance exist among these employees.

For the foregoing reasons I would dismiss the petition herein.

Questions

1. In *Federal Baseball*, the Supreme Court determined that baseball was not engaged in interstate commerce — a conclusion that prevailed until the Court's 1972 decision in *Flood v. Kuhn*. Was it proper in 1969 for the NLRB to conclude that "professional baseball is an industry in or affecting commerce"? Is the dissent correct as to Congressional intent regarding the application of the NLRA to Baseball?

2. Are you satisfied that umpires are not supervisors within the meaning of the NLRA? Are managers supervisors under the statute? Are individual coaches?

Section 2: Section 8(a)(1) · Interference, Restraint and Coercion

Section 8(a)(1) of the NLRA states:

§ 8 (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;

Congress utilized broad language in Section 8(a)(1) by declaring it illegal for an employer "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights to organize, engage in other concerted activities and bargain collectively. Thereafter, the statute also set forth, in Sections 8(a)(2) through (5) four specific classes of employer actions which were deemed especially objectionable and which were considered as sub-categories of the broader 8(a)(1) prohibition: employer domination of a union; discrimination in hiring, firing or working conditions because of union membership; discrimination for filing charges or giving testimony before the NLRB and employer refusals to bargain were made separate violations of the Act. Conduct violating 8(a)(2) through (5) — the more specific sections of 8(a) — would also "restrain and coerce" employees and would, accordingly, violate 8(a)(1) derivatively.

These more specific prohibitions were not, however, thought to constitute the entire range of proscribed conduct and it has long been recognized that 8(a)(1) can be violated by conduct other than that proscribed in sections 8(a)(2) through (5). Examples of conduct constituting independent violations of Section 8(a)(1) are threats of reprisals, or promises of benefit, to influence an employee's vote, employer questioning of employees concerning their union membership or proclivities, surveillance of employees in their union activities and employer rules barring union solicitation on company property.

The Supreme Court has also determined that 8(a)(1) does not require an actual showing that particular employees were actually coerced — only that the employer's actions would tend to coerce a reasonable employee.[7] Moreover, it is not necessary to establish that the employer intended to produce the prohibited coercive effect — only that the action would tend to produce the effect in the reasonable employee. That is, motive is not a necessary element in an 8(a)(1) case.

Despite the broad sweep of 8(a)(1), it is not without limit. Thus, even conduct which interferes with, restrains or coerces employees in the exercise of their section 7 rights may nevertheless be held lawful if it advances a substantial and legitimate company interest in safety, efficiency or discipline. As one commentator has written:

> In effect, section 8(a)(1) could be rewritten as follows: It shall be an unfair labor practice for an employer to take action which, regardless of the absence of antiunion bias, tends to interfere with, restrain, or coerce a reasonable employee in the exercise of the rights guaranteed in section 7, provided the action lacks a legitimate and substantial justification such as plant safety, efficiency or discipline. Thus construed, section 8(a)(1) requires that the Board strike a balance between the interests of the employer — which are not specifically accorded weight in the statute but which Congress surely intended be considered in administering a statute designed to further industrial peace and efficiency — and the interests of the employees in a free decision concerning their collective bargaining activities.[8]

Problem

Assume the NFL and the NFLPA are engaged in collective bargaining toward a new contract. The season has begun, however, with players working under the predecessor agreement. To show their solidarity with one another, players agree to meet at the center of the field before each game to shake hands.

The Lions and the Broncos are scheduled to play on Sunday. Management of the teams has learned about the players decision to demonstrate their union loyalty at the outset of the game and has announced to the players on each team that the handshaking demonstration will not be allowed and that any and all players engaging in such activity will be fined.

Does the announcement constitute a violation of 8(a)(1)? What facts are relevant in arriving at this determination? Does it matter, for example, when in the contest the players engage in the handshake exercise. Does potential adverse fan reaction enter into the determination? What if, instead, the players agree to wear black armbands in support of union solidarity?

See the *Seattle Seahawks* case, *infra*, for the NLRB's view of a similar incident.

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7 *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945).

8 R.A. GORMAN, BASIC TEXT ON LABOR LAW 133 (1976).

Section 3: Section 8(a)(3) · Discrimination on the Basis of Union Activity or Membership

Section 8(a)(3) of the NLRA states:

§ 8 (a) It shall be an unfair labor practice for an employer -

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization....

The most frequently recurring employer unfair labor practice is the discipline or discharge of employees because of their activities in, or support for, a union. Such conduct is forbidden by Section 8(a)(3). And, of course, such a finding would derivatively violate Section 8(a)(1). Unlike 8(a)(1), however, except under highly unusual circumstances, the discharge or discipline of an employee will not violate the act in the absence of a showing of anti-union *animus*. Thus, a necessary element of an 8(a)(3) violation is a finding that the employer was motivated in its decision to "discriminate" against an employee because of the employee's union membership or activities.

One of the most vexing problems in the development of the law surrounding Section 8(a)(3) has related to the burdens of proof borne by the NLRB in establishing antiunion *animus* and the correlative burden of the employer to rebut such a finding. Commonly, the NLRB will introduce evidence showing that the discharged employee engaged in union activities, that the employer was aware of these activities and that the employer reacted by discharging, disciplining or otherwise disfavoring the employee because of the activities. Evidence tending to show motivation is commonly shown by employer statements, the proximate timing of the union activity and the discipline, the disparate treatment of other employees not engaged in the union activity and the anti-union history of the employer. In the vast majority of cases, the employer takes the position that the discipline or discharge was for work-related reasons such as incompetence or insubordination.

In the following case, the U.S. Supreme Court endorsed the 8(a)(3) burdens of proof established by the NLRB in *Wright Line*. An understanding of these rules is necessary for an evaluation of an 8(a)(3) allegation in the professional sports, or any other employment, setting.

NATIONAL LABOR RELATIONS BOARD v. TRANSPORTATION MANAGEMENT CORP.
462 U.S. 393 (1983)

WHITE, Justice

The National Labor Relations Act makes unlawful the discharge of a worker because of union activity, but employers retain the right to discharge workers for any number of other reasons unrelated to the employee's union activities. When the General Counsel of the National Labor Relations Board files a complaint alleging that an employee was discharged because of his union activities, the employer may assert legitimate motives for his decision.

In *Wright Line*, the National Labor Relations Board reformulated the allocation of the burden of proof in such cases. It determined that the General Counsel carried the burden of persuading the Board that an anti-union *animus* contributed to the employer's decision to discharge an employee, a burden that does not shift, but that the employer, even if it failed to meet or neutralize the General Counsel's showing, could avoid the finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the Union. The question presented in

this case is whether the burden placed on the employer in *Wright Line* is consistent with §§ 8(a)(1) and 8(a)(3), as well as with § 10(c) of the N.L.R.A., 29 U.S.C. § 160(c), which provides that the Board must prove an unlawful labor practice by a "preponderance of the evidence."

Prior to his discharge, Sam Santillo was a bus driver for respondent Transportation Management Corp. On March 19, 1979, Santillo talked to officials of the Teamster's Union about organizing the drivers who worked with him. Over the next four days Santillo discussed with his fellow drivers the possibility of joining the Teamsters and distributed authorization cards. On the night of March 23, George Patterson, who supervised Santillo and the other drivers, told one of the drivers that he had heard of Santillo's activities. Patterson referred to Santillo as two-faced, and promised to get even with him.

Later that evening Patterson talked to Ed West, who was also a bus driver for respondent. Patterson asked, "What's with Sam and the Union?" Patterson said that he took Santillo's actions personally, recounted several favors he had done for Santillo, and added that he would remember Santillo's activities when Santillo again asked for a favor. On Monday, March 26, Santillo was discharged. Patterson told Santillo that he was being fired for leaving his keys in the bus and taking unauthorized breaks.

Santillo filed a complaint with the Board alleging that he had been discharged because of his union activities, contrary to §§ 8(a)(1) and 8(a)(3) of the NLRA. The General Counsel issued a complaint. The administrative law judge determined by a preponderance of the evidence that Patterson clearly had an anti-union *animus* and that Santillo's discharge was motivated by a desire to discourage union activities. The ALJ also found that the asserted reasons for the discharge could not withstand scrutiny. Patterson's disapproval of Santillo's practice of leaving his keys in the bus was clearly a pretext, for Patterson had not known about Santillo's practice until after he had decided to discharge Santillo; moreover, the practice of leaving keys in buses was commonplace among respondent's employees. Respondent identified two types of unauthorized breaks, coffee breaks and stops at home. With respect to both coffee breaks and stopping at home, the ALJ found that Santillo was never cautioned or admonished about such behavior, and that the employer had not followed its customary practice of issuing three written warnings before discharging a driver. The ALJ also found that the taking of coffee breaks during working hours was normal practice, and that respondent tolerated the practice unless the breaks interfered with the driver's performance of his duties. In any event, said the ALJ, respondent had never taken any adverse personnel action against an employee because of such behavior. While acknowledging that Santillo had engaged in some unsatisfactory conduct, the ALJ was not persuaded that Santillo would have been fired had it not been for his union activities.

The Board affirmed, adopting with some clarification the ALJ's findings and conclusions and expressly applying its *Wright Line* decision. It stated that respondent had failed to carry its burden of persuading the Board that the discharge would have taken place had Santillo not engaged in activity protected by the Act. The First Circuit Court of Appeals, relying on its previous decision rejecting the Board's *Wright Line* test, *N.L.R.B. v. Wright Line*, refused to enforce the Board's order and remanded for consideration of whether the General Counsel had proved by a preponderance of the evidence that Santillo would not have been fired had it not been for his union activities. We granted *certiorari* because of conflicts on the issue among the Courts of Appeals. We now reverse.

Employees of an employer covered by the NLRA have the right to form, join, or assist labor organizations. It is an unfair labor practice to interfere with, restrain, or coerce the exercise of those rights or by discrimination in hire or tenure "to encourage or discourage membership in any labor organization."

Under these provisions it is undisputed that if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice. He does not violate the NLRA, however, if any anti-union *animus* that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause. Soon after the passage of the Act, the Board held that it was an unfair labor practice for an employer to discharge a worker where anti-union *animus* actually contributed to the discharge decision.

In *Consumers Research*, the Board rejected the position that "antecedent to a finding of violation of the Act, it must be found that the sole motive for discharge was the employee's union activity." It explained that "[s]uch an interpretation is repugnant to the purpose and meaning of the Act, and ... may not be made." In its Third Annual Report, the Board stated, "Where the employer has discharged an employee for two or more reasons, and one of them is union affiliation or activity, the Board has found a violation [of § 8(a)(3)]." In the following year in *Dow Chemical Co.*, *supra*, the Board stated that a violation could be found where the employer acted out of anti-union bias "whether or not the [employer] may have had some other motive ... and without regard to whether or not the [employer's] asserted motive was lawful." This construction of the Act — that to establish an unfair labor practice the General Counsel need show by a preponderance of the evidence only that a discharge is in any way motivated by a desire to frustrate union activity — was plainly rational and acceptable. The Board has adhered to that construction of the Act since that time.

At the same time, there were decisions indicating that the presence of an anti-union motivation in a discharge case was not the end of the matter. An employer could escape the consequences of a violation by proving that without regard to the impermissible motivation, the employer would have taken the same action for wholly permissible reasons.

The Courts of Appeals were not entirely satisfied with the Board's approach to dual-motive cases. The Board's *Wright Line* decision in 1980 was an attempt to restate its analysis in a way more acceptable to the Courts of Appeals. The Board held that the General Counsel of course had the burden of proving that the employee's conduct protected by section 7 was a substantial or a motivating factor in the discharge. Even if this was the case, and the employer failed to rebut it, the employer could avoid being held in violation of sections 8(a)(1) and 8(a)(3) by proving by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event. It thus became clear, if it was not clear before, that proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense on which the employer carried the burden of proof by a preponderance of the evidence. "The shifting burden merely requires the employer to make out what is actually an affirmative defense...."

The Court of Appeals for the First Circuit refused enforcement of the *Wright Line* decision because in its view it was error to place the burden on the employer to prove that the discharge would have occurred had the forbidden motive not been present. The General Counsel, the Court of Appeals held, had the burden of showing not only that a forbidden motivation contributed to the discharge but also that the discharge would not have taken place independently of the protected conduct of the employee. The Court of Appeals was quite correct, and the Board does not disagree, that throughout the proceedings, the General Counsel carries the burden of proving the elements of an unfair labor practice. Section 10(c) of the Act, expressly directs that violations may be adjudicated only "upon the preponderance of the testimony" taken by the Board. The Board's rules also state "the Board's attorney has the burden of pro[ving] violations of Section 8." We are quite sure, however, that the Court of Appeals erred in holding that section 10(c) forbids placing the burden on the employer to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons.

As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on anti-union *animus* — or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under section 10(c). But the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under section 10(c). We assume that the Board could reasonably have construed the Act in the manner insisted on by the Court of Appeals. We also

assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer. The Board has instead chosen to recognize, as it insists it has done for many years, what it designates as an affirmative defense that the employer has the burden of sustaining. We are unprepared to hold that this is an impermissible construction of the Act. "[T]he Board's construction here, while it may not be required by the Act, is at least permissible under it ..." and in these circumstances its position is entitled to deference.

The Board's allocation of the burden of proof is clearly reasonable in this context, for the reason stated in *N.L.R.B. v. Remington Rand* a case on which the Board relied when it began taking the position that the burden of persuasion could be shifted. The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

In *Mount Healthy City Board of Education v. Doyle*, we found it prudent, albeit in a case implicating the Constitution, to set up an allocation of the burden of proof which the Board heavily relied on and borrowed from in its *Wright Line* decision. There, we held that the plaintiff had to show that the employer's disapproval of his First Amendment protected expression played a role in the employer's decision to discharge him. If that burden of persuasion were carried, the burden would be on the defendant to show by a preponderance of the evidence that he would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights. The analogy to *Mount Healthy* drawn by the Board was a fair one. For these reasons, we conclude that the Court of Appeals erred in refusing to enforce the Boards orders, which rested on the Board's *Wright Line* decision.

The Board was justified in this case in concluding that Santillo would not have been discharged had the employer not considered his efforts to establish a union. At least two of the transgressions that purportedly would have in any event prompted Santillo's discharge were commonplace, and yet no transgressor had ever before received any kind of discipline. Moreover, the employer departed from its usual practice in dealing with rules *infra*ctions; indeed, not only did the employer not warn Santillo that his actions would result in being subjected to discipline, it never even expressed its disapproval of his conduct. In addition, Patterson, the person who made the initial decision to discharge Santillo, was obviously upset with Santillo for engaging in such protected activity. It is thus clear that the Board's finding that Santillo would not have been fired even if the employer had not had an anti-union *animus* was "supported by substantial evidence on the record considered as a whole".

Accordingly, the judgment is REVERSED. Ron Santillo

The following case is an opinion of the Administrative Law Judge of the NLRB. Trial court decisions are rare in law school casebooks. In this instance, however, the trial court opinion on an allegation of 8(a)(3) conduct reveals the evidence tending to arise in the sports context, the burdens of proof and the reasoning of the trier in determining motive.

ELMER NORDSTROM, managing partner, *et al.*, d/b/a SEATTLE SEAHAWKS
292 N.L.R.B. No. 110 (1989)

Decision

Bernard RIES, Administrative Law Judge

The complaint alleges that Respondent, a professional football team, violated Section 8(a)(3) and (1) of the Act by discharging Sam McCullum on or about September 7, 1982. The answer denies the material allegations of the complaint.

Post-trial briefs were received from all parties on or about August 5, 1983, and supplemental briefs from Respondent and Charging Party on or about November 4, 1983. Having given careful consideration to the briefs, having reviewed the entire record, and upon my recollection of the demeanor of the witnesses, I make the following findings of fact, conclusions of law, and recommendations.

The Applicable Standard of Proof

Three years ago, in *Wright Line, A Division of Wright Line, Inc.*, the Board announced the following "causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation":

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

After a mixed reception in the Courts of Appeals, *Wright Line* recently received approval from the Supreme Court in *N.L.R.B. v. Transportation Management Corp.* One very important holding of *Transportation Management Corp.* is that "to establish an unfair labor practice the General Counsel need show by a preponderance of the evidence only that a discharge is in any way motivated by a desire to frustrate union activity," or, as otherwise stated, that General Counsel has "the burden of persuasion on the question of whether the employer fired [the employee] at least in part because he engaged in protected activities."

It could be said that there is one small remaining problem, and that has to do with the concept of the *prima facie* case. That phrase was used by the Board four times in explaining its formulation in *Wright Line*. In *Transportation Management Corp.*, however, the Supreme Court does not employ the phrase; it instead characterizes, and approves, the Board's holding as follows:

> [The Board] determined that the General Counsel carried the burden of persuading the Board that an anti-union *animus* contributed to the employer's decision to discharge an employee, a burden that does not shift, but that the employer, even if it failed to meet or neutralize the General Counsel's showing, could avoid the finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the Union.

Although the Board in *Wright Line* surely meant, as the Supreme Court implied in *Transportation Management*, to use the term *prima facie* in the sense in which the Court speaks (of an unshifting "burden of persuading"), *prima facie* more often in the law seems to be employed in a procedural sense, referring to the strength of the evidence produced by a proponent at some stage short of a final determination that the proponent has or has not satisfied his burden of persuasion. Since *Wright Line*, the Board has sometimes discussed the *prima facie* analysis in terms sounding in that procedural sense rather than in the ultimate terms of burden of persuasion. Of particular interest is where, even though the Board dismissed the case itself, it went out of its way to reverse the holding of an Administrative Law Judge that the General Counsel had failed to establish a *prima facie* case. In spelling out the requirements of such a case, the Board stated:

> The elements of protected activity on the part of the discharged employee, employer knowledge of the protected activity, and employer *animus* toward the Union, take together, are sufficient to establish a *prima facie* case of unlawful discharge.

This test is not a difficult one to meet in most cases; it was apparently satisfied in the present case. Whether the Board was thinking in procedural terms, or in burden of persuasion terms, in so applying the *prima facie* standard is debatable. But, in any event, it does not appear that, at this juncture, it is appropriate to examine the evidence for the existence of a *prima facie* case in the more traditional sense. The Supreme Court has recently reiterated that, under Title VII analysis, a (traditional) *prima facie* case merely creates a "rebuttable presumption" of unlawful discrimination, a presumption which "drops from the case" once the defendant has responded to the plaintiff's proof, and the Court further held that when a Title VII case has been fully tried, courts need no longer concern themselves with the preliminary question of whether the plaintiff has "made out a *prima facie* case", but should rather decide whether "the defendant intentionally discriminated against the plaintiff."

All of which leads me to conclude that, under *Transportation Management*, General Counsel must bear the unshifting burden of establishing that the act complained of here was "at least in part" done because of protected activities. If that is shown, the Respondent may attempt to show that the discharge would have occurred in any event, regardless of the protected activity. The General Counsel may, of course, go further and attempt to prove that the protected activity was the predominant motive, thus checking any claim by Respondent that the action would have been taken for valid reasons in any event. In view of the Aikens case, *supra*, it does not appear that there is any need at this point to examine the sufficiency of the *prima facie* case (using the term in its more customary meaning)....

III. The Discharge of Sam McCullum

Sam McCullum began to play for the Respondent in 1976. He was a starting wide receiver in that year and thereafter through the 1981 season. The 28 National Football League clubs bargain collectively with the Charging Party in a multiemployer unit which has been in existence for some years. The "player representative" for each team serves the same function as a shop steward: processing grievances, disseminating information, acting in a liaison capacity, etc. In October 1981, McCullum became the player representative for the Seattle team and thereafter performed that role with some vigor and prominence. On September 7, 1982, shortly before the start of the season, Respondent released McCullum. The question presented is what part, if any, McCullum's union activities played in the decision to let him go.

A. Some Background on Sam McCullum and the Seahawks

McCullum entered professional football in 1974, when he was drafted in the ninth round of the annual college draft by the Minnesota Vikings. In 1976, two new teams — Tampa Bay and Seattle — were added to the National Football League. These "expansion" teams were given the opportunity to select no more than three players from each of the existing teams, and the latter were allowed to "protect" a certain number of players against being taken. Minnesota chose not to protect McCullum, and he was picked by Seattle. The coach of the new Seattle Seahawks was Jack Patera; he had been a defensive coach at Minnesota during McCullum's two years there.

From 1976 on, McCullum was one of the two starting wide receivers for Respondent, "starting" meaning that they "were the first ones on the field when a game was played, and ... played a majority of the game". The other starting wide receiver since 1976 has been Steve Largent.

The job of a wide receiver is to catch forward passes. The two wide receivers on an offensive team are differentiated to some extent. One, who is referred to as the "split end", is positioned about ten yards from the next offensive lineman. The other, the "flankerback", is "one yard off the ball and ... generally ... lines up wide to the opposite side of the field from the split end". The positions are clearly different enough so that they are not wholly interchangeable. During 1976-1981, McCullum played only split end and Largent only flankerback, and reserve players apparently tended to substitute primarily for one or the

other.

The record shows, in addition, that the Seahawks and other teams with some frequency employ a formation utilizing a third wide receiver. In the 1976-1981 seasons, that would have been Steve Raible, who also "back[ed] up" both McCullum and Largent, but who seems to have been competing primarily for McCullum's position. During this period, various players served as a fourth wide receiver, playing in a reserve capacity. In 1981, a "free agent" — a college graduate who was not chosen in any of the total of 336 picks made in the 1981 college draft — tried out in Seattle's summer training camp and made the team as a reserve wide receiver; his name was Paul Johns.

Thus, at the end of the 1981 season, Respondent thought of its basic roster of wide receivers as consisting of Largent, McCullum, Raible, and Johns. Raible, however, was seen, at least by coach Patera, as unlikely to return to the team for the 1982 season, a prospect which Raible eventually confirmed by officially retiring in June of that year. Accordingly, the Seattle coach contemplating his roster on January 1, 1982, apparently thought of himself as having thee wide receivers for the 1982 season — Largent, McCullum, and Johns — and in some question about the fourth.

At this point, we should examine the status of the team, and the wide receivers, after six seasons of play. The won-lost experience of the Seattle club for 1976 and 1977 was dreadful. For 1978 and 1979, however, Seattle sported identical winning seasons of 9 wins and 7 losses. 1980 and 1981, with records of 4-12 and 6-10, were another matter.

The success of the wide receivers, however, did not necessarily track the team's fate. Largent is, let it be quickly established, if not a superstar, not many light-years away. He is at least a demigod, as demonstrated by his three-time selection for the Pro Bowl (the *ne plus ultra* of professional football). In 1981, when the team was plodding to its 6-10 record, Largent made 75 catches, a personal high for his career.

McCullum, as just about all the witnesses agreed, while a good, smart, quick football player, is no Largent. Thus, while statistics are to be viewed with caution in this arena, by way of rough example, Largent in 1978 caught 71 passes for an average of 16.5 yards and 8 touchdowns, while McCullum caught 37 for a 14.2 yard average and 3 touchdowns; in 1979, Largent caught 66 passes for a 18.7 average and 9 touchdowns, and McCullum caught 46 for a 16.1 yard average and 4 touchdowns.

In 1980, however, McCullum blossomed. He caught 62 passes (Largent had only 4 more), his best year yet. His teammates voted him the most valuable player, an honor which had been alternated in the prior 4 years between Largent and quarterback Jim Zorn.

1981, as noted, was almost as poor a year for the team as 1980 had been, and I conclude from the record that McCullum's performance was not quite as impressive as the preceding year. The evidence shows that, having lost six of its first seven games, Seattle in midseason emphasized a running attack for at least he next four games and, consequently, threw fewer passes in those games (the record is silent about the style of the final five games). For the first seven games, said coach Patera, McCullum was a "very productive" receiver, catching about 27 passes; and despite the change in strategy in midseason, his total number of catches for the season was 46. At the hearing, however, McCullum indicated some personal dissatisfaction with his own performance in 1981: "1981 wasn't quite the year it was in 1980. I'd say, uh, I dropped approximately 7 passes that year as opposed to dropping two the year before. And, uh, I didn't get as many passes thrown but I dropped more than I should have dropped, so it wasn't quite the year."

Paul Johns, the rookie free agent receiver who began in 1981, caught only eight passes that year. The record shows, however, that he was a well-regarded prospect as a receiver and also was the second leading punt returner in the AFC, apparently a remarkable feat for a rookie.

The foregoing fairly approximates, I think, the situation as of the end of the 1981 season. It seems appropriate at this point to consider McCullum's union activities, and those of the team, in 1982.

B. The Union Activities; Respondent's Animus; The Discharge and the Aftermath

While there is testimony that, upon his election to player representative in October 1981, McCullum immediately tackled the role more effectively than had his predecessors, there is no reason to believe that his enthusiasm came to the attention of club officials until the latter part of February. The bargaining agreement covering the NFL was to expire in July 1982, and negotiations began in February. On February 19, McCullum and four teammates (members of a 7-man "team council" which assisted McCullum) held a press conference at which McCullum stated that the Union's bargaining demand for 55 percent of the gross revenues "isn't enough," and also said that the chances of a strike were "very great."

McCullum also made some other controversial statements. One was that the team was "well below average" in pay and that salary was "a factor in who makes the team." Another was a demand that the players be allowed to choose their own doctors, on the theory that the team doctors were allied with management and, as a result, "A lot of [injured] players are put on the field who should never be put on the field."

John Thompson, the general manager of the Seahawks since 1976, heard about the press conference from one reporter and called an Associated Press reporter in order to respond to McCullum's remarks. He said that the statement that injured players were used was "insulting," and, in answer to a question about the possibility of litigation against McCullum, stated, "If I were a doctor, I might sue. I know I'd take a look at it." Thompson also questioned McCullum's assertion about the low salaries of the Seattle players. At the hearing, coach Patera testified that he had read the statement about the team using injured players and he conceded that it had "bothered" him.

One other comment made by McCullum at this press conference, to be mentioned later, had to do with a question put to him as to why only half the Seahawk players had responded to a union survey. McCullum replied, "I think they were the ones who didn't care. Maybe the survey was too complicated. Everyone knows there are guys in football who can't add two and two and get an answer."

McCullum testified that he held about 3 more press conferences between February and April and also got some press coverage for attending a meeting of the state AFL-CIO around April 27, at which he sought support for the players. Patera read of McCullum's attendance at the latter meeting. The third press conference was held the day after the state labor meeting, to bid goodby to a player named Beeson whose release was announced while he was in attendance at the state meeting. No articles about these events were introduced in evidence.

It would appear that the principal thing that McCullum did to set Respondent against him after his appointment in October 1981 and until the summer of 1982 (as hereafter discussed) was the outspoken press conference of February 19. Nonetheless, McCullum testified at the hearing that he noticed immediately after becoming the player representative that the club was no longer calling upon him to make promotional appearances (which might either be paid or unpaid) as it had in the past.

He testified on direct that, in 1980, before he became player representative, he had made perhaps 20 club-sponsored appearances in the off-season (the end of January to June 1) and 6 or 7 during the regular season (September through December); and in 1981, perhaps 15 in the off-season and 4 or 5 during the season. However, records (which appear to be authentic) maintained by Respondent's front office for those years show that in 1980 McCullum was referred by the club to only one engagement in the period January-June 1980 and (as he had approximated) to six from September-December; and in 1981, he attended only six such engagements between January and June (one of which, for the United Cerebral Palsy Association, was probably arranged by McCullum himself) and three engagements (all unpaid) between September and December.

Moreover, the record shows that McCullum attended two functions (for which he was paid a total of $600) in January 1982, although his pretrial affidavit had asserted, "Once I became rep I was simply given no more such assignments at all." The only other engagement assigned to McCullum between January

and June was with 11 other players for a nonpaying function on April 29. He testified, however, that he had informed Patera's secretary in late February or early March 1982 that he would not be able to appear with the "Highlights" film -- one of the principal uses to which the players were put in the spring -- during the daytime because of another job, but if "there's something comes up at night, where I can go at night close by," then he would be willing to take the engagement.

This particular claim of discrimination is a matter of interest mostly for what may be an insight into McCullum's disposition and temperament. One has the impression that he was quite nervous about holding the job of player representative, and this could have led to an overdeveloped imagination on his part. Thus, his statement that he received "no more" publicity assignments "at all" after becoming player representative is simply wrong, by three.

McCullum seemed an honest, personable, intelligent man, and considerably more articulate than the transcript shows him to be. Nonetheless, given this sort of discrepancy, I am constrained to scrutinize his testimony with care.

Respondent's training camp in Cheney, Washington, opened for the veterans on or about July 30. On the first night of camp, McCullum went to visit Patera in his room. McCullum testified that he asked Patera "if we can put the things that have happened with our press conferences and the union and the me being player rep behind us," seeking an assurance from Patera that "he was able to divorce the two, I mean me being player representative and me being football player." Instead of directly responding, McCullum says, Patera replied that he was still angry about McCullum's press conference remark about certain football players not being able to add. After some discussion of this, Patera brought up his concern that McCullum had not "put [his] heart" into the treadmill test which the athletes took annually; McCullum said that he had not done so because he thought the test to be inconclusive. Patera said that his "picking and choosing" in this manner was a "sign that you're on your way down." Later, McCullum again asked to be judged on his own abilities, but assertedly received no direct answer, being told instead by Patera such things as "You've had a great career with us." The conversation lasted some 25 minutes.

Patera agreed that such a meeting had occurred. He said that McCullum had come in asking to "clear the air between me and himself regarding his off-season activities, and to make sure that his activity on behalf of the Union was not going to create any animosity on my part." He says that he assured McCullum that he held no "animosity" against him and there was "no air to clear." He also agreed that he made reference to McCullum's "knock" against the intelligence of some of his fellow players, and to McCullum's restrained performance on the treadmill test.

The point intended by the foregoing testimony of McCullum is that Patera refused to give McCullum "assurances" that he would not be prejudiced by his union activity. Although Patera's testimony became somewhat confusing later on, his initial testimony, quoted above, clearly has him agreeing that McCullum asked for an assurance of a lack of animosity and giving a positive reply on that point.

Whether Patera turned a deaf ear to the specific request for a promise that there would be no future animosity, which seems to be the burden of McCullum's testimony, is a question to which I have no ready answer. At the hearing, McCullum relented somewhat on cross by saying "I don't recall" Patera making a direct reply to his request for assurances. McCullum was admittedly "very nervous" at the outset of the meeting. McCullum also agreed that the meeting ended with some mild "joking" about the treadmill test. On the other hand, given my conclusions about Patera's hostility toward McCullum's union activities and his general credibility, and given Patera's critical attitude toward McCullum during this conversation, it would not surprise me if he had withheld the requested assurances. He did testify that he made the seemingly stern admonition to McCullum that "I felt his number one responsibility was as a football player, and that his activities as a player rep should not detract from his performance." While Patera was not one of the most impressive witnesses at this hearing, I have no particular reason to discredit him on this issue, given my earlier (and subsequent) findings as to McCullum's testimony.

McCullum testified that he had in past years enjoyed a good, even social, relationship with Patera,

but that during the August training camp, Patera was aloof toward him. Patera said that his attitude did not change. I think it likely that Patera was not as congenial to McCullum as he had been in the past and that his attitude was probably due to McCullum's performance as a player representative; as shown, Patera conceded that he had been "bothered" by McCullum's February reference to the callous use of injured players, and as found below, I believe that his reaction was considerably stronger than that.

McCullum further testified to what he thought had been unusually unfair criticism leveled at him during the first few days of training camp by offensive coordinator Jerry Rhome, who had been the coaching assistant immediately in charge of McCullum since 16. When, on the third or fourth day, McCullum asked Rhome why he was being so harshly criticized, Rhome said that McCullum was being "paranoid" and pointed out that he had only been trying to get McCullum to "stick to the basics" because the offensive line was being reconstructed. Rhome recalled a similar conversation, in which McCullum had told him that everything was "funny," apparently linking that to his union status, and Rhome had replied that he was being a little "paranoid."

The next block of testimony is the most potentially damaging direct evidence of motivation in the case. McCullum first testified on direct examination to a conversation with Rhome shortly following the foregoing talk:

> Yeah, later on in that week he knew that I was back to being myself and he commented on it so, because I felt better after talking to him, that the criticism wasn't just pointed at me in the sense, I didn't think, but he knew I was back to myself and I was having more fun on the football field and I was playing better and I was catching more passes. At which time he pulled me aside on the field and said to me he says, he said, "I just want to let you know something," he says, "being a player rep is risky business." At which time I responded, I go "really" and then he just kind of walked away and I kind of walked away myself, rather stunned that he would even say something like that to me.

On cross, McCullum made it clear that another conversation had occurred between the first one and this latter exchange; he said that in the middle conversation, Rhome had commented that he was "happy" that McCullum was himself again, was "having some fun," and was "back chattering." The last colloquy, about the "risky business," was just a "one-line comment from him and a one-line response from me."

Rhome denied ever saying anything about "risky business," but he did recall telling McCullum, a few days after their first talk, that he knew McCullum had "a lot of pressure" on him and that he should just relax: "I said I know it's tough being the union rep and having all the responsibilities you have, but just — when you get out here on the football field, this is your escape."

I cannot credit McCullum on this issue. Although McCullum gave the Board an 11-page affidavit in support of his charge, that statement makes no mention of the "risky business" incident. McCullum testified that he signed the affidavit on September 8, only the day after he was released, at a time when his life was exceedingly hectic. I have no doubt that things were frenetic at the time, but it is not easy to believe that McCullum would simply have forgotten the sole direct suggestion that his union status could be "risky business," made to him by a managerial official only a month before — a suggestion that had "rather stunned" him.

The record clearly shows that McCullum was apprehensive about the effect of his union activity on his position with the team. That is shown by, among other things, his visit to Patera seeking "assurances," and general manager Thompson's testimony that, in April, McCullum had complained to the press that management was denying him his previous allocation of promotional dates. That an intelligent man with his antennae quivering so violently in this particular direction would forget to mention the "stunning" "risky business" statement in his affidavit is, to say the least, surprising.

McCullum testified that he only recalled the exchange around February or March of 1983, when

he was preparing for this hearing. McCullum had kept notes of his activities during training camp, and in reviewing them, he "saw an incident that says `Jerry Rhome incident' in my notes." At that point, he says, he called a Mr. Reese, apparently a Union employee, to whom he had, during 1982, "called in every day to report every incident we had so that it could be recorded to the union." He asked Reese to "read me back all my notes," which was done. He clearly seemed to be replying affirmatively when he was asked whether the Union-kept notes reflected "specifically the words `being player rep is a risky business'":

> Oh, now I do — because when we, when I started asking for the re — you know, redefinit [sic] reread me back my notes that I'd given him, and they do, yes, they do.

But when Respondent made a request for the relevant notes, they were not produced. McCullum's own notes, which his testimony indicates should at least show the words "Jerry Rhome incident," had been thrown away, he said, after giving the affidavits, because "all I needed was recall from the affidavits." But that was not entirely so, because he in fact retained 7 pages of notes which were produced and entered in evidence. These notes reflect activities of August 10, 11, 16, and 17, thus beginning rather soon after the conversations with Rhome. Why these notes were retained, and not the others, was not explained.

Nor did the Union ever produce the notes assertedly given by McCullum to the Union contemporaneously, which had been "reread" to McCullum in February or March, and which, as I construe his testimony, purportedly show "specifically the words `being player rep is a risky business.'" Nor, indeed, did McCullum explain why he thought it necessary to refresh himself about a simple two-sentence incident which had "stunned" him at the time.

Given these considerations, I simply have no choice but to conclude that Rhome did not make the sinister "risky business" remark, but rather only tried to sympathize with McCullum about the "pressure" of being a Union agent.

The most significant showing of Respondent's hostility toward the Union may be found in the evidence of certain fines imposed by Respondent in August. In the spring of 1982, the Union decided that it would be useful for competing teams to engage in mass "solidarity" handshakes just before the preseason games began, in support of the bargaining to be done in 1982. The week prior to Respondent's first preseason game against St. Louis on August 13, McCullum and the team council decided to shake hands with the Cardinals just before the game started. They also decided, according to player David Brown, to ask Patera "could we go out and do the handshake."

A delegation consisting of McCullum, Brown, and Kenneth Easley went to see Patera. McCullum told Patera that they had decided that they wanted to shake hands so that they could "get a chance to know" the other players during this contract renewal year. Patera immediately opposed the idea because it was "against tradition," and he said that they could get to know the other players after the game. Easley then said, rather more forthrightly, that the purpose of the handshake was "as a show of solidarity for our union." Easley testified that, at this point, Patera said that he did not "need any union activities on his team." Brown did not substantiate this, although he did recall Patera saying "If it wasn't for the Union, then you wouldn't even be in here." McCullum gave no similar testimony. I suspect that Brown's recollection is the correct one, and that Patera made such a comment in making clear his preference for Easley's more open statement of a Union-related purpose as compared to McCullum's.

McCullum finally said that the players might go ahead and do the handshake, and Patera said, according to McCullum and Easley, "I'll fine you as much as I can."

On Wednesday, August 11, Patera called McCullum to his table in the cafeteria and showed him a telex to all the clubs from the Management Council Executive Committee, stating that in the event of players engaging in "disturbances," they "should be fined no less than $100." Patera told McCullum that he would fine the players for engaging in the handshake, and McCullum replied that the Union lawyers believed that such fines would be unlawful. McCullum testified that Patera's response was that McCullum should tell Ed Garvey, the executive director of the Union, to "take his lawyers and shove `em up his ass."

That evening, Patera spoke to the team. He told them that McCullum had not been honest with him about the reason for the handshake, and he applauded Easley's candor. He went on to explain his opposition to the handshake gesture as being demeaning and disruptive to football, and he announced that he would impose a fine upon any players who participated consisting of one-half of their first regular season game checks. In the case of McCullum, who earned $160,000, that would amount, presumably, to something under $5,000.

The players nonetheless voted that night to shake hands with the Cardinals. In a meeting later that evening between Patera and team captains Largent and Simpson, Patera was told that the players were going to defy him, and he said something to the effect that "he knew who wrote the checks and that we would have a tough time getting the money back and if we did it may be 2 or 3 years down the road."

The following evening, Patera again told the players that they would be fined, but said that if they did decide to shake hands, he wanted them to do so as a team, for the sake of unit.

On Friday, the handshake took place. Thereafter, on Monday, the team did not receive their regular preseason checks, and McCullum was told that Patera had ordered that the players were not to be paid. That evening, the team council met with Patera, with McCullum threatening to sue; Patera said that Thompson was handling the matter. Thompson told McCullum the next day that he was waiting for clarification as to the permissible fine. On Wednesday, Thompson told McCullum that the half-a-regular-game-check fine would be levied by withholding from the players one-half of each of their preseason game checks, with the balance, if any, to be taken out of the first regular checks.

A day or two later, after the Union had filed a charge with the Board, the Management Council ordered all clubs which had imposed fines to rescind them. The parties stipulated that no other club had imposed a fine in excess of $100. When the word of the rescission reached the Seahawks camp, excitement filled the cafeteria. According to McCullum, he "looked over at coach Patera, who was looking at me at the same time. After about a 5-second stare amongst us, he slammed his fist down on his tray at his table and pranced out of the room very fast without saying a word." Easley, his recollection somewhat more restrained, saw Patera "bolt up out of his seat and leave the cafeteria"; he was "obviously upset over something." Although Patera attested to his relative amiability at the time, I have no doubt that he was intensely unhappy about the players' victory over him in this off-the-field scrimmage.

At a regular meeting prior to the second preseason game, having been informed by Brown that the team planned to shake hands with the Vikings, Patera told the players that he still did not want them to shake hands. McCullum testified, "He said the NFL Management Council treats this — said this is a union matter, but I want you to know, I took it as a personal matter to me...."

Respondent attempts on brief to paint Patera's stiff opposition to the handshakes as something less than, or different from, traditional antiunionism. In a sense, I can understand the effort. I believe that Patera was concerned with tradition, but I believe, even more, that he was concerned with the perceived affront to his authority. Once the players had decided, perhaps foolishly, to seek his permission to engage in the handshake, and then notified him that despite his refusal, they were going to do it anyway, the special hackles of unchallengeable authority which probably grow on professional football coaches must have stood straight up in the air.

However, Patera was reacting to collective activity, which is protected by Section 7 of the Act. The law is clear that even where a case can be made that an employer would have been equally harsh with a single employee for engaging in unconcerted activity as he has been with two employees engaged in the same activity, he may not treat the two situations the same if the activity is concerted and protected. In addition, an employer may be held to account for retaliation resulting from "caprice or anger [which] arises out of, or may reasonably be attributed to, resentment against employees for pressing their rights under the Act...."

Moreover, it seems clear that Patera was not indifferent to the collective dimension of his employees' conduct, as illustrated by the "knee pad" incident of around August 22. Patera noticed at that

time that a number of players were not wearing their knee pads as required. Calling them together, he told them that the rule would be enforced. As they began to leave, Patera added, "And there'll be no vote on that."

McCullum played as a starter in the four preseason games in August and on September 3. On the latter date, Respondent acquired by trade from the Baltimore Colts a wide receiver named Roger Carr. By that time, a new and promising wide receiver named Byron Walker had also been discovered in the training camp. On September 7, the final day for reducing Respondent's active roster, it released McCullum and retained wide receivers Largent, Johns, Carr, and Walker.

On September 7, Respondent placed McCullum on "waivers," which meant that any other team was entitled to claim him by taking over his contract. Patera called McCullum in and said that he had tried to trade him but had been unable to do so. Patera explained, as McCullum recounted, that "because of the acquisition of Roger Carr that I was in a fight for the fourth wide receiver position with rookie Byron Walker, and he felt that Byron Walker's career was on the way up and mine was on the way down, and that he could see no reason to keep me around when he could keep a younger player around." Patera also said, however, that if an injury occurred and McCullum was still available, he would try to have him rejoin the team.

One of the other 27 NFL teams, the Minnesota Vikings, put in a claim for McCullum under the waiver system. Although he at first opted to become a free agent, McCullum eventually signed with the Vikings just prior to the second regular season game. At the time, in a press release, the esteemed Viking coach Bud Grant stated:

> Sam was the most valuable player on the Seattle team a year or two back. Our scouting reports say that he is one of the better wide receivers in the league. We never had any trouble with him when he was with our club, and we have no reason to believe that we would have any problem with him now.

Michael Lynn, Vice-President and General Manager of the Vikings, testified that his team acquired McCullum because all five of its wide receivers had been injured to various degrees within the previous few weeks. When first signed, McCullum was put on Minnesota's four-player "inactive list." A League-wide strike began later in September; when the strike ended on November 17, the rules changed and McCullum became one of the 49 active players. He did not start the next five games, but he played in three of them. He became a starter in the sixth game after a regular starter suffered an injury. McCullum also started in the two post-season games played by Minnesota. In a 1983 "Prospectus and Season Summary" prepared by the Minnesota publicity department for distribution to the fans and media, coach Grant is reported as saying, in the section of the pamphlet dealing with wide receiver prospects for the coming year:

> Getting Sam McCullum was the best thing we could have done. He proved that against Detroit, when we needed a win there, which has never been easy, and he came up with a big game when we needed one (seven catches, 79 yards in a 34-31 victory). And then against Atlanta, in the playoffs, he caught a big touchdown pass in the fourth quarter to put us back in the lead. In today's game, there's a lot a receiver has to know and Sam brings to us the kind of intelligence and experience that you must have to play the position. He also is a good athlete and I don't see any diminishing of his skills in the immediate future.

There are other matters, occurring around and after early September, which are said to cast some light on Respondent's motivation. Largent and Smith gave testimony intended to show that Rhome told them at one point that he had nothing to do with the decision to terminate McCullum, but then later told Smith that it had been Rhome's decision to cut McCullum. It seems that the two players were confused on this

point, having construed Rhome's statements to them that he had nothing to do with the acquisition of Carr to also comprehend having nothing to do with the separate act of the release of McCullum. Rhome testified that he did say to them that he was uninvolved in the Carr trade, which he was, but he denied saying that he had nothing to do with the release of McCullum, which he believed himself responsible for.

During the hearing, Patera was asked about two statements he made to the press in explanation of the decision to cut McCullum. He acknowledged that he said that "when a veteran slips out of the starting lineup, he should no longer be part of the team." At the hearing, he described a "general policy" that "[i]f a player has started for you and is beat out by someone and you have [sic; don't have?] an adequate back-up or young person you're training, if you have room for the veteran, that's fine. He will remain on your team, but for the most part, the reason the man is beat out and you're training someone else, then there's no reason to keep a back-up unless you're a championship team and you feel that that back-up would help you win a championship more than if you're building a team and the young player would be more valuable to you as a trainee."

It was established that McCullum and guard Robert Newton were the only failed ex-starters who were cut in 1982, and that perhaps five former starters were retained. But it does not seem fair to hold Patera to a rigid announced policy of automatically eliminating all former starters; obviously he did not intend to convey such inflexibility, given that he knew even as he spoke to the press on this subject that he was not cutting most of his ex-starters. He likely meant as he indicated at the hearing, simply that it was preferable to jettison a potentially disgruntled former starter if one could afford to (he "should" no longer be part of the team).

The other statement by Patera quoted from a newspaper story was: "Sam was a very productive wide receiver. The thing is that the other receivers can do something more with the ball after they catch it. A lot of players can catch the ball. The four we ended up keeping are capable of doing something with it." McCullum testified that in the film sessions after the preseason games in 1982, he was "criticized for the same thing, that I don't run very well after catching the ball...." McCullum described these criticisms as unjustified; somehow, I have difficulty imagining a coach persistently criticizing a player in front of other players, as they all watch the game films, about a point which is not at least sometimes valid. Nonetheless, this criticism of McCullum, as I understand the record, was never before one of the major deficiencies attributed to him. His inability to "do something" with the ball once having caught it is not a principal theme in this record.

Patera testified that he had "a lot" of press conferences on the subject of McCullum's discharge, which apparently stirred up controversy, and that he generally made the following statement:

> I told them I felt we had four wide receivers that, in our coaching opinion, were better than Sam, and that Sam had been very productive for us in the time that he was with us, that I appreciated having him on our football team, but that the players that we had now, the four players that we kept at that position, could do more than Sam, and that while Sam is very adequate at what he could do, these players can do the same thing as Sam, with a little extra.

Seattle lost both of the games played prior to the strike. On October 13, during the strike, Respondent discharged Patera and Thompson (the latter being told that the owners were "not satisfied with the team's progress"). Michael McCormick, the "director of football operations," became the coach for the rest of the season and then was appointed president and general manager. Rhome stayed on until the end of the season and was then discharged.

At some time after the strike, players Smith, Brown, and Butler met in a hotel room in Denver with John Nordstrom, the majority stockholder of Respondent. In the course of conversation, according to Smith and Brown, Nordstrom said that when he had first heard of the firing of McCullum, he had stated that "even if it was because of his playing ability, he felt that the timing was bad." I find nothing very

meaningful in this; it does not constitute a concession by Nordstrom, who told the players that he knew nothing of the discharge before it happened, that the decision was not based on McCullum's "playing ability."

Finally, McCullum testified that in February 1983, he attended a football banquet in Seattle at which McCormick stated, during a speech, that "if the situation here had been remedied earlier, that Sam McCullum would still be a member of the Seattle Seahawks." McCullum understood the "situation" to refer to the regime of Patera and Thompson. McCormick testified that he had acknowledged McCullum's presence at the banquet, had congratulated him on his season with Minnesota, "may have inferred that I would like to have coached Sam," but did not say anything relating to the release of Patera and Thompson, a situation to which he was "very sensitive."

I have difficulty believing that McCormick, who had become president and general manager of the team in the month before the banquet, would have publicly made the remark attributed to him by McCullum. The statement not only suggests that McCullum was unfairly or unwisely fired, thus giving some support to the Labor Board complaint then outstanding, but it also denigrates Patera and Thompson, the latter of whom had apparently been McCormick's benefactor in obtaining the Seattle position for him. No other player present at the banquet testified. I am inclined to think that McCullum misunderstood the compliments directed at him by McCormick.

The foregoing summarizes the evidence of McCullum's union activity during the pertinent period, Respondent's reaction to that activity, and related matters. We now turn to a review of the changing Seahawk wide receiver situation as it unfolded in 1982.

C. The Evolving Wide Receiver Situation in 1982

At the end of the 1981 season, as earlier noted, Respondent, to all intents and purposes, had three potentially useful wide receivers on its rolls — Largent, McCullum, and Johns — and one — Raible — whose career may have appeared to be at its end. By September 7, 1982, the day McCullum was released, Respondent was carrying as wide receivers five solid players and prospects — Largent, McCullum, Johns, Roger Carr, and Byron Walker. The development of this situation is a complex tale in which events moved along on separate tracks concurrently, as shown below. In relating these events, I shall take the opportunity to discuss their possible meaning in the broader context of the alleged discrimination.

1. The 1982 Goals

Jack Patera and Jerry Rhome both testified to a coaches conference in January 1982, prior to McCullum's visible emergence as an active player representative, at which they discussed the team's needs for the 1982 season. As far as the offensive requirements were concerned, Patera said, they "needed to replace the center, guard, tackle, and a wide receiver." He said that one of the "specific names" discussed at this time as players who "needed to be replaced" was McCullum. Patera also testified that rookie Paul Johns had shown in 1981 that he had "a great deal of ability" and that "it was possible that he could be the replacement as a wide receiver," but he still needed to show improvement. Patera explained the reason for seeking such a "replacement":

> We said that if we are going to be better, we've got to have a receiver on the opposite side from Steve Largent that is going to give us more help. We didn't feel that Sam McCullum was the type of receiver that was a threat to anybody, that they would continue to cover him one-on-one, he didn't have much respect in the League. The fact that they could take Steve Largent away from us with any type of defense pretty much limited our overall passing game. There are things that we've done in the past to take advantage of defenses that have overshifted, and so forth, played Steve double-coverage, and so forth, but we were running out of things to do. So, we said, we have to come up with a different type of threat or a better threat.

Although he did not initially make any reference to a decline in McCullum's 1981 performance as

playing a role in this decision, Patera responded, when specifically asked about that aspect, that part of this conclusion was based on "[McCullum's] performance in 1981," which was "not as good as it was in 1980." However, he went on, the "basic part of it was that people had seen what we could do with the two wide receivers that we had. We had to come up with better talent in order to make ourselves more effective." That specific talent, he amplified, was "a person that can open up the defense." Patera went on to say, "That was just one of the things we said. And it wasn't the first year that we said that. But it was 1981 [sic], we said, this a must if we're going to get better." He also testified that the acquisition of such a "deep threat" wide receiver was his "number one" priority.

Charging Party's brief asks a question which I have trouble answering on this record: "[W]hy would the team feel that one of its greatest needs was to open up the offense so that Steve Largent would be open to catch passes," in view of the fact that Largent "had just had his best year ever as a pro in 1981, setting a club single-season record with 75 catches." It is a good rhetorical question.

The record, which does not contain statistics for years before 1978, shows that Largent had actually improved his statistical performance in 1981 over the preceding 3 years. In 1978, he caught 71 passes for an average of 16.5 yards. In 1979, he caught 66 passes for an average of 18.7 yards. In 1980, he again caught 66 passes for an average of 16.1 yards. But in 1981, he caught 75 passes for an average 16.3 yardage.

The statistics further show that 75 passes is a topnotch performance for a wide receiver in the NFL. In 1978, with 71 catches, Largent led the League among wide receivers in terms of completions. In 1979, with 66, he was the 5th wide receiver in the League (the others having 80, 74, 72, and 70). In 1980, with 66, he was the 7th (against 82, 82, 71, 71, 69, and 68). But it was only after the 1981 season, when Largent was the second leading wide receiver in the NFL in terms of completions (the leader had 85), that Patera had concluded that Largent could be "taken away from us with any type of defense."

And this conclusion was reached, it should be added, after a season in which the Seahawks' passing game was deemphasized following the 7th game and Respondent began to run the ball more often. Presumably, if the normal amount of passes had been thrown, Largent would have caught even more than his grand total of 75.

It could be argued, I suppose, that these statistics may not disclose the whole story. It is at least theoretically possible, for example, that the ball was thrown to Largent more in 1981 than before, and that his relative percentage of completions was worse even though the absolute figures improved. No such evidence, however, appears in the record, and since fewer passes were thrown in 1981, the possibility seems most unlikely.

But any lingering doubt on the subject is, to my mind, plainly dispelled by the subsequent testimony of Jerry Rhome. When he was asked whether McCullum's longstanding inability to catch the deep ball seemed "to you ... suddenly more important" at the beginning of the 1982 season, he replied:

> Well, it wasn't necessarily more important. It was just like it had always been through the years. We had always been trying to find somebody that could do it, and we went through a lot of receivers. We went through Dick Ferguson, who was supposed to be a great deep threat, and he didn't turn out to be. Steve Raible was supposed — you know, you are constantly trying to find a guy that can do that. '82 wasn't any more, you know, the interest on that wasn't any more in '82 than it was in '81, '80 or '79.

Thus, to offensive coordinator Rhome, who was certainly in a position to know about such things, the deep threat need had not, as Patera said, become a "must" in 1982 because Respondent was "running out of things to do" and Largent was being "taken away." On the contrary, the need was not "more important"; it was "just like it had always been through the years"; and "the interest on that wasn't any more in "82" than in the preceding years. Clearly, then, it was not true that, as Patera testified about the coaches conference attended by Rhome, that, unlike prior years, "[W]e said, this is a must, if we're going

to get better." Similarly, it was not true that the other teams were "taking Largent away" and that Respondent was "running out of things to do."

2. The Roger Carr Initiative

It does not appear that, after the January meeting, Patera acted as if there was any urgency about acquiring a "deep threat" wide receiver. As far as the record shows, nothing more was done toward this end until March, and that effort was rather fortuitous.

In the middle of March, Michael McCormick joined Seattle in the newly-created post of "director of football operations." McCormick's previous position had been as head football coach for the Baltimore Colts in 1980 and 1981. After he joined Seattle, McCormick was asked by Patera and general manager Thompson if Baltimore had any players who might be available and helpful to Seattle in four positions specified by Patera, including wide receiver. He recommended, in order, wide receiver Roger Carr, an offensive center (Donaldson), an offensive tackle (Griffin), and an offensive guard (Pratt).

It is useful at this point to know something about Roger Carr. Carr is about McCullum's age and had entered pro football in the same year, 1974. The evidence indicates that Carr possessed more natural ability than McCullum. He was a first-round selection in the college draft. In 1976, he was chosen to play in the Pro Bowl game and was named to the All-Pro second team. In Carr's first five seasons (1974-1978), he had only played one full 16-game season and had never, except perhaps in 1980, caught an impressive number of passes, at least compared to other such statistics in evidence. However, in those first five seasons, his average yardage per catch was 21.3, which, as I read the other numbers in the record (that is to say, cautiously) seems to suggest that Carr was something of a "bomb" threat.

This is also an appropriate time to meet Mike Giddings. Giddings is a former coach who operates the only completely independent professional football scouting service, called Pro Scout, Incorporated. It is Mr. Giddings' sole occupation to review 112 football game films a year between August and April, spending 12-18 hours each on four films of the 28 clubs, and writing up evaluations of nearly every player (perhaps more than 1,500, I suppose) he sees. Eight NFL teams, in an arrangement which makes his services exclusive, pay him undisclosed sums of money for his opinions of the players. Respondent is not one of Giddings' clients, and, prior to this hearing, presumably had no knowledge of the opinions he had published regarding the players here involved. In view of the fact that Giddings appraises so many players each year, he can hardly be considered the definitive authority on any one or two. Nonetheless, his professional judgments seem worth some weight.

Giddings' ratings are color-coded, abbreviated, and use some symbols, particularly an arrow pointing upward which means "ascending, improved, uptrend," and one pointing down which means the opposite. He employs a six-color rating range with plus and minus gradations (blue, red, orange, gray, black, and yellow). "Red" is defined as "Solid starting job. Fine football player," "blue," as one can imagine, is even better. "Orange" players are also looked on with approval; while not red, they occasionally "do red things," and they are the "key group for `developing' players." A player usually possesses characteristics of different hues at the same time.

At the end of the 1980 season, Giddings had rated Roger Carr as an overall "blue minus." Carr was blue in "key big plays," "very few errors," "change of direction," "hands," escaping "tight cover," and "finding zone holes." Carr was also graded "red" as to "worker," "going inside," and "bomb." He was rated less than red on strength, aggressiveness, and blocking. In his comments, Giddings noted that Carr "can do it all (except block) when well," and "pushes cornerback deep."

After the 1981 season, Giddings was somewhat less enthused about Carr. Now Carr was rated as an overall red, but Giddings still noted Carr's blue "feet," "finding zone holes," "hands," and the fact that he had been blue in "most skill areas" in 1980. For 1981, he was grading Carr red in "most skill areas" other, than, presumably, the blue features already noted. Carr received an orange ratin$_g$ for "too many errors" and green for blocking, strength, etc. Giddings' written comment was "[Descending] or sulking? I'm not familiar enough with the team to make such decisions." Patera then assigned McCormick to keep

abreast of the matter. The latter spoke to Ernie Accorsi, the new Colts' general manager, but he wanted to defer discussions until after the 1982 college draft.

3. The 1982 Draft

As of the end of April 1982, no new wide receiver had been acquired by Seattle or was even in faint view over the horizon. The college draft, held on April 27-28, offered an opportunity to pick up a top college wide receiver to satisfy Patera's asserted "number one" priority.

Rhome and Patera testified about two college wide receivers (Tuttle and Hancock) who were considered "prospects" (Rhome) and "outstanding" (Patera) and a third (McDaniel) who was almost of that quality. The 1982 draft selections show that although Seattle picked 6th in the first round, it chose a defensive end; thereafter, Hancock was picked 11th and Tuttle 19th in the remainder of the 1st round, and 2 other wide receivers were also chosen.

In the second round, Respondent, going 6th, selected a linebacker; McDaniel was chosen as the 23rd choice by Denver, and 1 other wide receiver was picked 25th by Miami. Seattle, picking 20th after 5 wide receivers had been claimed in the 3rd round, chose a tight end. Seattle had traded away its selections in the fourth and fifth rounds, in which a total of three wide receivers were claimed; in the sixth round, it selected a tackle, in the seventh a linebacker, and it finally picked a wide receiver in the eighth round (Chester Cooper). In rounds 9 and 10, Seattle picked 2 more linebackers, in the 11th a defensive end, and in the final round, a center.

Patera testified at the hearing to Respondent's draft philosophy; his purpose for doing so was apparently to explain the Seahawks' failure to obtain a good wide receiver in the draft:

> Our particular philosophy, from the day we began, was to draft the best athlete available, and I know that phrase has been twisted and turned a little bit — you can say we weren't going to draft the best javelin thrower, or whatever, but the best football player at that position, the way the ratings came up, regardless of the position that we needed.
>
> If we needed a running back — if we considered the fact that we need a running back more than we do a defensive lineman, and the defensive lineman is clearly superior in his position in college, we would take the defensive lineman. And that's what is meant by drafting the best athlete available.

He described a system of listing the 300 best college athletes on a board, removing their names as they were drafted, and selecting the top name when Seattle's turn came again regardless of the position he played.

Subsequently, Patera stated on cross-examination that there was enough flexibility in the philosophy that, toward the bottom of his list of best athletes, he might choose for position rather than for quality if the quality of the players was close. But Thompson announced a stricter approach: "In our case all of our drafting was based on a best athlete available. And then if we have a need we would attempt to fill that need through trades rather than...." Similarly, McCormick stated, "Seattle and a few other teams have always drafted on a pure best athlete, by grade, best athlete available."

At first exposure, I was skeptical about this approach, but I have come to regard it as not an unreasonable one. Patera argues that a team can ultimately do more with better college players for which it has no immediate need than with lesser players that it can now use; that is arguably sensible, at least up to a point.

There is also some equivocal internal evidence that Patera did adhere to this professed principle in 1982. Seattle picked linebackers in 4 of the 10 rounds in which it was entitled to choose in 1982, even though Patera testified that linebacker was already "one of the stronger positions on [his] team." On the other hand, at another point, Patera testified that as of 1982, "we could use a linebacker," and McCormick spoke of the need for "linebackers." Two of the four linebacker draftees remained on the team when the season opened.

I am disturbed, however, by certain testimony by Rhome which reads as if the club in fact considered drafting for position to be a permissible practice. At the hearing, in describing the early January coaches meeting on the subject of improving the team in 1982, Rhome twice indicated that they had spoken about drafting for need. "[W]e talked about each player, as to how, you know, what their deficiencies are, whether we can replace them, whether we need a draft at that position"; "Who was potentially the best guy? Who would we count on the next year? Do we have to trade for somebody or are we going to draft at that position?" and he also testified, "I was hoping that we could plan on somebody in the draft, but we didn't...."

It is arguable, I suppose, that the bottom-of-the-draft flexibility referred to by Patera (but not by Thompson and McCormick) would theoretically make it possible for the coaches to discuss drafting "at that position" in one of the late rounds, but it is hard to imagine, with the uncertainties of the draft, how that would be worked out. It does not seem sensible to discuss in January whether to trade to acquire a player or, in the alternative, to hope to find someone useful at "that position" somewhere in the bowels of the draft and only if the position player is close in quality to the next name on Patera's "best athlete" list. I do not believe that football coaches, speaking of whether they "need a draft at that position," have any such wildly unpredictable scenario in mind.

It could, however, be argued that if Seattle did not adhere strictly to a "draft for excellence" policy, and it did want to remove McCullum for antiunion reasons, it would have drafted a good wide receiver or two. The answer might simply be that it had uses for its top draft choices which seemed more important at the time than getting rid of McCullum.

4. The Roger Carr Initiative (Resumed)

After the draft was completed, McCormick assertedly received a call from Baltimore's Accorsi about the proposed trades. It had been publicized that Roger Carr had not attended Baltimore's "mini-camp" (apparently a pretraining season activity), and Accorsi told McCormick that Robert Pratt, a Baltimore guard whom McCormick had earlier indicated a desire to acquire, did not want to stay in Baltimore. McCormick tried to put together a package deal of Carr and Pratt (offering "Sam and a draft choice, or a combination of players"), but Accorsi only wanted to talk about Pratt at the time. In point of fact, a trade was worked out for Pratt by July, and he came to Seattle's camp at the end of that month.

Discussions apparently continued between McCormick and Accorsi about Carr during the late summer. McCormick testified that it was not "until into July" that Baltimore even became interested in trading Carr. Carr missed the second mini-camp and became "very vocal" with the press about his dissatisfaction, and Baltimore suspended him. Accorsi was, nonetheless, asking for Carr a first-round draft choice in 1983, a "pretty stiff price." Seattle would not pay that dearly; however, McCormick, having obtained permission from Baltimore, kept in personal touch with Carr at his Louisiana home and, as well, apparently maintained contact with Accorsi.

McCormick testified that it was decided around the second week of August that the intermittent discussions about Carr would better be carried on solely by general managers Accorsi and Thompson (who had, a few times earlier, talked to Accorsi on the subject.) It appears that the best offer Seattle had made for Carr to that point was a third-round 1984 draft choice, or a variant thereof. About August 20, just after the solidarity handshake incident, Thompson got a call from Accorsi to the effect that he wanted Seattle's best offer by August 23, saying that the Colts still wanted a "high choice" — "they still thought they could get a first for Roger Carr" — in 1983. Seattle let the deadline pass without sweetening its offer.

The scenario was purportedly repeated, with more urgency, the following week. On August 27, Accorsi called, saying that his team still wanted a high 1983 choice and that "we're informing all clubs today that we're going to trade Roger, and it will be done after we receive all offers by Monday the 30th." Again Seattle did not respond by increasing its offer.

On September 1, Accorsi called. He told Thompson that no "fair" offer had been made for Carr; negotiations were resumed. Respondent the next day lowered its offer, Thompson telling Accorsi that

"Roger Carr, we didn't feel, was worth as much to us at this point in time," since the final cut was near and acquiring a new player would "leave us with a difficult choice to make on who to release." Seattle's new offer was a fourth-round choice in 1984. The deal was consummated for that price on September 3, with, however, certain modifications of the prior trade for Pratt and other "sweeteners." Thus, the choice given for Carr would become a third-round 1984 choice if Carr "participates in 50% of Seattle's offensive plays during the 1982 regular season" or is credited with "50 or more pass receptions during the 1982 regular season." The Pratt trade, which had given Baltimore a sixth round 1984 choice, improving to a fifth if certain qualifications were met, also was upgraded to a fifth round choice in 1984 with a possibility, in addition, of a fifth round choice in 1985.

The September 3 Carr trade was not the only event occurring in the small universe of Seattle wide receivers. Things had been happening at the training camp, to which we now turn.

5. The 1982 Training Camp: The Emergence of Johns and Walker

Training camp began around July 25 for the rookies and July 30 for the veterans. In attendance were 15 or 18 non-drafted "free agent" wide receivers. Among these was Byron Walker.

Jerry Rhome testified that Johns and Walker had a very satisfying training camp. There is some impressive evidence that this estimate had substance, so that Rhome's testimony is not necessarily critical on this point. However, the question of whether Rhome was telling the truth or was manufacturing evidence is pertinent to the issue of Respondent's motivation and needs to be dealt with here.

Rhome authenticated 5 weekly charts maintained by him during July 30-September 3, containing his evaluations of the wide receivers. He also identified a chart maintained during the 1982 camp which compared the statistics of the wide receivers in "skelly" and "thud" drills, and, as well, a list of "Grade A" wide receivers in the NFL purportedly developed by him after the 1979 season. The latter item is the most remote, its purpose in being offered only to show that as long as 2 years prior to 1982, Rhome had considered Roger Carr to be one of the best receivers in the League. But since General Counsel appears to be questioning the partial authenticity of all of Rhome's documents, the "Grade A" list is worth examining.

The list (which Rhome apparently made up for his own amusement) names seven wide receivers, their teams, their 1978 and 1979 statistics, their rankings by Rhome, their "strength" and their "weakness." It is obvious that the last two names on the list, Carr of Baltimore and Swann of Pittsburgh, were added at a time different than the first five — the pen is different, no statistics are shown for the last two names (unlike the first five), and for some reason, instead of being ranked numbers six and seven, Carr and Swann are both shown as number five, the same number given to Moore of Miami above them. Rhome does not deny having added the last two names later, saying that he did not remember much about this early 1980 document, but that he may have been adding names as he watched the films of the 1979 season.

Rhome testified that the 1978 and 1979 statistics available to him in early 1980 with respect to the first five players might not have been available to him when he added Carr and Swann to the list. That seems no more improbable an explanation than supposing that, in 1982 or 1983, he went to the trouble and danger of attempting to falsify the document and yet did not bother to make it unsuspicious-looking by using statistics which likely were easily available at the later time.

There can be no doubt that the document looks peculiar, but it is so patently peculiar that one hesitates to think that an intelligent man like Rhome could have done such a bad job of falsifying it. I could be wrong, of course, but I find it difficult to imagine Rhome engaging (especially so unconvincingly) in the cold-blooded fabrication of documentary evidence, although I have doubts about some of his testimony.

Of the remaining six pages of documents, there are three items which can be classified as discrepancies or suspicious entries, and they all pertain to McCullum. In my view, they are all arguably explicable.

The first occurs on the weekly evaluation chart for "July 30" (a Friday) to "August 5" (a Thursday). In the "Comments" section on McCullum, the words "Having trouble with long pattern" have

been squeezed into the box with the other comments and slightly overlap into the next box below. This was uncharacteristic of Rhome; throughout the evaluations, his comments generally fit neatly into the boxes. It may have been added to falsify the document; but it may simply have occurred to Rhome as an afterthought. I note, furthermore, that this entry already contained a mild criticism of McCullum ("Dropped little more than usual"), and that the same thought that is contained in the added criticism is neatly inserted in the comments for the following week ("Having problem catching long ball").

The next unusual entry occurs on the August 20-27 sheet. Here, added at the bottom of the comments on McCullum, and crossing into the lined space beneath, are the words "Adjusts very poorly." It is obvious, however, that this was not written at some later time, because Rhome's entry in the next space below begins under the foregoing words and at a substantial distance below the printed line, a distance which is quite foreign to Rhome's otherwise consistent pattern of starting his entries near the top of each box. As to this entry, I have not doubt that the quoted words were not added much later.

Finally, there is the summary of the "skelly" and "thud" practice drill statistics. Only one figure on the page, which contains 40 numbers pertaining to 8 players, is unmistakably changed, and that is the number of dropped balls by McCullum, changed from "5" to "6." It is such a noticeable modification, and, as Rhome said, of such little moment, that I doubt that anyone thought to affect the result of this proceeding by falsifying the document. Rhome testified that he probably made, and then realized, an error in addition.

The weekly evaluations, a form devised by Patera which every assistant coach filled out each week, provided for an entry as to the player's "squad rating," *i.e.*, "top" or "bottom" half of his group (*e.g.*, wide receivers); an entry as to the player's "potential for championship team," whether "all pro," "starter," "reserve," or "can't play" (Rhome's testimony indicated that he ignored the concept of evaluating the player's potential to play on a "championship team" and instead more pragmatically related the choices to the potential for the Seattle football team); entries for "mental work," "practice habits," and "physical condition"; and "Comments: Strengths [and] Weaknesses."

For the week of "July 30" — "August 5," McCullum is shown in the "top" half of the wide receiver squad, as a "starter," with the comments: "Working hard. Dropped little more than usual. Seems quiet. Normally a chatterer. Having trouble with long pattern." Johns is also listed in the "top" half and as a potential "starter," with the comments "Very quick, has improved and doing excellent. Speed improved." As for Walker, Rhome had him circled both "top" and "bottom" (he explained "Sometimes I just say they're halfway in between"), and a "reserve," and he commented: "Very smart. Not real smooth. Catches ball well, mostly with body (can run)."

For August "6" (a Friday) to "12" (Thursday), McCullum was still shown as a "starter": "Very quick and smart. Does excellent job inside on blue and is good short receiver. Having problem catching long ball." Johns also was listed as a potential "starter," with the comments, "Very quick and the fastest receiver. Works hard and is competing for starting position at X." Walker was still shown as a "reserve," but was now moved to the "top" half of the squad; Rhome noted, "Best of the rookies. Has speed and very smart. Has improved daily. Good size and is tough." This was the week, it should be noted, in which the handshake possibility arose and the fines were threatened.

The next period, August 13-19, covered not only training camp, but also the first preseason game against St. Louis on August 13, at which the handshake had occurred. The only descriptions of any length of the four preseason games were given by McCullum. He said that in the first game, he himself caught two passes, Johns caught two passes (one of over 35 yards for a touchdown), and Walker "made a very good catch, and an excellent run with the "ball." Rhome's notes for August 13-19 continue to show McCullum as a starter, and they say, "Doing well on short routes. Catching ball better than week before. Running better deep routes. Lacks burst deep." Rhome was not asked to explain the latter criticism; presumably it is yet another variation of "bomb." Johns, still designated a "starter," was called "Very quick and explosive. Better off playing X only, gets confused doing too many things. Excellent player." Rhome explained at the hearing that Johns became confused in the "blue," or third-receiver, position. As for

Walker, Rhome had for the first time evaluated him as between a "reserve" and a "starter" by circling both, and he wrote, "Rapidly improving. Very smart. Catches well. Outstanding prospect for a free agent."

The evaluation for the period August 20-27 presumably included the Minnesota game on August 20. McCullum testified that he caught four passes in that game and that Johns "dropped a lot of passes," perhaps four, and also incurred an offsides penalty. Walker made two catches. Rhome, however, continued to show Johns for that week as a potential "starter," saying "Much speed. Much improved over 81. Very quick." And Rhome also moved Walker up to a potential "starter," no longer in the "reserve-starter" limbo, with the comments, "Can run. Very smart. Drops few passes." Also for the first time, Rhome circled both "reserve" and "starter" for McCullum, commenting, "Hustles. Very smart. Dropping to [sic] many deep balls. Adjusts very poorly." Rhome explained the latter as meaning that McCullum was having trouble catching long balls — "A couple of them bounced off his head even, you know." He further said that his putting McCullum into the starter-reserve category had "a lot to do with the competition," since not everyone could be a "starter."

The third preseason game was played on August 27, and is also presumably covered by the foregoing evaluation. McCullum said that Johns caught perhaps one pass and dropped "two, maybe three," Walker caught at least two, and he himself caught a 23-yard pass (requiring an adjustment) for a touchdown.

The final preseason game was on September 3. Although he started, McCullum did not play much in that game. He testified that Johns made a long catch for a touchdown and had at least one dropped ball; Walker may have had one short catch. On or about September 3, Rhome made out the last evaluation sheet (for "8-27-82" to "9-3-82"). He again had McCullum listed as somewhere between "starter" and "reserve," saying, "Working hard. Runs good short routes. Still having deep problems." Johns, still shown as "starter," "Continues to improve. Catching deep ball. Ready to start." Finally, Walker had been downgraded from the previous week, with both "starter" and "reserve" circled; Rhome noted," "Improving daily. Can run. Doing well at X and Blue."

Rhome's testimony about this period supported his weekly evaluations. I thought his basic enthusiasm about Johns and Walker was genuine. He testified that he told Patera at the end of the preseason, but before the acquisition of Carr, that he thought Johns should be a starter, a possibility he had expressed as early as January. As for Walker, Rhome said, he "was a sensation in training camp. I mean he just ran by people every day. He just — he was terrific." Walker was "great" in the first preseason game and "we got real excited about him"; this was the game in which, McCullum acknowledged, Walker made "a very good catch and an excellent run with the ball."

Other testimony, including that given by some of McCullum's former teammates, makes it appear that Johns and Walker were bright prospects. Running back Sherman Smith testified that he believed that McCullum should not have been cut because his experience was valuable, but Smith also said on cross that Johns "probably had more physical ability than any wide receiver that we've had in Seattle" and "has the physical potential to be better" than McCullum. Similarly, cornerback Keith Simpson, who ranked McCullum with a rating of 8 on a 10-point scale, testified that although he would only give Johns a 5 rating at the moment (a "good" score), he thought that Johns has the potential to become "more than a 8." David Brown, the current player representative, testified that Johns was "looking good in the preseason, you know, he made some good catches...." Kenneth Easley testified that both Johns and Walker can be "outstanding receivers" when they acquire experience. This sort of testimony from McCullum's own friends and former teammates makes it rather hard to conclude that the retention of Johns and Walker would have been an irrational act. And that body of testimony receives further support from Pro Scout's Giddings.

In the "book" he produced at the end of the 1981 season, Giddings classified Johns as an "orange ascending," with blue "feet" and "bomb." Johns was labeled "red" for the quality of "escaping tight cover" and orange for being "unsure" and "not precise yet." Giddings commented in the 1981 report that Johns was the "lanky speed type," and although he did not see Johns make a catch, the latter had used his hands

"fine" as a punt return specialist. He presumably evaluated Johns as "orange ascending" because, as he later said with respect to Walker, "It is very hard for me to rate rookies red."

However, in a separate box Giddings rated Johns on his punt return specialty as a "red ascending," with blue "feet" and "work." In 1981, rookie Johns had been the number two punt returner in the AFC. Giddings" comment here was that Johns was a "real free agent find." In summarizing the Seattle wide receiver situation, Giddings had noted: "Appear to be 1 WR [wide receiver] away from having excellent striking power (that is, if stay well). If Johns can be the bomb WR, this is a fine crew. NEED WR (bomb)."

As for Walker, Giddings had observed him in the 1982 St. Louis preseason game in which, as McCullum testified, Walker made "a very good catch" and an "excellent run." Giddings testified that he thought Walker "an eye catcher ... he jumps out at you." In his written wrap-up of the strike-shortened 1982 season, having watched Seattle in three regular season games, Giddings rated Walker as an "orange plus ascending," with a blue characteristic of "key big plays," red on speed and most skill areas, and orange on strength and "quicks." Giddings' written comments: "Fine rookie as possession wide receiver — top finds zone holes and can bomb. Long-legged (lanky) — Top one if quicks improve."

The only testimony which might be said to detract from the foregoing picture of Johns and Walker was given by Allen Webb, a witness for Respondent. In 1982, Webb had been the director of pro scouting for the Cleveland Browns, and he attended all four of Seattle's preseason games in order to scout Seattle, Cleveland's first opponent.

The purpose of Webb's appearance at the hearing was to support Respondent's claim that McCullum did not present a stellar performance in those games. Using a color-coding system like Giddings', in which blue is superior, red is a "solid starter," and green is a "guy who is going to be in a backup role; he is not going to be a starter" (that is, he would not be a starter for Cleveland, Webb later explained), Webb rated McCullum on September 12 as only a green. The Browns' computer printout shows that Webb, once a wide receiver himself, had listed McCullum's strong points as "Quick into cuts — routine execution and jumping ability" and his weak points as "average speed — catch inside — intimidation."

Webb was asked on cross about Johns and Walker, whose computer reports he had not brought with him to the hearing. He thought, although he was not sure, that he had "probably" given Johns a green evaluation "because of his experience"; he said, however, that he thought that Johns had a "great future," for one thing "because he can do the punt return." As for Walker, however, he "wasn't as impressive to me in exhibition, as Johns was. He didn't stand out, you know, surface...."

In other words, Webb watched Walker play four games without having an impression made on him, even though McCullum himself says that in the first of the games, Walker made a "very good catch and an excellent run." Considering the other evidence in their favor, however, it is difficult to believe that those Seattle coaches who scrutinized Johns and Walker day in and day out during August would not have perceived the abilities that the two men evidently possess.

My judgment is that as of early September, coaches like Patera and Rhome could reasonably have thought of both Johns and Walker as appealing young prospects who deserved to be in serious contention for spots on the active roster, even over a skilled veteran like McCullum. The evidence indicates that both players showed considerable promise. The record confirms that a squad of wide receivers is, ideally, balanced in age, so that the veterans may prepare juniors for the future. In a long discussion of the subject, Keith Simpson complained at the hearing about having seen his team's "veteran ball players go elsewhere" after 1979, because of Patera's predilection for "making headway for the young players coming up." On such testimony, and such a record as this, it would normally be hard to fault Patera's decision to retain newcomers such as Johns and Walker, men much younger than McCullum who brought promise of future success to the team over the coming years. As Giddings put it, a team does not "let an outstanding rookie go."

The foregoing conclusions are, I should note, based on a rather theoretical approach, *i.e.*, could a football coach like Patera, legitimately having in camp five wide receivers like Largent, McCullum, Carr,

Johns, and Walker, be found guilty of violating the Act by choosing to let McCullum go rather than Johns or Walker, given the objective evidence of union *animus* shown here. My opinion is that the General Counsel would not, on those assumptions, have a sufficient case.

6. *Carr v. McCullum*

The more serious question is why did Patera move to acquire Roger Carr in early 1982 and then, just before the season opened, consummate the trade for Carr on September 3, anticipating, as he did, that the trade would result in the release of McCullum? This is the question which the General Counsel and the Charging Party both ultimately pose: did Patera seek out and acquire Carr for the purpose, in whole or in part, of bringing about the release of McCullum in retaliation for his union activity?

Before addressing the question of motivation, however, let us examine the evidence supporting the premise asserted just above that Patera assumed in September that the acquisition of Carr would directly bring about the removal of McCullum.

Both Patera and Rhome testified to several conferences between the coaches after Friday, September 3, and prior to Monday, September 6, or Tuesday, September 7, whichever was the day on which the "final cut" to a 49-player roster had to be made. At these meetings (probably on Sunday night, Monday, and early Tuesday), Patera and his assistants assertedly discussed the whole roster.

With respect to the wide receivers, Rhome said that he told the others that, having just acquired Carr, they would, of course, keep him; for the other three, he would choose to retain Largent, Johns, and Walker. They discussed the possibility of keeping a fifth wide receiver, but could see no justification for this, given the other demands of the team. Patera told the others that "if we let Sam go, man, everything is going to break loose," referring to McCullum's Union status. Rhome pointed out that if McCullum was not going to start, he would be unhappy sitting on the bench. Rhome further said that they had "to do what's best for the football team" and that Largent, Carr, and Johns were "musts" (as for Johns, "We couldn't let him go. He was our punt returner. He's one of the best punt returners in the League"). So as between McCullum and Walker, said Rhome, "why not keep Byron Walker and develop him? This kid is going to be one of the better players in the League." And all those present agreed.

Rhome's position at the hearing was that the decision was basically his. But it is clear on this record that any such decision was ultimately of no effect unless approved by Patera, as Rhome himself testified. And it further appears that, even though the coaches may have debated earnestly over the weekend about, *inter alia*, which receivers to cut and which to keep, Patera had already made up his mind.

On Saturday, September 4, according to Patera, and at a time prior to the coaches' discussions about the final cut, he gave McCormick and pro personnel director Chuck Allen a "tentative list of who he thought were going to be the players" to be released, and told them to see if there was any interest in trades for the players. One of these players was McCullum. Patera explained that he gave out the "tentative list" of expendable players because if the team discovered that it "could make a trade for any of those players, they'd inform me, and then we would make that decision quicker than what I would on Monday" after the coaches had fully discussed the personnel situation.

Because of the Saturday trade efforts, counsel for General Counsel brands the later coaches' meeting a "sham" on the theory that the decision to release McCullum had already been made. It does seem quite clear that prior to that exercise in collegiality, Patera's mind was fully fixed on releasing McCullum. That he would have the club officials calling around to try to make a trade means to me that the matter was determined. Moreover, Patera made this state of mind evident when he testified that he told Rhome, after receiving word that the Carr deal had gone through just before the September 3 preseason game, "I have no reason to want to see Sam for next week, but you go ahead and play him as you see fit."

It would thus appear from the foregoing that when Patera cut the deal for Carr, he anticipated that it was the effective end of McCullum's career with Respondent. This returns us to the central questions: why go after Carr in the first place? And why, in September, take him on, knowing that it would result in McCullum's release?

There is no need to rehearse the details of McCullum's union activities and Patera's reaction to them. Patera conceded that he was "bothered" by McCullum's February 19 press conference. My impression is that he was probably furious about those remarks, judging from his later criticism of McCullum for impugning the intelligence of football players and his subsequent extraordinary response to the handshake activity. The imposition of fines amounting to thousands of dollars for the concerted handshake (as compared to the hundred- dollar fines imposed by the other teams), and the implicit threat to make the players wait as long as possible for a return of their money, reveals the depth of Patera's animosity toward the concerted activity.

In all of this, McCullum was there as the personification of the Union: holding the press conferences, having the discussions with Patera about the fines, leading the effort to secure the return of the withheld monies, threatening legal action. With this history, I have little doubt that Patera's anger at the upsurge of concerted activity (both McCullum's press conference remarks and the players acting in concert against Patera and then mortifying him by triumphing) could have occasioned a particular hostility toward McCullum.

But how does General Counsel prove, by a preponderance of the evidence, that this hostility "at least in part" contributed to the decision to bid for and acquire Carr, thus effectively leading to the termination of McCullum. Here, there is no direct evidence issuing out of the mouth of a central manager which would tend to show such motivation. But that is true in almost all of these cases, and it has been recognized over and again that, as in all areas of the law involving motivation, circumstantial evidence may well suffice in Section 8(a)(3) proceedings.

In examining the relevant circumstances, it is sensible to consider the inconsistencies, contradictions, and inexplicabilities in Respondent's case. When one sees enough such anomalies in a party's story, one begins to question the fundamental reliability of the account the party is trying to put across.

The following circumstances cast doubt, I think, upon the legitimacy of Respondent's motivation.

1. I disbelieve Patera's testimony that prior to the acquisition of Carr, he had asked Rhome who the latter thought should be released if the team happened to acquire Carr, and that the two men had agreed it should be McCullum. This testimony popped out on Patera's cross-examination in order to explain why, when he told Rhome on September 3 of Carr's acquisition, Rhome had asked how much of McCullum Patera cared to see in the preseason game that night. To explain Rhome's relating of the Carr trade to the playing of McCullum, Patera told us for the first time that he had previously discussed with Rhome the question of who would be eliminated in the event of Carr's recruitment. He described the conversation: "And that's when [Rhome] said, well, I'd like to keep five. And I said no, how you're begging the question. Tell me who you're going to give up. And we went down the line, and so forth, and he finally said, Sam McCullum. And I said, I agree."

This testimony clearly intends to refer back to a similar conversation alluded to in Patera's earlier testimony ("And that's when [Rhome] said"). But in that previous testimony, Patera had placed such a conversation only in the post-Carr-acquisition discussion among the coaches about who to eliminate (in describing that conversation, Patera had testified, *inter alia*, "Well Jerry Rhome would have liked to have as many receivers as he could possibly have").

Rhome did not testify to a conversation preceding Carr's acquisition in which Patera had asked him to speculate about the effect of such an acquisition, although he did testify to another Carr-related discussion with Patera. I believe that Patera simply created this conversation on the spot at the hearing, and I think that reflects adversely upon his general credibility.

2. I doubt Patera's testimony that he had "project[ed]" Johns as the starting split end "after the first preseason game." I conclude that Rhome was probably recommending at training camp that Johns could be a starter in 1982, based on the worksheet evaluations. However, I find questionable Patera's testimony that he "project[ed]" Johns as the starter "after the first preseason game."

The evidence is that McCullum started all four preseason games. Patera testified, speaking of the team in general, that the starters from the previous year are used to start preseason games, and "very seldom" (with the exception of quarterbacks) does anyone else start, unless it is "very obvious that [the newcomer] was the best in the position." The evidence shows, however, that in the 1982 preseason, aside from the new quarterback, at least three other new players (a guard, a tackle, and a tight end) started preseason games, replacing the former incumbents; three is a number which does not seem to qualify as "very seldom."

While Patera did not testify that he had actually "decided" after the first preseason game that Johns would be a starter, but rather had "projected" that notion, it is hard for me to believe that any such idea "projected" after the first game would not have sufficiently hardened into a decision by the final game so as to afford Johns the opportunity to start at least one preseason game like the other newcomers noted above. And what this could suggest is that Patera really had not made up his mind to start Johns until he knew that he had Carr and could thus terminate McCullum; if he felt that he had to retain McCullum, he might well have kept him as the starter while bringing Johns along.

3. I entertain further suspicions about the following statement made by Patera to the press after McCullum was fired:

> Sam was a very productive wide receiver. The thing is that the other receivers can do something more with the ball after they catch it. A lot of players can catch the ball. The four we ended up keeping are capable of doing something with it.

The phrasing of this statement suggests that the principal factor (while McCullum was very productive, "[t]he thing is") setting McCullum apart from the other wide receivers was that they can "do something more with the ball after they catch it." There are three references to such a problem in this record. Two of the references are Rhome's testimony indicating that he thought this to be a secondary problem of McCullum's, and Smith's testimony that Rhome mentioned it as a problem after the discharge; the former statement was of course made by Rhome after Patera had already made his statement to the press; it is not clear that the latter one was made before or after that press conference. The other is McCullum's testimony that during film sessions following the 1982 preseason games, he was criticized for not "run[ning] very well after catching the ball;" this has been previously discussed.

Nowhere else in this record do I find any mention of such a problem, either by Giddings or Webb or in Rhome's weekly evaluations. It simply does not appear to have been regarded as a major fault of McCullum's and I find it hard to understand the importance seemingly assigned to it by Patera. The absence of any reference to the issue of a "deep threat" capability is striking.

4. I cannot but look with profound suspicion upon the testimony about drafting for "excellence" in the face of Rhome's casual testimonial references to discussions among the coaches about the possibility of having "a draft at that position." While, as earlier indicated Patera's (although not Thompson's) hypothetical allusion on cross-examination to considering the factor of position toward the bottom of the draft makes it possible, perhaps, that such discussions could occur, it does seem inconceivable to envision the coaches sitting around in January and talking intelligently about whether they should trade to get a needed player or, in the alternative, hope that they will fortuitously find someone useful toward the end of the draft. Whether "we need a draft at that position" surely implies a more methodical determination to plan to do exactly that.

5. The most serious circumstance is the evidence indicating that Patera misrepresented at the hearing both the nature of the conversation held by the coaches in January 1982 and, as well, the underlying situation with regard to Largent. As discussed, Patera described a perilous situation in which the other teams were capable of "tak[ing] Largent away with any type of defense," in which Respondent was "running out of things to do," and in which the acquisition of a deep threat was, unlike previous years, "a must." But to offensive coordinator Rhome, who attended the conference and who should know about this

subject if anyone does, nothing was new in 1982: "It wasn't necessarily more important. It was just like it had always been through the years ... '82 wasn't any more, you know, the interest on that wasn't any more in '82 than it was in '81, '80 or '79"; and the statistics certainly seem to support a conclusion that matters had not materially declined.

Rhome did testify, however, that the team was "constantly" looking for a deep threat receiver and that there was a discussion at the January conference about the need for another wide receiver. He said that he told Patera at the January meeting that he thought the team "needed another wide receiver. Not necessarily to take the place of Paul Johns and Sam McCullum but we needed another wide receiver. We needed somebody to help Largent...." He also told Patera that "if we can't get somebody, that Paul Johns had an excellent chance of becoming a starter on our football team, but, you know ... he has some deficiencies and he's going to have to improve on them."

Rhome's testimony, while a bit hard to interpret here, seems to be speaking of either Johns or someone taking over McCullum's starting position. But Rhome made clear that the conversation was no different than in prior years: "[E]ach year I would tell Jack, you know, our weaknesses, what we need. Every year it was a deal where we need another wide receiver. Not necessarily to take Sam's place, but another wide receiver. One that could do what we were looking for. We could use Sam maybe as a back-up."

To the extent that Rhome's testimony indicates that a discussion of the need for a "deep threat" replacement for McCullum took place at the January 1982 meeting, I find that difficult to believe. He himself made it evident that no special concern existed in 1982 about such a need. Furthermore, it is not easy to conceive of these coaches discussing "every year" the asserted requirement for a bomb receiver, and then, season after season, ignoring that perceived need while McCullum kept rolling along.

The fact is that at the hearing, both Patera and Rhome identified by name only two real contenders for McCullum's starting position in the 6 years of the team's existence — Raible and Ferguson. But Raible was with the team from its start and was kept on as a reserve receiver for six seasons, long after, said Patera, it became obvious that he could not successfully challenge McCullum. And Ferguson, as we found out later from Thompson, came aboard briefly in 1978 only because McCullum was seriously injured. There is no indication that Respondent had, prior to 1982, ever attempted, when McCullum was healthy, to work out a trade to bring into its camp a promising deep threat wide receiver to replace McCullum. And on the evidence as found above, there is no reason to believe, as of January, 1982, that Patera would have thought of 1982 as a "must" year for accomplishing that result.

Thus, I believe that Patera was not telling the truth when he testified (1) that as of 1982, Largent was being rendered ineffective by the lack of a deep threat capability on McCullum's part and (2) that the coaches had agreed in their January 1982 meeting that this problem had caused the acquisition of a deep threat receiver to be a "must" in 1982. Having so concluded, I believe it appropriate to infer that Patera felt that such lies were necessary to camouflage what he perceived to be his own questionable behavior in the March approach to Carr, by leading this tribunal to believe that the necessity for the replacement of McCullum had already been decided upon prior to McCullum's controversial February press conference. This willingness to lie reasonably gives rise to the inference that Patera was attempting to conceal a wrongful motivation, and also that he cannot be trusted on any point in issue. ("If [the K] finds that the stated motive for a discharge is false, he can certainly infer that there is another motive. Moreover, he can infer that the motive is one that the employer desires to conceal — an unlawful motive — at least where, as in this case, surrounding facts tend to reinforce that inference.")

Of course, the argument can be made that when McCormick came to Seattle and talked about the Baltimore personnel, including Carr, Patera might have become traded in any event. That is always possible, but Patera told us no such straightforward tale. What he said, untruthfully, is that a new and urgent need existed in 1982, as enunciated by himself and the other coaches in January, and that in speaking affirmatively to McCormick in March about Carr, he was acting pursuant to that earlier-stated need. By

implication, Patera was telling us that had it not been for this nonexistent "must" need, he probably would not have attempted to trade for Carr. But if there was no such "deep threat" imperative in early 1982 (and there was not, according to Rhome and the statistics), there is no reason to believe that, absent the very notable fact of McCullum's protected press conference activity in February, Patera would have done anything different than he had for six seasons.

For the fact is that Patera did not need McCormick to tell him that Roger Carr was a good and potentially helpful football player. The name and ability of Roger Carr had surely been known to Patera since 1974, and it is obvious from the record's silence that for six years, Patera had attempted to acquire neither Carr nor any other deep threat receiver to replace McCullum. In 1982, 1 month after the press conference which bothered Patera, the lure of a Roger Carr had become magnetic and, indeed, McCormick testified that Respondent's first offer to Baltimore was McCullum and a draft choice. But the pivotal difference between 1976-1981 and 1982, as spelled out by Patera, simply did not exist.

The record shows that Roger Carr was a superior football player, likely a better all-round wide receiver than McCullum, at least earlier in their respective careers, and probably more adept than McCullum in 1982 at catching the "bomb." But prior to 1982, so far as this record shows, Respondent had never put forth any effort or shown itself willing to pay any price at all to obtain Carr or anyone else like him to replace McCullum, and had displayed only the most passive sort of hope that a deep threat might someday perhaps turn up in camp. Now Patera tells us that the attempt to acquire Carr in 1982 was simply part of his pre-February resolve to find someone to take McCullum's place, a resolve reached in January in a falsified conversation about a nonexistent "must" need. I certainly cannot say that Patera's interest in obtaining Carr concerned itself solely with a desire to get rid of McCullum; but in these circumstances, which include serious lying and obvious trepidation by Patera about the appearance of his motivation, intense *animus* toward player independence, as especially reflected subsequently in the solidarity handshake matter, and Patera's unprecedented behavior attributed to both a fabricated premise and conversation in January, I believe it right to infer that the approach to Carr was spurred in the first instance by McCullum's legally protected behavior. That sort of motivation is all that the Supreme Court requires.

Of course, the legal issue presented here is not why Patera first approached Carr in March, but whether, in releasing McCullum in September, he engaged in unlawful discrimination. In my view, as pointed out, the evidence makes clear that the acquisition of Carr on September 3 inexorably foreshadowed the release of McCullum on September 7 — Patera plainly had his mind made up. And there is no reason to believe that in actually acquiring Carr on September 3, Patera was not motivated by the same reasons which aroused his interest in Carr in March. It is true that some things had changed in that time period, but I think that it is important to focus here on not only what happened at various times in 1982, but also on what happened in 1983. For it was on June 7 of this year that Patera came into the courtroom and dissembled about (apparently among other things) what had aroused his interest in Carr in 1982. That sort of mendacity, long after the events, permeates the case and makes it fair to believe that the unlawful motive was pervasive throughout.

The factors earlier alluded to strongly support an inference that the attempt to acquire Carr, and the eventual acquisition, were animated at least in part by a proscribed intention. Respondent would contend that the inference is dispelled by various factors, including the evidence showing that Carr was a more useful player than McCullum and that, in any event, Respondent showed that it was not terribly anxious to get Carr. Much of the evidence on this score is also pertinent to the question of whether, pursuant to *Transportation Management*, *supra*, Respondent has established by a preponderance of the evidence that it would have dispatched McCullum even if he had not engaged in protected activity. I shall consider the evidence on these issues below.

Respondent argues that its failure to increase its offer of a 1984 third-round draft choice when urged to do so by Baltimore on two occasions in late August, and its actual lowering of that choice when Baltimore called again on September 1, are persuasive evidence that Respondent was not terribly anxious

to acquire Carr. In the milieu of this case, I am not sure that even these undisputed facts, testified to only by Respondent's witnesses, are entitled to credence. But on the assumption that the events so unfolded, they need only mean that Respondent had not become unbalanced with rage at McCullum, and that it simply drew the line as a price for Carr at a third-round choice in 1984 (Thompson testified that the first through fourth round choices ar considered "high").

The alleged decision to lower the bid to a fourth-round choice after September 1, when Accorsi called back, would clearly be nothing more than a prudent assessment that no other team was offering as much as a 1984 third-round choice. After Respondent had already passed up two chances to raise its original bid of a third-round choice, Accorsi assuredly knew that Respondent was not going to increase its offer at that late date, and yet he sought to reopen negotiations, telling Thompson that no "fair" offer had been received. It must have reasonably appeared to Respondent that in these circumstances, 10 days before the season opened and with Carr refusing to play in Baltimore, the sensible move was a reduction in the offer. As Thompson put it, after Respondent heard from Baltimore on September 1, "Obviously, we thought that they were starting to panic a little bit, too." There was, of course, always the possibility of a reinstitution of the original offer if it became necessary. Patera so acknowledged at the hearing: he advised lowering the offer, but "[w]e can certainly talk about what we had offered them before."

I further note that the final price arrived at would, under the terms of the trade, again rise to a third-round choice if Carr met some conditions which do not seem very demanding, and also that the value of the Pratt trade was substantially improved in Baltimore's favor. Moreover, as indicated, Thompson considered a fourth-round draft choice to be a "high" one.

Respondent would further contend that Carr was a superior player compared to McCullum, and that in any event the situation changed meaningfully between March and September, thus negating the inference of unlawful motivation in the original approach to Carr and in the decision to take him. While I have considered that argument, I have concluded that the other evidence earlier discussed outweighs the evidence relating to Carr's performing abilities and the needs of the team, and that, in fact, the merit-related evidence is at best mixed and could even be read as tending to strengthen the inference of antiunion motivation.

As for Carr's primacy, it does appear that he was a fine football player and had been more of a bomb threat (according to Giddings, a "red" one) than McCullum. As earlier discussed, however, Respondent had not for 6 years felt impelled to search out such a replacement for McCullum and had no more reason to do so, according to Rhome, in the year in which McCullum's union activity came to the forefront.

In addition, while it is true that Giddings thought Carr to be endowed with a number of blue features and McCullum with almost none, at the end of the 1981 season, he colored Carr an overall red (down from blue minus) and questioned whether he might be "descending." At the same time, Giddings had McCullum as a "red descending" but having "improved self" in the last 3 years.

In the preceding 2 years, Carr's long-pass effectiveness as compared to earlier years seemed to have dropped, if average yardage is any criterion at all. In 1980, Carr caught 61 passes in 16 games for a 15.1 yard average and 5 touchdowns; in 1980, McCullum caught 62 passes for a 14.1 average and 6 touchdowns. In 1981, Carr caught 38 passes in 15 games for a 15.4 average yardage and 3 touchdowns, while McCullum, in that year in which the Seahawks running game was emphasized over passing starting at midseason, caught 46 passes in 16 games for a 12.3 yard average and 3 touchdowns. Giddings testified that at the end of the 1981 season, he rated McCullum as a "solid red receiver" who had "become a better receiver" over "the last three years," and testified further "I don't think that there's any question that I think Sam McCullum is a good football player.... [T]here's very few smarter than this gentleman at his craft.... [T]here aren't certainly that many red receivers in this league." And while Webb held that McCullum was not a deep threat, although he ran an "excellent short route," he had noted in a December 13, 1981, evaluation that McCullum had "great hands" in that game and was "on top with moves," meaning that he

had beat a deep defender by clever running rather than speed. McCormick significantly conceded that he "could have told" some Seattle players that he "wished Sam was on his team" because "I think Sam is a good receiver." And the encomiums by Minnesota's coach Grant should not go unremarked.

Rhome's evaluations during the preseason, while persistently critical of McCullum for an aspect of his play which allegedly had never been his forte -- catching the deep ball — (which criticisms appear here earlier and to which I have eluded reference below) also spoke approvingly of his work. Although Webb evaluated McCullum as hypothetically a reserve player for the Cleveland Browns after watching him in the 1982 preseason, the record tells us nothing about the caliber of those receivers. In addition, it appears that Webb's standards may tend to be more demanding than those of Patera's and Rhome's, given their evident lack of agreement on the impressiveness of Byron Walker.

Although Rhome's week evaluations show that he was envisioning Johns as the 1982 starter, he testified that the reduction of McCullum to somewhere between starter and reserve had "a lot to do with the competition," since "[a]ll of them can't be starters." At the same time, as late as September 3, Rhome was writing of McCullum, "Runs good short routes." But that is essentially all that McCullum had ever really been asked to do, and Respondent had evidently been satisfied enough with that talent for 6 years, until he became an active and vocal Union representative.

During this entire evaluation period, McCullum was under stress. Rhome demonstrated his understanding of that when he concededly spoke to McCullum in the first week of camp about that pressure. Patera and Rhome surely must have recognized such pressures even more keenly beginning the week of August 9 with the onset of the distracting handshake affair in which McCullum was squarely in the middle from the beginning until the end (if, indeed, it can be thought that such a matter can abruptly end). Reasonably, they both would have known that McCullum could hardly have been performing at his best under such strain. He was, nonetheless, dumped, purportedly in the service of enlisting the assistance of the "risky," immediately useless Carr who was purchased at a substantial price to help out Largent who actually required no help to begin with.

I suspect that Rhome had doubts about this as well, despite his testimony that his response to the news of the acquisition of Carr was to exclaim, "Hey, that's great." Rhome testified that even without Carr, he was "pretty much satisfied from my point of view with Byron Walker, Paul Johns were going to get things done for me. Roger Carr was nothing but a bonus." Rhome's statement to Sherman Smith, when Smith mentioned the Carr trade, sounds, as Smith told it, as if Rhome did not think it was a very good idea: "Yeah, but I'll tell you one thing, I didn't have anything to do with it."

This ambivalence is further conveyed, I think, in Rhome's account of the pre-cut meeting. He testified that he said, "I can't rate Roger Carr because I haven't seen him. Now, I'd seen him before but I can't rate him now so you've got to — you know, you can't just eliminate Roger Carr because you just got through trading for him." To me, this is tonally a far cry from a reaction of "Hey, that's great."

There are factors which, General Counsel and Charging Party argue, militated enough against the acquisition of Carr as to cast doubt upon the legitimacy of the decision. It is appropriate to consider such arguments in deciding the questions of whether Respondent has effectively vitiated the inferences arising from the evidence adverse to Respondent, and also in determining whether Respondent has effectively satisfied its own second-step burden of persuasion under *Transportation Management*.

Giddings had listed Carr in his 1981 book as "very risky" with respect to his health. Presumably Respondent knew about Carr's health problems in March, and I cannot imagine that it would knowingly plunge ahead to acquire a player it regarded as a high risk; on the other hand, McCullum had a more sound health record and very likely Respondent knew that it was taking a greater chance with Carr than it would with McCullum.

Again, there is the contention that Respondent impoverished itself by giving up the team leadership qualities of McCullum. I do not doubt that McCullum was such a leader, as his teammates averred. While Patera and Rhome, at hearing, questioned McCullum's leadership role, I doubt that they failed to perceive

this Union player representative, 6-year veteran, and 1980 winner of the team's most valuable player award, as one of the leaders of the team. Patera testified that leadership qualities were "important" to him.

That Carr had not been in a professional training camp in 1982 and did not know Seattle's offensive system are other factors seemingly adverse to his acquisition, although how seriously I cannot be sure. McCormick said that he had heard that Carr had been working out, but that is not the same as being in camp. The fact that Carr would be lost to the team for some period during the season was also a negative consideration. Raible testified that Seattle has a "relatively complicated" offensive system and that McCullum's "knowledge and experience with the system was of great value." This assessment was not directly controverted. McCormick agreed at the hearing that Carr's "value did go down because he was not going to be here to work out, to actually develop the skills, the timing with the quarterback, the knowledge of the routes, and everything else."

The foregoing reasons generally tend to argue against the replacement of McCullum by Carr, and so do other considerations. One important factor is that while in March, Respondent had no certified deep threats to speak of, in September, and without Carr, it potentially had two: Johns, now seen as a potential starter, and Walker, of whom Giddings said at the end of 1982, "Can bomb." For the first time in its history, Respondent was ankle-deep in deep threats. One may question how significant to the team the late-arriving Carr might have seemed in that context, until one recalls that the handshake episode had occurred only 2 weeks before and that without Carr there would be no obvious explanation for letting McCullum go. Of course, I recognize the possibility that Johns and Walker might not have worked out, but it certainly appears to be true that Respondent was suddenly rich with potential deep threats after evidently not having bothered even looking for any for 6 years. Such a capability having been the purported reason for attempting to acquire Carr in the first place, one wonders how he still could have seemed worth the fourth (or possible third) round choice expended for him to replace a veteran thoroughly familiar with the system and ready to play.

As discussed, Rhome testified that he told Patera that Johns "should" be the starting split end; I will assume that to be true, although, as indicated, Rhome seemed to believe the choice to be a close one. It can be argued, however, that even if it was simply possible that Johns might be the starter, that fact not only indicated that McCullum's effectiveness had declined, but also that the potential non-starting status of McCullum would naturally have inclined Patera to be more interested in obtaining Carr, pursuant to his stated policy of not wanting to have former starters on his team.

As for McCullum's possible decline, that subject has earlier been addressed. To me, Rhome's evaluations indicate simply the same McCullum who had played for Respondent for 6 years, albeit under known stress for the present period, and a tentative belief that Johns was slightly better, a belief that might not have survived the first regular season game. But the evidence does not indicate that Respondent in any other instance went out of its way in the last week prior to the season to acquire replacements for other starters who were losing that role. In 1982, six 1981 starters aside from McCullum had lost out to newcomers when the season opened; the only one who was cut from the squad was Newton, whose replacement, Pratt, had been with the team since July. The only last-minute acquisition was Carr, so far as the record shows, a player for whom no other team had been willing to pay a third-round 1984 draft choice.

It seems to me that when an employer comes into a hearing and misrepresents the circumstances which prompted him to become interested in securing a replacement for a union activist, it is fair to assume that the inference of unlawful motivation to be drawn therefrom applies not only to the original effort to acquire the replacement but also to the subsequent acquisition. Under *Transportation Management*, it is up to the employer to "meet or neutralize" that showing and, if it does not, it may still avoid a finding of violation "by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the Union."

I do not conclude that the changed circumstances in September 1982 neutralize the inference of

unlawful motivation which I have drawn. Respondent had never before had a "deep threat" or tried very hard to find one. Now it had a Johns and a Walker and essentially the same McCullum it had for years; I am not persuaded, given the evidence tending to show unlawful motivation, that in any other year it would have reached out for Carr, spending a valued draft choice in the process, at the last minute.

Similarly, I do not view the same evidence as "demonstrating" that Patera would have taken on Carr in any event. Patera did not testify that the course of events in the preseason played any role in the ultimate acquisition of Carr; as far as the record shows, that followed ineluctably from the original expression of interest. Nor does it appear to me from the objective evidence that Carr would normally have been acquired anyway as a consequence of the developments in the 1982 preseason. As noted above, other 1981 starters who fell from grace during the preseason were not in fact replaced as of the time the season began. Respondent had not in the past, it seems clear, spent any draft choices to acquire a player like Carr; can it be said that it would have routinely done so in 1982, given the excitement about Johns? It is, of course, possible, but I do not believe that Respondent has "demonstrated" by a preponderance of the evidence that such a decision would likely have been made.

In summation, I do not believe that Patera was, as he says, inspired to seek out a replacement for McCullum in early 1982 because McCullum was not doing enough to "help" out Largent, or that the coaches had agreed in January that such replacement was a "must." I therefore infer from the fact and nature of this fabrication, and the other suspect testimony, that the approach to Carr, after six seasons of contentment with McCullum's style of play, came about because Patera was angry with McCullum for his abrasive remarks made as a Union representative in February. There is no reason to suppose that this unlawful impulse had lessened at the time the actual decision to trade for Carr was made, and there is every reason to believe — namely, the handshake episode — that it had increased. Even though the illusory "must" predicate for seeking out Carr — the need for a deep receiver to help Largent — could be thought to have vanished with the evident improvement of Johns, and even though the "sensational" Byron Walker had arrived as unexpected manna from heaven, Patera still spent the "high" draft choice (which, under the terms of the trade, could rise to an even more "highly valued" third-round selection) in order to remove McCullum.

I recognize that Patera had as much of a personal stake in protecting the value of the team as anyone. After two losing seasons, his job was probably on the line. But logic does not always control action, and emotion often overrides judgment. Moreover, Patera's view of the seriousness of the disciplinary principles involved, and the appropriate reaction, seem to have been unique. Of the coaches who fined players for the handshake, none levied more than $100. Patera, on the other hand, wanted to exact thousands levied more than $100. Patera, on the other hand, wanted to exact thousands of dollars from his players, an action which might well be thought to be seriously demoralizing just a month before the season began. This intense desire to retaliate against the players' concerted activity suggests a personality which was not inclined to brook the sort of critical independence displayed by McCullum in February and again in August.

It may indeed be that in going after Carr in March, Patera thought that he might improve his team. But the question is, why, after 6 years, he suddenly considered it worth trading away a valuable draft choice to accomplish such an improvement. His apparent willingness to lie in explaining that development, as well as the other matters earlier discussed, lead me to believe that another, unlawful, motivation existed. A purpose to deceive generally means there is something to conceal. I can only construe Patera's fabrication of both a conversation and a perceived "need" as revealing a sense of guilt about the legitimacy of the decision to try to obtain Carr and a concomitant effort to conceal that guilt and lack of legitimacy. Along with the other evidence of Patera's general lack of credibility (including my personal impression of the manner in which he testified), his demonstrated and intense hostility toward the players' Section 7 activities, and the years of acceptance of McCullum's qualifications until the year in which McCullum became an upstart player representative, I am persuaded that General Counsel has demonstrated that the release of

McCullum was prompted at least in part, and very probably significantly, by his activities on behalf of the Union.

Once such a showing has been made, the Supreme Court has said in *Transportation Management*, any other overriding legitimate motivation must be proved by the offending employer: "The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." In the present case, the Respondent has had the opportunity pursuant to *Transportation Management* to establish by a preponderance of the evidence that it would have acquired Carr and discharged McCullum even if he had not engaged in union activities. I conclude that Respondent has failed to so demonstrate.

On these findings, I conclude that the Respondent violated Sections 8(a)(3) and (1) of the Act.

* * *

Question

Are you satisfied that McCullum's activities as player representative were a "motivating factor" in the team's decision to release him? On what specific evidence does the Administrative Law Judge rely in reaching that conclusion? Assuming, *arguendo*, that the NLRB has met its initial burden, do you agree that the team failed to meet its burden of showing that, notwithstanding McCullum's union activities, they would have released him anyway?

The Seahawks appealed the Administrative Law Judge's decision to the NLRB. The following is the Board's review of that decision.

NORDSTROM, managing partner, *et al.*, d/b/a SEATTLE SEAHAWKS AND NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION
292 N.L.R.B. No. 110 (1989)

Decision and Order

On November 23, 1983, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in reply to the Respondent's exceptions, the Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed a brief in answer to the Charging Party's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

This is a factually complex case. In its exceptions to the judge's decision, the Respondent attacks not only the judge's factual findings but also the legal standards that he applied. We are satisfied that the judge applied the appropriate standards and that his factual findings are supported by the record, but we address below certain of the Respondent's specific objections and the views of our dissenting colleague.

1. The Respondent challenges the judge's formulation of the test for determining whether the decision to release Sam McCullum violated Section 8(a)(3) of the Act. Specifically, the Respondent contends that the judge failed to apply the *Wright Line* test and this failure is demonstrated by his use of the terms "in part" and "predominant motive," in describing what the General Counsel must prove as to

unlawful motive before the burden shifts to the Respondent either to rebut the General Counsel's case or to show, as an affirmative defense, that the action in question would have been taken in any event, whether or not the Respondent was motivated by the employee's protected activities. We disagree.

It is true that in *Wright Line*, *supra*, the Board rejected "in part" and "dominant motive" tests, but it did so because those earlier tests of the lawfulness of a particular employment decision stopped with the conclusion whether the decision was dominantly or "in part" motivated by discriminatory sentiments. The Board changed to a test under which, after the General Counsel had presented evidence "sufficient to support an inference that protected conduct was a motivating factor in the employer's decision," the Respondent could avoid liability by demonstrating, as an affirmative defense, that "the same action would have taken place even in the absence of the protected conduct." In the Supreme Court's subsequent endorsement of the *Wright Line* test in *N.L.R.B. v. Transportation Management Corp.*, the Court made clear its understanding that the significant change in the Board's test was not the characterization of the General Counsel's initial burden but rather the addition of a new step by which the Board was required to consider an employer's affirmative defense even when the presence of unlawful motivation had been established. Thus, the Court saw "substantial or motivating factor" as nothing more than the way the Board now "puts it" in describing the General Counsel's initial burden.

It is incontestable that the judge, notwithstanding his occasional use of the term "in part" to describe the extent of the Respondent's unlawful motivation, found that antiunion considerations were a motivating factor in the decision that produced McCullum's release, and that he fully considered the Respondent's *Wright Line* defense. We therefore find that his analysis fully comports with the *Wright Line* standard.

2. The Respondent has also excepted to the judge's implicit finding that certain remarks that Sam McCullum made in his role as the team's player representative at a February 19, 1982, process conference and that produced negative reactions from both the team's general manager, John Thompson, and its head coach, Jack Patera, are in fact protected under Section 7 of the Act. In particular, the Respondent argues that McCullum's expression of his view that team doctors, whom he saw as identified with management, released injured players for games too soon, when the players were not fully recovered, constituted "disloyal" disparagement of the employer, which, pursuant to the theory of *N.L.R.B. v. Electrical Workers Local 1229 I.B.E.W. (Jefferson Standard)*, is not protected activity under Section 7. The Respondent also argues, as to the "solidarity handshake" episode, that any hostility would naturally be against the Union — as the author of this activity throughout the league — rather than against McCullum. We disagree with both contentions.

a. In *Jefferson Standard*, the Supreme Court held that a union's public attacks on the quality of the employer's product were not protected under Section 7 in which they had no connection with the employee's working conditions or any current labor controversy. It seems indisputable, however, that the relative haste with which injured players are returned to the football field is a matter that directly affects the players' working conditions. Although McCullum's views may have been exaggerated or not soundly based, that does not withdraw the protection of the Act from them. Indeed, employees and employers frequently differ greatly in their views whether the employees are properly treated.

b. We do not mean to suggest, of course, that it was unlawful for either Thompson or Patera to take issue with McCullum's statements. The fact remains, however, that McCullum established himself at this press conference as a fairly aggressive union spokesman. McCullum's role as player representative was highlighted again when he and two other players approached Patera in August to apprise him of the players' intention to support the Union's "solidarity handshake" plan by engaging in such a handshake with the opposing team in the upcoming August 13 game with St. Louis. Although it was another player who mentioned the "union solidarity" symbolism of the handshake, it was McCullum who — after Patera had expressed his opposition — said that the players might go ahead and do it anyway. We agree with the judge that Patera's prediction of the subsequent fines ("I'll fine you as much as I can") and the heavy fines that

the Respondent sought to impose reveal *animus* toward union activity for which, at this point, McCullum was the obvious focus on the team. Thus, we see no merit in the Respondent's argument that, because the solidarity handshake was an activity planned by the Union, the Respondent's *animus* had nothing to do with the individual Seattle players who participated. It was those players whom the Respondent sought to fine (a fine averted only because the Management Council ordered rescission after an unfair labor practice charge was filed). It was McCullum who had vowed to go through with the handshake after Patera said he opposed it.

3. The Respondent attacks the judge's discrediting of Patera — which is essential to his findings of unlawful motive — by insisting that it rests fundamentally not on observations of witness demeanor but rather on a flawed logical analysis of the plausibility of Patera's account of an urgent search, beginning as early as January 1982, for a "deep threat" wide receiver. We do not agree that the judge's logic is fatally flawed, but in any event it is apparent that the judge's decision is based in part on his observation of Patera, who he found "not one of the most impressive witnesses at the hearing."

Thus, for example, the judge saw and heard Patera testify that he was merely "bothered" by McCullum's remarks at the February 19 press conference, but the judge found that Patera's reaction had been "considerably stronger than that." (The judge found his impression corroborated by Patera's later involvement in the fines for the solidarity handshakes.) Similarly, on the question of whether Patera and Rhome had jointly agreed prior to the trade for Carr that McCullum was to be released if the trade went through, the judge was clearly influenced by the manner in which this testimony "popped out" of Patera on cross-examination.

We, of course, recognize that the judge's evaluation of all the testimony was influenced by his view of how it fit together logically or failed to do so, but we are necessarily reluctant to disregard the demeanor component of credibility resolutions by a trier of fact.

We therefore decline the Respondent's invitation to reverse the judge's assessment of the credibility of Patera's testimony.

4. Finally, we address two of the Respondent's arguments concerning alleged inconsistencies between the judge's factual findings and the record evidence. These are both matters raised also by our dissenting colleague.

a. First, the Respondent argues that a finding that it was seeking to obtain Carr in order to rid itself of McCullum is inconsistent with the evidence that the Respondent had declined to accept Baltimore's offer of Carr in late spring for a first round draft choice, that it had declined another Baltimore offer in August for a "high" draft choice, and that the Respondent had even toughened its position by insisting on September 2 that it would give up only a fourth round draft choice for Carr. We do not see that conduct as inconsistent with the judge's motivation finding for the reasons essentially given by the judge.

An employer may harbor an unlawful intent to rid itself of a troublesome employee but still wish to do so on the most advantageous terms possible. Furthermore, the testimony of the Respondent's own witnesses shows that they reasonably believed that Baltimore wanted to be rid at all costs of the injury-prone Carr, particularly in August, by which time he had missed a preseason minicamp and commented to the press about his dissatisfaction with Baltimore. The Respondent knew that Baltimore would willingly take a fourth-round draft choice if that was all that were offered. Thus, the Respondent's conduct of negotiations with Baltimore is not at all inconsistent with a desire to make a trade that would produce an apparent justification for releasing McCullum.

b. The Respondent also contends that the judge's findings concerning Patera's influence over the release of McCullum are inconsistent with evidence concerning the role of Seattle's offensive coordinator, Jerry Rhome, in the decision to release McCullum and the role of the team's owner, John Thompson, and its director of football operations, Michael McCormick, in the decision to acquire Roger Carr just prior to McCullum's release. We see no fatal inconsistency.

It is undeniable that Rhome was responsible for rating the wide receivers throughout training camp and the preseason games and that Patera would reasonably take seriously his judgment, after the Carr-trade, that McCullum should be released rather than Steve Largent, Byron Walker, or Paul Johns. But it is clear from Rhome's testimony that he was not consulted about the desirability of having Carr, as opposed to McCullum, at the point in the season that Carr was finally acquired. Thus, Rhome testified that he could not rate Carr because he had not seen him play very recently. Rhome obviously approached the evaluation process with the realization that Carr was not for cutting. As he testified, "You can't just eliminate Roger Carr because you just got through trading for him." Hence, having Carr as one of the wide receivers going into the new season was essentially imposed on Rhome by the trade. He made no considered judgment that an injury-prone player who had not participated in any training camp that summer and did not know Seattle's system of offensive plays would be more valuable than McCullum.

Although Carr's name was first mentioned by McCormick when he joined the Respondent's organization in March and the initial decision to make inquiries about Carr occurred after a conversation among McCormick, Patera, and Thompson about the matter, Patera made the initial call, while subsequent negotiations with Baltimore were carried out first by McCormick and later by Thompson. But Patera's role was crucial. As Thompson testified, Patera was the one to decide who would make the team. Given the time at which Carr was finally acquired — just before the opening of the season — it was clear that, as Rhome recognized, acquiring him meant bringing him onto the team. Nothing in the record suggests that efforts to acquire players would have been made without continuing consultation with the head coach. Thus, it had to be up to Patera whether negotiations to acquire Carr would continue just before the start of the season, when cuts were to be made. Contrary to our dissenting colleague, we do not rely simply on an absence of evidence as to Patera's role in the acquisition of Carr. We rely on admissions of the Respondent's own witnesses that Patera determined who would be on the team (testimony of Thompson) and that the trade for Carr, given its timing, was tantamount to a decision that Carr would be on the team (testimony of Rhome). We then find that there is no record evidence contradicting the clear implication of those admissions considered together, namely, that Patera's views were necessarily taken into account in the decision to make the trade just before the regular season was to begin.

Given the reports that Rhome says he made to Patera about the progress of players Walker and Johns in the training camp and preseason games, the continued pursuit of Carr is suspect. McCullum was rated a very good wide receiver in many respects — allegedly all except for the ability to go deep and catch "the bomb." But this was an area in which Johns and Walker were now rated highly, so the need to obtain Carr for that particular skill was diminishing rapidly according to the Respondent's own witnesses.

The Respondent simply has not shown that the acquisition of Roger Carr on September 3 would have occurred even in the absence of the *animus* of the Respondent's management — more notably, but not solely, the *animus* of Patera — against McCullum as an outspoken representative of union sentiment on the team. The *animus* against the Union's solidarity had been powerfully expressed, but thwarted in August, when the Respondent imposed fines for the "solidarity handshake" that greatly exceeded those imposed by any other NFL team and then was forced to rescind the fines. The opportunity for the Respondent to rid itself of the most visible team symbol of that solidarity was finally seized upon in September through the acquisition of Carr.

Member JOHANSEN, dissenting

At issue in this case is whether the Respondent's releasing of wide receiver Sam McCullum violated Section 8(a)(3) and (1) of the Act. Unlike my colleagues, I would reverse the judge's finding of a violation and dismiss the complaint.

For reasons fully set forth by the judge, I agree that the General Counsel made out a *prima facie* case warranting an inference that McCullum was released for his union activity. However, unlike my colleagues and the judge, I find that the Respondent established that it would have released McCullum even

in the absence of his union activities.

In essence, I cannot accept the finding of my colleagues and the judge that the Respondent undertook laborious efforts to acquire wide receiver Roger Carr from the then Baltimore Colts in order to give itself justification for releasing McCullum. Rather, it is clear to me that the Respondent established that McCullum's release was precipitated by the Respondent's having acquired Carr in order to better its team and on terms very advantageous to the Respondent and by the improving performance of wide receivers Paul Johns and Byron Walker.

In so finding, I rely in particular (1) on evidence — none of which the judge discredited — concerning the important roles played by Mike McCormick, the Respondent's director of football operations, John Thompson, the Respondent's general manager, and Jerry Rhome, the offensive coordinator, in the events leading to the decision to let McCullum go; (2) on the fact that the events leading to the trade were set in motion when McCormick arrived to take up his position, many months before McCullum's prominent union activity; (3) on the logic of the decision to pick McCullum, rather than one of the other four wide receivers, to be let go; and (4) on the Respondent's tactics in negotiating with the Baltimore Colts to obtain Carr-tactics that were inconsistent with a fixed plan to assure the departure of McCullum.

Sam McCullum began his NFL career in 1974, following his selection by the Minnesota Vikings in the annual college draft. Two years later, the league was expanded and the Seattle franchise was established. The Respondent acquired McCullum from Minnesota. McCullum was one of the Respondent's two regular starting players at the wide receiver position from 1976 through the 1981 season. Jack Patera was the Respondent's head coach during that entire time.

As fully set out in the judge's decision, McCullum was selected by his teammates as the union player representative in 1981, and he began taking a prominent role in the Union's affairs in February 1982. McCullum's union activities during 1982 ultimately resulted in serious animosity between McCullum and his coach, Patera.

McCullum was a starting player in each of the four 1982 preseason games. On the day of the final preseason game, September 3, the Respondent obtained wide receiver Roger Carr in a trade with the team then known as the Baltimore Colts. This brought the Respondent's number of players for the wide receiver position up to five — one more than the Respondent customarily maintained on its final active player roster. On September 7, the final day for NFL teams to bring their player complement down to the number allowed for the final active list, the Respondent placed McCullum on waivers. This released McCullum from his contractual obligation to play for the Respondent and allowed any other NFL club to claim his services by assuming his contract.

Mike McCormick had assumed his duties as the director of football operations in the Respondent's organization on March 15, 1982, just after having served for 2 years as the Baltimore Colts' head coach. One of the first tasks of his new job was to review the Respondent's game films and evaluate the team's strengths and weaknesses. Within a week of his arrival McCormick and Patera discussed personnel, specifically which Colt players might be available and helpful to the Respondent. McCormick named four possibilities, ranking Carr at the top of the list. During that March meeting Patera asked McCormick to contact Baltimore to inquire as to their interest in trading any of these players. Thereafter, McCormick phoned Baltimore General Manager Ernie Accorsi and asked specifically about Carr. Accorsi, however, was not willing to discuss possible trades until after the college draft in late April.

In mid-May, Accorsi contacted McCormick regarding a trade involving Robert Pratt, one of the four players McCormick had inquired about earlier. McCormick suggested a Pratt-Carr combination trade, offering McCullum and a draft choice or a combination of Seattle players in exchange for the two Colts. Accorsi would not discuss Carr at that time and no deal was made. During the course of the summer, talks between the teams continued. Accorsi began discussing Carr when Carr's desires to leave Baltimore became publicized. However, because of widespread interest in Carr from around the league, Baltimore's asking

price was high — a first round 1983 draft choice — and the Respondent was unwilling to pay so dearly. Because of McCormick's lack of progress with Accorsi in the Carr matter, trade talks for the Respondent were taken over by Thompson in about the second week of August.

In an August 20 conversation between Thompson and Accorsi, Accorsi asked for the Respondent's best offer by August 23. Accorsi stated that Baltimore was not willing to settle for a 1984 draft choice or any of the Respondent's veteran players because they still believed that they could obtain a first round 1983 draft pick for Carr. Thompson advised Accorsi that the Respondent had gone over this again and again and that it could not agree to meet Baltimore's price. Accordingly, the Respondent allowed the August 23 deadline to pass. On August 27, Accorsi called Thompson, telling him that no deal for Carr had yet been worked out, that the Colts still wanted a 1983 draft selection for him, and that all interested teams were being so advised. The Colts established a second deadline of August 30 for receipt of such an offer. The Respondent again allowed the deadline to pass without raising its offer for Carr. On September 1 Accorsi contacted Thompson, again telling him that no acceptable offer for Carr had been made. On September 2 Thompson and Accorsi spoke several times. Thompson told Accorsi that the Respondent was lowering its previous offer because Carr was not worth as much at this point — so close to the final cut date and the opening of the regular season. Carr would not have much opportunity to acquaint himself with the Respondent's program. Thompson testifies that he sensed that the Colts were beginning to "panic" because they were not getting what they wanted for Carr, and thus were in a weakened bargaining position. Thompson then offered Accorsi only a fourth-round 1984 draft choice. On September 3, following the approval of others in the Colts' management, the Baltimore team agreed to accept the Respondent's fourth-round 1984 draft choice (an offer which would be improved if certain performance standards were met by Carr) in exchange for Carr.

Despite the undisputed facts regarding the timing and progress of the Carr-trade talks — notably the early initial efforts of McCormick, the hard bargaining techniques of Thompson, and the absence of any role in the process by Patera — the judge and my colleagues nevertheless conclude that the Carr-acquisition was central to a carefully designed pretext to justify McCullum's elimination. I cannot agree. The judge's analysis is flawed by his failure to account for Patera's lack of participation in effecting the trade. The judge imputed Patera's apparent hostility toward McCullum to the Respondent generally. By so doing, however, the judge ignored the fact that the Respondent did not stand accused of having committed any unfair labor practices independent of the McCullum discharge, and that there is no union *animus* on the part of those within the Respondent's organization, *i.e.*, McCormick and Thompson, who actually played a direct personal role in the Carr-acquisition.

The judge's analysis also too readily discounts the fact that the attempts to deal for Carr were initiated right after McCormick joined the Seattle Organization after leaving the Colts, and well in advance of McCullum's most "anti-Patera" confrontation, *i.e.*, the "solidarity handshake" incident; and it leaves unexplained the unwillingness of the Respondent's trade negotiators to conclude the Carr-deal quickly so as to assure an excuse for dismissing McCullum. Indeed, it was the Colts who, in the end, were the party most eager to make a trade for Carr. It was the Colts, not the Seahawks, who backed down from their earlier demands and agreed to a trade that brought them less than they had sought. If, as the judge found, the Respondent had traded for Carr primarily to furnish itself with a basis for getting rid of McCullum as a union activist, then logic dictates that the Seahawks would have been the party more anxious to conclude a deal. Yet the Seahawks twice passed by Colt deadlines for trading for Carr.

The judge's analysis also does not refute the Respondent's evidence that it cut McCullum for sound business reasons. In this regard, as with the Carr-acquisition itself, the judge again overemphasized Patera's responsibility in the selection process. By the time the protracted trade negotiations for Carr came to fruition, the Respondent was facing a deadline when it had to reduce its roster to 49 players. The judge determined that this process was tainted by Patera's anti-McCullum, anti-union attitude. He discredited several portions of Patera's testimony concerning the team's needs and the relative strengths and weaknesses

of various players because of this finding of overriding taint. While I would not overturn the judge's credibility resolutions, I find that he failed to account fully for the role of the Respondent's offensive coordinator, Jerry Rhome, in the decision to let McCullum go.

During training camp, and prior to the trade, Rhome evaluated on a weekly basis the wide receivers. As recounted by the judge, Rhome's week-by-week evaluations of McCullum declined while, in comparison, those of Walker and Johns improved.

Rhome testified that, following the Carr-trade, Patera held meetings with his assistant coaches to discuss personnel matters. Patera, Rhome, offensive line coach Howard Mudd, and backfield coach Andy MacDonald met on 3 consecutive days immediately prior to the final-cut deadline to evaluate the players. Rhome took the lead in the discussion of wide receivers. His first question to Patera concerned Walker, a rookie free agent who had favorably impressed Rhome throughout the preseason. Patera replied that Rhome should rate the wide receiver corps himself rather than ask for Patera's views.

Rhome then proceeded to rate Largent as their star. He stated that he could not rate Carr because he had not seen him play in preseason. He declared that Johns, Walker, and McCullum were very close, but that he would take Walker over McCullum. Rhome testified that he had earlier told Patera that Johns should probably be given the starting position over McCullum. Rhome also testified that retaining five players at the wide receiver position would not have been tenable because the extra receiver would cost the team a player at another slot; the team could not afford cutting back on the strength of their offensive line; the possibility of an injury to a quarterback precluded having only two at that position; the tightend position was thought to require three active players; and the Respondent had traditionally carried just four wide receivers. Rhome averred that his fellow assistant coaches agreed with his assessment on the number of receivers that should be carried. Rhome further commented that in any event McCullum was not likely to be happy in a backup role, spending the bulk of the gametime on the bench. Rhome stated that the decision boiled down to a choice between McCullum and Walker and that developing the potential of a youthful Walker was an appealing prospect for the team.

After giving his perspective to Patera the decision to terminate McCullum seemed logically to emerge: (1) Largent, as the Respondent's premier wide receiver, would obviously be kept; (2) Carr would be retained in view of the fact that the trade for him had just been effected; (3) Johns was projected as a probable starter over McCullum; (4) Johns was needed as the punt returner — a matter independent of his role as wide receiver; (5) Walker displayed promise as a young talent with his best playing years ahead; and (6) McCullum's starting role was challenged and he was facing the declining years of his playing abilities.

The judge minimized Rhome's role in the decision to release McCullum, stating that, to be effective, any "decision" by Rhome concerning player personnel had to be approved by Patera and that Patera had previously made up his mind that McCullum was going to be released. There is no evidence, however, that Rhome's evaluation of the receivers was not reached independently of Patera, or that it was based on anything but Rhome's judgment of the five receivers' talents and their suitability to the team's receiving needs. Consequently, that Patera might have been pleased to accept and act on Rhome's decision because he was predisposed to release McCullum would not be inconsistent with Rhome's account of the basis for his recommendation and the role that he played for his recommendation and the role that he played in McCullum's departure. Moreover, Patera's predisposition to drop McCullum from the team cannot be viewed as engraved in stone. Patera was not faced with a decision by Rhome to retain McCullum over Walker. I do not know what Patera would have done in that situation and I refuse to speculate whether he would have acted in accord with his predisposition. I do know, however, that Rhome had decided that McCullum was the most expendable of the receivers, that Rhome had so informed Patera, and that Rhome's decision was given effect.

For all the foregoing reasons, the Respondent's choice of McCullum as the expendable player emerges as one based on a business judgment of the team's personnel needs that would have been made

even in the absence of anti-union motivation. Accordingly, I find that the Respondent has met its *Wright Line* burden and I would reverse the judge's conclusion that the Respondent's termination of McCullum violated the Act.

* * *

Section 4: The Duty to Bargain

§ 8 (a) It shall be an unfair labor practice for an employer -

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Once a union has been selected by a majority of employees in an appropriate collective bargaining unit, the parties are mutually obligated under the National Labor Relations Act "to bargain collectively" regarding "wages, hours and other terms and conditions of employment."[9] Section 8(a)(5) of the Act makes it an unfair labor practice for an employer, under these circumstances, to refuse to bargain in good faith with the employees' collective bargaining representative. Once the agent is selected, it becomes the exclusive bargaining representative of all members of the unit regarding the subject matter of collective bargaining and any agreement reached is binding upon all members of the unit. Moreover, as is demonstrated in the following cases, the collective bargaining agreement is superior to and supplants any preexisting individual agreement between the employer and an employee to the degree the two agreements are inconsistent.

A. The Appropriate Bargaining Unit

An initial question in any newly organized setting surrounds the unit of employees about which the Parties must bargain. All major professional sports leagues bargain on a league-wide, rather than a team-by-team basis. The following case illustrates why that is the case.

NORTH AMERICAN SOCCER LEAGUE v. NATIONAL LABOR RELATIONS BOARD
613 F.2d 1379 (5th Cir. 1980)

RONEY, Circuit Judge

The correct collective bargaining unit for the players in the North American Soccer League is at issue in this case. Contrary to our first impression, which was fostered by the knowledge that teams in the League compete against each other on the playing fields and for the hire of the best players, our review of the record reveals sufficient evidence to support the National Labor Relations Board's determination that the League and its member clubs are joint employers, and that a collective bargaining unit comprised of all NASL players on clubs based in the United States is appropriate. Finding petitioners' due process challenge to be without merit, we deny the petition for review and enforce the collective bargaining order on the cross-application of the Board.

The North American Soccer League is a non-profit association comprised of twenty-four member

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[9] Section 8(d).

clubs. The North American Soccer League Players Association, a labor organization, petitioned the NRLB for a representation election among all NASL players. The board found the League and its clubs to be joint employers and directed an election within a unit comprised of all the soccer players of United States clubs in the League. Excluded from the unit were players for the clubs based in Canada because the Board concluded its jurisdiction did not extend to those clubs as employers.

Players in the unit voted in favor of representation by the Association. After the League and its clubs refused to bargain, the Board found them in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C.A. §§ 158(a)(1) and (5), and ordered collective bargaining. The League and its member clubs petitioned this Court for review. The Board's cross-application seeks enforcement of that order.

The settled law is not challenged on this petition for review. Where an employer has assumed sufficient control over the working conditions of the employees or its franchisees or member-employers, the Board may require the employers to bargain jointly. The Board is also empowered to decide in each case whether the employee unit requested is an appropriate unit for bargaining. The Board's decision will not be set aside unless the unit is clearly inappropriate. Thus the issues in this case are whether there is a joint employer relationship among the League and its member clubs, and if so, whether the designated bargaining unit of players is appropriate.

Joint Employers

Whether there is a joint employer relationship is "essentially a factual issue," and the Board's finding must be affirmed if supported by substantial evidence on the record as a whole.

The existence of a joint employer relationship depends on the control which one employer exercises, or potentially exercises over the labor relations policy of the other. In this case, the record supports the Board's finding that the League exercises a significant degree of control over essential aspects of the clubs' labor relations, including but not limited to the selection, retention, and termination of the players, the terms of individual player contracts, dispute resolution and player discipline. Furthermore, each club granted the NASL authority over not only its own labor relations but also, on its behalf, authority over the labor relations of the other member clubs. The evidence is set forth in detail in the Board's decision and need be only briefly recounted here.

The League's purpose is to promote the game of soccer through its supervision of competition among member clubs. Club activities are governed by the League constitution, and the regulations promulgated thereunder by a majority vote of the clubs. The commissioner, selected and compensated by the clubs, is the League's chief executive officer. A board of directors composed of one representative of each club assists him in managing the League.

The League's control over the clubs' labor relations begins with restrictions on the means by which players are acquired. An annual college draft is conducted by the commissioner pursuant to the regulations, and each club obtains exclusive negotiating rights to the players it selects. On the other hand, as the Board recognized, the League exercises less control over the acquisition of "free agent" players and players "on loan" from soccer clubs abroad.

The regulations govern interclub player trades and empower the commissioner to void trades not deemed to be in the best interest of the League. Termination of player contracts is conducted through a waiver system in accordance with procedure specified in the regulations.

The League also exercises considerable control over the contractual relationships between the clubs and their players. Before being permitted to participate in a North American Soccer League game, each player must sign a standard player contract adopted by the League. The contract governs the player's relationship with his club, requiring his compliance with club rules and the League constitution and regulations. Compensation is negotiated between the player and his club, and special provisions may be added to the contract. Significantly, however, the club must seek the permission of the commissioner before signing a contract which alters any terms of the standard contract.

Every player contract must be submitted to the commissioner, who is empowered to disapprove a contract deemed not in the best interest of the League. The commissioner's disapproval invalidates the contract. Disputes between a club and a player must be submitted to the commissioner for final and binding arbitration.

Control over player discipline is divided between the League and the clubs. The clubs enforce compliance with club rules relating to practices and also determine when a player will participate in a game. The League, through the commissioner, has broad power to discipline players for misconduct either on or off the playing field. Sanctions range from fines to suspension to termination of the player's contract.

Although we recognize that minor differences in the underlying facts might justify different findings on the joint employer issue, the record in this case supports the Board's factual finding of a joint employer relationship among the League and its constituent clubs.

Having argued against inclusion of the Canadian clubs in the NLRB proceeding, petitioners contend on appeal that their exclusion renders the Board's joint employer finding, encompassing 21 clubs, inconsistent with the existence of a 24-club League. The jurisdictional determination is not before us on appeal, however, and the Board's decision not to exercise jurisdiction over the Canadian clubs does not undermine the evidentiary base of its joint employer finding.

Even assuming the League and the clubs are joint employers, they contend that *Greenhoot, Inc.*, 205 N.L.R.B. 250 (1973), requires a finding of a separate joint employer relationship between the League and each of its clubs, and does not permit all the clubs to be lumped together with the League as joint employers. In *Greenhoot*, a building management company was found to be a joint employer separately with each building owner as to maintenance employees in the buildings covered by its contracts. The present case is clearly distinguishable, because here each soccer club exercises through its proportionate role in League management some control over the labor relations of other clubs. In *Greenhoot*, building owners did not exercise any control through the management company over the activities of other owners.

Appropriate Unit

The joint employer relationship among the League and its member clubs having been established, the next issue is whether the league-wide unit of players designated by the Board is appropriate. Here the Board's responsibility and the standard of review in this Court are important.

The Board is not required to choose the most appropriate bargaining unit, only to select a unit appropriate under the circumstances. The determination will not be set aside "unless the Board's discretion has been exercised `in an arbitrary or capricious manner.'"

Notwithstanding the substantial financial autonomy of the clubs, the Board found they form through the League, an integrated group with common labor problems and a high degree of centralized control over labor relations. In these circumstances the Board's designation of a league-wide bargaining unit as appropriate is reasonable, not arbitrary or capricious.

In making its decision, the Board expressly incorporated the reasons underlying its finding of a joint employer relationship. The Board emphasized in particular both the individual clubs decision to form a League for the purpose of jointly controlling many of their activities, and the commissioner's power to disapprove contracts and exercise control over disciplinary matters. Under our "exceedingly narrow" standard of review, no arguments presented by petitioners require denial of enforcement of the bargaining order.

Thus the facts successfully refute any notion that because the teams compete on the field and in hiring, only team units are appropriate for collective bargaining purposes. Once a player is hired, his working conditions are significantly controlled by the League. Collective bargaining at that source of control would be the only way to effectively change by agreement many critical conditions of employment.

Petition for review denied.
Order enforced.

Notes and Questions

1. Commonly, unions desire to represent smaller units of employees while employers prefer larger units. The reasons often forwarded for these preferences are that smaller units are easier for the union to organize and administer. And, one effect of having multiple units is that one unit can take advantage of benefits gained by another unit, thereby resulting in a "leapfrogging effect" in bargaining.

2. It will become apparent that, insofar as exposure to antitrust liability is concerned, it may be safer for leagues to organize themselves on the basis of a single business entity with franchises rather than each team constituting a separate business. Were this to happen in a future sports league, would the presumptively appropriate unit be a league-wide basis?

B. The Principle of Exclusivity and the Duty to Bargain

MORIO v. NORTH AMERICAN SOCCER LEAGUE

501 F. Supp. 633 (S.D.N.Y. 1980)

On or about July 26, 1978, through August 4, 1978, the employees of Respondent Clubs participated in a secret ballot election conducted under the supervision of the Board, wherein a majority of the valid votes counted were cast for the Union. On September 1, 1978, the Union was certified as the exclusive collective bargaining representative of the employees of Respondent Clubs.

Subsequent to the certification, Respondents refused to bargain with the Union and contested the Board's determination of a single "League-wide unit" as being appropriate for collective bargaining. The Union filed an unfair labor practice charge on October 30, 1978. The General Counsel issued a complaint on November 24, 1978, against Respondents which alleged, *inter alia*, that Respondents had failed and refused to recognize and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act. Following a summary judgment proceeding, the Board, on April 30, 1979, issued an order directing Respondents to bargain with the Union. The Respondents appealed the Board's order to the United States Court of Appeals for the Fifth Circuit.

On March 21, 1980, the United States Court of Appeals for the Fifth Circuit issued its decision enforcing the Board's order and on May 14, 1980, issued its mandate. The mandate contained language directing the Respondents to recognize and bargain with the Union as exclusive collective bargaining representative of Respondent's professional soccer players.

Respondents have filed a petition for a *writ of certiorari* in the United States Supreme Court. Their petition for rehearing has been denied by the Fifth Circuit and no stay of the Fifth Circuit's mandate has been secured.

On March 28, 1979, the Union, pursuant to provisions of the Act, filed with the Board a charge alleging that Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. Other such unfair labor practice charges were filed by the Union on June 25, 1979, alleging violations of 8(a)(1), (3) and (5) of the Act. These charges were referred to Petitioner for adjudication. Thereafter, on October 20, 1979, a complaint and notice of hearing pursuant to Section 10(b) of the Act, alleging that Respondents have engaged and are engaging in unfair labor practices within the meaning of the Act, was issued by the Regional Director. On November 30, 1979, the Union filed more charges of unfair labor practices by Respondents which were again referred to the Regional Director and again on January 18, 1980, a complaint and notice of hearing with respect to these latest charges were issued by petitioner. All charges by the Union were ordered consolidated for hearing by Petitioner on February 14, 1980. On February 19, 1980, Petitioner amended the consolidated complaint.

Subsequently, hearings were held before Administrative Law Judge Benjamin Schlesinger. These hearings were held between March 4 and May 1, 1980, in four cities around the country. On May 28, 1980, the general counsel of the Board moved to amend the consolidated complaint. The hearing before the Administrative Law Judge has not been concluded. Petitioner [the Regional Director of the National Labor Relations Board] seeks a temporary injunction pending the final disposition of the charges presently before the Administrative Law Judge and the final action of the Board with respect thereto.

Respondent, the North American Soccer League, is a non-profit association. It currently comprises about 24 professional soccer teams, 21 of which are located in the United States and three of which are located in Canada. The League's principal office is at 1133 Avenue of the Americas, County, City and State of New York, where it has been engaged in its operation as a non-profit association. Each of the constituent members is engaged primarily in the business of promoting and exhibiting professional soccer contests for viewing by the general public. Collectively, these clubs annually gross revenue in excess of half a million dollars and purchase and cause to be imported in interstate commerce goods and materials valued in excess of $50,000. The Respondent League and its constituent member clubs constitute and have constituted at all times material herein joint employers for the purpose of collective bargaining.

All professional soccer players, whether on loan or otherwise, employed by respondent League and Respondent Clubs constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. This unit includes players on the following eligibility lists: active, temporarily inactive, disabled, suspended, ineligible, and military. The unit does not include officials of Respondent League or managerial or executive personnel of respondent League and Respondent Clubs or players employed by the Edmonton Drillers, Toronto Metros and Vancouver Whitecaps. All other employees and supervisors as defined in the Act are also included. Since September 1, 1978, the Union, by virtue of Section 9(a) of the Act has been and is now the exclusive representative of all the employees in the unit for the purpose of collective bargaining with respect to the rates of pay, wages, hours of employment and other terms and conditions of employment.

In this case Petitioner [the NLRB Regional Director] alleges that she has reasonable cause to believe that Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act by engaging in the following acts and conduct:

NLRA Sec 7 rights violated

1. On or about October 19, 1978, and continuing thereafter, Respondents unilaterally changed the employment conditions of the employees in the Unit by requiring them to obtain permission from their respective clubs whenever a particular brand of footwear, other than selected by each of respondent Clubs, is desired by an employee.

2. On April 10, 1979, Respondent, acting through their agents, Phil Woosman and Ted Howard, unilaterally changed the employment conditions of the employees in the unit by initiating plans for a new winter indoor soccer season which began in November, 1979, and ended in March, 1980.

3. On or about November 24, 1979, and continuing to the present, Respondents, acting through their agents, Phil Woosman and Ted Howard, and other agents presently unknown, unilaterally changed and are continuing to change the employment conditions of the employees in the unit by requiring them to play or otherwise participate in the winter indoor soccer season.

4. On or about October 16, 1979, Respondents, acting through the same agents named above, unilaterally changed the employment conditions of employees in the unit by initiating plans to increase the 1980 regular summer outdoor soccer season schedule by two games and two weeks over the 1979 format and by subsequently implementing said plans and maintaining them in full force and effect.

5. On or about October 16, 1979, respondents, acting through their said agents, unilaterally changed the employment conditions of employees in the unit by initiating plans to reduce the maximum roster of all the Respondent Clubs during the regular summer outdoor summer season from 30 to 26 players and by subsequently implementing said plan and maintaining them in full force and effect.

6. Commencing on or about October 19, 1978, until on or about March, 1979, and continuing thereafter, Respondents by-passed the Union and dealt directly with employees in the unit. Respondents solicited employees to enter into individual employment contracts with the employee members of the unit.

The evidence introduced at the hearing conducted by the court established that Petitioner has reasonable cause to believe that Respondents have entered into individual contracts with employees since September 1, 1978, and continue to do so and that these individual contracts constitute 96.8% of the existing individual contracts. The other 3.2% of the current individual player contracts were entered into prior to the Union's certification on September 1, 1978.

Respondents conceded that they have unilaterally changed the conditions of employment by requiring employees to obtain permission from their respective clubs before wearing a particular brand of footwear other than that selected by each Respondent Club; that they have changed the conditions of employment by initiating plans for a new winter indoor soccer season which began in November, 1979, and ended in March, 1980; that they unilaterally changed conditions of employment by requiring employees to play or otherwise participate in the winter indoor soccer season; that they unilaterally changed conditions of employment by initiating plans to increase the 1980 summer outdoor soccer season by two games and two weeks over the 1979 format, which is presently in operation; and that they unilaterally changed employment conditions by initiating plans to reduce the maximum roster of all the Respondent Clubs during the regular summer outdoor season from 30 players to 26 players beginning on or about October 16, 1979, and continuing to the present.

Petitioner has therefore established that she has reasonable cause to believe that the Respondents have engaged in the foregoing unfair labor practices and is, therefore, entitled to temporary injunctive relief, pending the final determination of these charges presently pending before the Administrative Law Judge and the Board, as provided by Section 10(j) of the Act.

The court therefore finds and concludes that there is reasonable cause to believe Respondents have engaged in unfair labor practices in violation of the Act and that Petitioner is entitled to temporary injunctive relief as prayed for in the petition.

Respondents next claim that injunctive relief should be denied since the Board, itself, is responsible for delaying its own final determination of the charges of unfair labor practices which have been filed before it by the Union. The court finds that delay was caused in part by Respondents and that there has been no such delay by the Board as to warrant a denial of the requested injunctive relief. The section pursuant to which Petitioner invokes this court's jurisdiction for temporary injunctive relief contemplates that there will be need for relief pending the final determination of matters pending before the Board, as the legislative history indicates. Section 10(j) of the Act provides that the Board shall have the power on the issuance of a complaint charging unfair labor practices to petition any district court of the United States, in any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief, or a restraining order. That section confers jurisdiction upon this court to grant the relief requested after notice and hearing.

The unilateral changes which Respondents admit have occurred since September 1, 1978, in the terms and conditions of employment, may violate the employer's obligations to bargain with the exclusive bargaining representative of the players. The duty to bargain carries with it the obligation on the part of the employer not to undercut the Union by entering into individual contracts with the employees. In *N.L.R.B. v. Katz*, the Supreme Court noted: "A refusal to negotiate in fact as to any subject which is within § 8(d) and about which the Union seeks to negotiate violates § 8(a)(5)."

It is undisputed that Respondents have since September 1, 1978, refused to bargain with the Union. Respondents claim that they had a right to refuse to bargain with the Union since they were pursuing their right to appeal the Board's determination that all of the players referred to above constitute a unit for collective bargaining purposes. Respondents' duty to bargain with the Union arose from the time the Union was certified as the exclusive bargaining representative of the players — September 1, 1978. The fact that

Respondents were pursuing their right to appeal did not, absent a stay of the Board's order, obviate heir duty to bargain with the Union and does not constitute a defense to an application for relief under Section 10(j) of the Act where, as here, Respondents have apparently repeatedly refused to bargain with the Union and have continued to bypass the Union and deal directly with employees. As Petitioner says, Respondents could have bargained subject to later court decision adverse to Petitioner and the Union and can do so now. Negotiations between Respondents and the Union were scheduled to commence August 12, 1980, notwithstanding Respondents' petition for a *writ of certiorari*.

Respondents' most vigorous opposition comes in response to Petitioner's application for an order requiring Respondents to render voidable, at the option of the Union, all individual player contracts, whether entered into before or after the Union's certification on September 1, 1978. Respondents' claim that such power in the hands of the Union, a non-party to this action, would result in chaos in the industry and subject Respondents to severe economic loss and hardship since these individual contacts are the only real property of Respondents.

It should be noted, at the outset, that the relief requested by Petitioner is not a request to have all individual contracts declared null and void. It should be emphasized that Petitioner is not requesting that the "exclusive rights" provision of the individual contracts, which bind the players to their respective teams for a certain time, be rendered voidable. Moreover, the Board seeks an order requiring Respondents to maintain the present terms and conditions in effect until Respondents negotiate with the Union — except, of course, for the unilateral changes — unless and until an agreement or a good faith impasse is reached through bargaining with the Union. Petitioner does not, however, seek to rescind that unilateral provision which provided for the present summer schedule. The Board has consciously limited its request for relief to prevent any unnecessary disruption of Respondents' business. The Board is seeking to render voidable only those unilateral acts taken by the Respondents, enumerated above, which Respondents admit have in fact occurred.

These unilateral changes appear to modify all existing individual contracts entered into before September 1, 1978, in derogation of the Union's right to act as the exclusive bargaining agent of all employees in the unit.

The court finds that Petitioner is entitled to the temporary injunctive relief which it seeks with respect to all of the individual contracts. The individual contracts entered into since September 1, 1978, are apparently in violation of the duty of the Respondents to bargain with the exclusive bargaining representative of the players. The Act requires Respondents to bargain collectively with the Union. The obligation is exclusive. This duty to bargain with the exclusive representative carries with it the negative duty not to bargain with individual employees.

With respect to the individual contracts entered into prior to September 1, 1978, Petitioner is entitled to an injunction enjoining Respondents from giving effect to these individual contracts of employment or any modification, continuation, extension or renewal thereof "to forestall collective bargaining." *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 341 (1944). The evidence adduced at the hearing disclosed that Respondents have refused to recognize that only the Union has the right to waive, if it so desires and to the extent it so desires, its right to be the exclusive bargaining representative. Respondents had also refused to negotiate with the Union since September 1, 1978, pending resolution of their appeal.

In *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350 (1940), the Supreme Court held that the Board has the authority, even in the absence of the employees as parties to the proceeding, to order an employer not to enforce individual contracts with its employees which were found to have been in violation of the NLRA. Petitioner is seeking temporary relief to this effect as to those individual contracts entered into prior to September 1, 1978. The evidence discloses that Respondents have used, and will continue to use, the individual contracts entered into prior to September 1, 1978, to forestall collective bargaining.

With such contracts in place, Petitioner has reasonable cause to believe that Respondents' determination not to bargain with the Union has been well fortified and that there simply is no incentive for

Respondents to bargain with the Union with those contracts in place. Petitioner has reasonable cause to believe that the ability of Respondents to enter into individual contracts and to continue to enforce them is to bypass and to undermine support for the Union. The court therefore finds that there is reasonable cause to believe that Respondents have used the individual contracts entered into prior to September 1, 1978, to forestall collective bargaining.

The Board is, therefore, entitled to the relief which it seeks requiring Respondents to render voidable certain provisions in the existing individual contracts which the Union requests, as set forth above. The Union has been permitted by the court to intervene in this action as a party petitioner. The court finds that it is not the intent of the Petitioner, as Respondents claim, to visit punitive actions on Respondents and that the requested relief with respect to the individual contracts has been carefully tailored to avoid chaos in Respondents' industry and to avoid any economic hardship to Respondents.

Finally, the court finds that under the circumstances of this case a temporary injunction would be just and proper. In so holding, this court does not intend to pass on the merits of any pending unfair labor charges before the Board. Those are matters for determination by the Board.

Notes

The professional sports industry is unique among American industries in that collective bargaining contracts and individual contracts co-exist. In virtually all other collective bargaining relationships, the collective bargaining contract applies uniform terms to classes of employees and the terms reached comprise the entire contract governing all employees in the unit. In the professional sports industry, however, the players' associations bargain with the leagues regarding certain subjects such as minimum wages, benefits, and conditions of employment, including such player restraint mechanisms as the draft and free agent indemnity rules while the individual players and their agents also bargain with the individual teams regarding compensation and contract length. It is important to remember, however, that, given the principle of exclusivity and the teachings of the *J.I. Case Co.* case, individual bargaining regarding matters touching on "wages, hours or terms and conditions of employment" exists only because the union and the employer have agreed to permit this arrangement. Thus, were the union and the league to agree upon a uniform wage scale for players according to agreed-upon criteria that might include position played, length of service or accomplishments earned, that wage scale would govern all unit players and the individual contracts executed before or after the effective date of the collective bargaining contract would be superceded.

Section 5: The Subject Matter of Collective Bargaining

In the absence of a collective bargaining agreement or some other employment contract the employment relationship is usually characterized as being "at-will". That is, the employer may hire, fire and otherwise set the terms and conditions of employment without limitation and the employee may cease employment also without limitation. Once a union is selected to represent a group of employees in an appropriate unit, however, the employer and the union are obligated by the NLRA to "confer in good faith with respect to wages, hours, and other terms and conditions of employment"[10] for employees in that unit.

Although the requirement of good faith bargaining cannot be defined with precision, it is usually thought of as requiring that the parties enter into negotiations with an open mind and a sincere desire to reach an agreement. It is important to remember that the obligation to bargain in good faith does not require

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[10] 29 U.S.C. 158(d) (1976).

was violative of the Collective Bargaining Agreement, which provided that:

> [A]ny change in current practices affecting employment conditions of the players shall be negotiated in good faith.

Commissioner Rozelle replied to the two letters on October 21st. He wrote:

> While still considering your letter of September 30 regarding player fines I am now in receipt of your October 18 letter on the same subject.
>
> The action taken as the result of the player fights was done so under a resolution passed by the member clubs last March. It reads:
>
> > Any Player leaving the bench area while a fight is in progress on the field will be fined $200.
>
> * * *
>
> It has been the long-standing policy of this office to most certainly *accord* any disciplined players the right of appeal to the Commissioner, either through writing or hearing, but I have serious doubts whether the [Union] has jurisdiction in the area of player fines for misconduct during the course of a game. Therefore, I believe I must request written argument from the [Union] and the [Council] on this issue before I can entertain any grievance initiated by the [Union].

The Union responded as follows:

> [T]he Collective Bargaining Agreement makes it clear that the [Union] may appeal any grievance that it so desires. Article XII, Section (d) states:
>
> > Any such fine and amount thereof, however, may be made the subject of a grievance in accordance with the provisions of Article X hereof.
>
> Article X relates to the non-injury grievance procedure, and Step 1 states:
>
> > Any NFL player or the [Union] may present a written grievance to any member club or to the League itself within sixty days....
>
> I completely reject any suggestion that we could not have jurisdiction in this matter, given the clear language of the Collective Bargaining Agreement....
>
> It also raised a series of questions going to the merits of the issue.

On December 29, 1971, Garvey wrote to Commissioner Rozelle stating that he was withdrawing the entire matter from the Commissioner's hands and that he was asking the Council to begin negotiations on the matter. He stated that he understood Rozelle's position to be that he was simply implementing a decision of the Owners and that, therefore, the matter was not properly before him.

On February 1, 1972, the Council's Executive Director wrote to Garvey as follows:

> We take the position that [the Commissioner] was acting under the powers vested in him as Commissioner under the Collective Bargaining Agreement which incorporates by reference both the NFL Constitution and ByLaws and the Standard Player Contract.
>
> In the absence of language to the contrary, we contend that he has the authority to fine a player and it is reviewable as provided for in the Constitution and By-Laws and the Standard Player Contract. They provide for the right of hearing before the Commissioner.

The Union filed an unfair labor practice charge with the Board on December 10, 1971, alleging that Employers' unilateral adoption of the rule was a refusal to bargain. Amended charges were filed on February 11 and May 10, 1972. The General Counsel of the NLRB issued a complaint on May 12, 1972.

It alleged that the Employers violated § 8(a)(5) of the Act by unilaterally promulgating and implementing a new rule providing for an automatic $200.00 fine against any player leaving the bench area during a fight or altercation on the football field during the game.

The Employers denied the Union's allegations, taking the position that the fines were Commissioner fines rather than Owner fines and that the Employers had not violated § 8(a)(5) because they had not instituted the rule change. They contended, alternatively, that the action was taken more than six months prior to the filing of the charges by the Union and hence was barred by § 10(b) of the Act, and that the Collective Bargaining Agreement contained grievance and arbitration mechanisms for resolution of the issue that the Board should stay its hand in deference to those mechanisms.

The administrative law judge found: (1) that the rule was an Owners' fine rather than a Commissioner's fine; (2) that the statute of limitations did not start to run until late August of 1971 when the Executive Director of the Union first learned of the fines and that, therefore, the charges were not barred by § 10(b) of the Act; and (3) that deferral to arbitration was not appropriate because there was no merit to the Employers' position and because the policy considerations underlying the deferral rule would not be satisfied by a procedure where "the arbitrator [Commissioner Rozelle] was determining the merits of his own conduct."

The Employers filed exceptions to the administrative law judge's decision.

The Board agreed that deferral would be inappropriate for the reason that the Commissioner was not a disinterested party and thus the purpose of the Act would not be served by having him resolve the dispute. It went on to state:

> As to the merits of the bench-fine issue, the General Counsel and the Union concede that the Commissioner has, and always has had, the authority to impose fines for conduct detrimental to football with or without the approval of the owners. This fact leads us to conclude that nothing of substance was changed by the owners' action at their March 25 meeting. Since it is conceded that the Commissioner had the authority to impose the rule in issue, and indeed was the moving force in securing an adoption of the rule by the owners, we do not perceive any meaningful or substantial unilateral conduct arising out of the meeting of the owners. Thus, if the owners had not met on March 25 and the Commissioner had levied the fines without prior consultation, there would be no dispute as to the propriety of his conduct. What the General Counsel and Charging Party are asking us to find is that by approving the resolution, the Respondent unilaterally altered the terms and conditions of employment. We believe any such holding would exalt form over substance, in that mere approval of a rule initiated by the Commissioner adds nothing of substance when the facts show that such approval was neither required nor that it partook of any substantive difference over what the Commissioner could have done without such approval. We therefore find that Respondent's conduct on March 25 did not constitute a violation of Sections 8(a)(5) and (1) and we shall accordingly dismiss that portion of the complaint.

We understand the Board to have made the following findings: (1) that the Union conceded that the Commissioner had a right to adopt the bench-fine rule; (2) that the bench-fine rule had in fact been promulgated by the Commissioner rather than the Owners and that the Owners engaged in no meaningful or substantial conduct with respect to its adoption or promulgation; and (3) that, as a matter of law, there is no substantive difference between the Commissioner's imposing individual fines for conduct detrimental to the game after notice and hearing and promulgating the bench-fine rule — thus, promulgation of the rule was within the authority of the Commissioner.

(1) The record does not support the Board's finding that the Union conceded that the Commissioner had the right under the Collective Bargaining Agreement to adopt and promulgate the bench-fine rule; to

the contrary, the Union denied that he had such a right. The Union agreed only that the Commissioner had a right pursuant to the Agreement to fine a player for conduct detrimental to the League or professional football after notice and hearing. The distinction is a meaningful one to the Union and also to us. If the Commissioner's power is limited in the manner the Union suggests, each player who has been notified that he is being charged with conduct detrimental to the game can at the hearing attempt to prove that the conduct in question is not, in fact, detrimental and to prove that he did not engage in the proscribed conduct. The questions raised in footnote 2, for example, would have to be answered by the Commissioner.

(2) Nor does the record support the Board's finding that the bench rule was adopted by the Commissioner without meaningful or substantial conduct on the part of the Owners.

(a) The Commissioner stated in his letter of October 21, 1971, that the action was taken pursuant to a resolution passed by the member clubs. He was not called by the Employers to qualify that statement. Thus, it is fair to say that the Commissioner viewed the rule as one adopted and promulgated by the Owners and the individual fines as being levied pursuant to that rule.

(b) The Commissioner did discuss with his staff "his feeling that from now on if a player left the bench area during a fight, he felt he would have to fine him." But, he was obviously concerned about the reaction of the Owners to such a course of action and instead of announcing that such would be his policy or simply imposing a fine when an occasion occurred, he asked a member of the staff of the NFL to discuss the matter with the competition committee of the League — a committee in which only management is represented. When that committee indicated its approval, the Commissioner still wasn't satisfied. He had the committee bring a recommended resolution to the Owners for their approval. It was only when Owners voted twenty-four to two that the rule should be put into effect that the Commissioner had a press release sent out indicating that the bench-fine rule was now in effect.

(c) At no time prior to the press release did the Commissioner discuss the problem of players leaving the bench during fights with the Union. If, as the Employers contend, the Commissioner is the agent of both the Employers and the Union, and promulgated the rule as their agent, one must assume a serious breach of ethics by the Commissioner if he talked to only one of his principals. And, no one suggests that the Commissioner is an unethical man.

To summarize, every fact and inference supports the administrative law judge's conclusion that the rule was adopted and promulgated by the Owners.

Finally, the Board held that because the Commissioner had the power to promulgate the bench-fine rule, he exercised that power. The premise is doubtful and the conclusion a non sequitur. While the Board is permitted to draw inferences from the facts in the record and while we are required to accept such inferences when supported by facts, we are not required to adopt inferences or conclusions that are totally lacking in factual support.

We hold that the Employers, by unilaterally promulgating and implementing a rule providing for an automatic fine to be levied against any player who leaves the bench area while a fight or an altercation is in progress on the football field, have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

We remand to the Board with instructions to it to adopt a remedy consistent with this opinion.

Questions

1. Given the significance of the distinction between mandatory and non-mandatory subjects of bargaining, important questions will inevitably arise as to whether rules require bargaining before implementation. Which, if any of the following rules are mandatory subjects?

A. The height of the pitcher's mound.
B. The breadth and length of the field.
C. Natural or artificial turf.
D. The number of players on a roster.
E. The length of the preseason.
F. Ticket prices.
G. Team logo and colors.

2. Later in the course, it will become very important to determine whether player restraint mechanisms are mandatory subjects of bargaining. Thus, consider whether the draft, free agent indemnity rules, salary ceilings and draft eligibility rules are mandatory subjects of bargaining.

Section 6: Remedial Issues

Worker's Compensation

At common law an employee injured in the course of his normal employment duties might recover damages against the employer as a result of a tort based lawsuit. While this option still exist to some degree, all states have now adopted a statutory remedial system. These worker's compensation laws are deemed more efficient and fair to employees overall. The worker's compensation laws have been referred to as a no-fault system of recovery for injured employees. Liability is imposed on the employer without any admission of fault and the employee receives a statutorily based award.

The hallmark of worker's compensation laws is the requirement that both employers and employees renounce their common law rights. Thus an employee, though certain to recover under worker's compensation statutes, has no opportunity to supplement that recovery with additional damages arising from a suit based in tort. Statutes vary greatly throughout the country though they are all compulsory or elective in nature. Likewise, whether certain employers or employees are covered, as well as the scope of the coverage, is a matter of statutory interpretation.

Worker's compensation issues related to athletes have arisen on two levels reflecting the major distinctions between sports in our country. College athletes have tried to secure redress through the worker's compensation system for nearly half a decade, however, they have consistently been met with a resounding rejection by the courts. On the professional level, the courts have been much more willing to find the law applicable at least where there is no statutory exception or exemption.

An athlete's particular sport may also influence the ability or amount recoverable under the state's worker's compensation laws. Many uniform player contracts contemplate the potential for recovery and factor that possibility into the team's and/or league's remuneration to the injured athlete. For instance, the standard NFL players contract:

> 10. WORKERS' COMPENSATION. Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed in advance payment of workers' compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workers' compensation.

Likewise, the collective bargaining agreement between the NFL players association and the team owner's references worker's compensation issues where it states in part;

Article LIV: Workers' Compensation

Section 1. Benefits:

In any state where workers' compensation coverage is not compulsory, a Club will either voluntarily obtain coverage under the compensation laws of that state or otherwise guarantee equivalent benefits to its players. In the event that a player qualifies for benefits under this section, such benefits will be equivalent to those benefits paid under the compensation law of the state in which his Club is located.

Section 2. Rejection of Coverage:

Nothing in this Article is to be interpreted as preventing a Club that has the legal right to do so from rejecting coverage under the workers' compensation law of its state. However, if a Club elects to reject coverage under the compensation law of its state, it must nevertheless guarantee benefits to its player in the manner provided in Section 1 above. Moreover, any Club may be excluded from those laws if it elects to do so, but any such Club will be obligated to guarantee benefits to its players in the same manner provided in Section 1 above.

* * *

The question arises whether it is fair for an athlete to be bound to a potentially unforgiving worker's compensation statute in one state while similarly situated athletes receive common law tort benefits across the state border. Consider the following cases.

RENSING v. INDIANA STATE UNIVERSITY BOARD OF TRUSTEES

444 N.E.2d 1170 (IN 1983)

Opinion By: HUNTER

This case is before this Court upon the petition to transfer of defendant-appellee, Indiana State University Board of Trustees (Trustees). The plaintiff-appellant, Fred W. Rensing, was a varsity football player at Indiana State University who suffered an injury on April 24, 1976, during the team's spring football practice which left him a quadriplegic. Rensing filed a claim with the Industrial Board of Indiana (Industrial Board) seeking recovery under workmen's compensation for permanent total disability as well as medical and hospital expenses incurred due to the injury. The Industrial Board rejected his claim finding that an employer-employee relationship did not exist between Rensing and the Trustees and, therefore, he was not entitled to benefits under the Workmen's Compensation Act, Ind. Code § 22-3-1-1 et seq. (Burns 1974). The Court of Appeals, Fourth District, reversed the decision of the Industrial Board on the basis that Rensing was an "employee" for pay within the meaning of the statute and his employment by the Trustees was also within the coverage of the statute. (Citations omitted.)

We now grant transfer and reverse. The opinion and decision of the Court of Appeals are hereby vacated, and plaintiff's petition to transfer is granted. The decision of the Full Industrial Board is reinstated.

The facts established before the Industrial Board were summarized by the Court of Appeals:

> The undisputed testimony reveals the Trustees, through their agent Thomas Harp (the University's Head Football Coach), on February 4, 1974 offered Rensing a scholarship or 'educational grant' to play football at the University. In essence, the financial aid agreement, which was renewable each year for a total of four years provided that in return

> for Rensing's active participation in football competition he would receive free tuition, room, board, laboratory fees, a book allowance, tutoring and a limited number of football tickets per game for family and friends. The 'agreement' provided, inter alia, the aid would continue even if Rensing suffered an injury during supervised play which would make it inadvisable, in the opinion of the doctor-director of the student health service, 'to continue to participate,' although in that event the University would require other assistance to the extent of his ability.

"The trustees extended this scholarship to Rensing for the 1974-75 academic year in the form of a 'Tender of Financial Assistance.' Rensing accepted the Trustees' first tender and signed it (as did his parents) on April 29, 1974. At the end of Rensing's first academic year the Trustees extended a second 'Tender of Financial Assistance' for the 1975-76 academic year, which tender was substantially the same as the first and provided the same financial assistance to Rensing for his continued participation in the University's football program. Rensing and his father signed this second tender on June 24, 1975. It is not contested the monetary value of this assistance to Rensing for the 1975-76 academic year was $2,374, and that the 'scholarship' was in effect when Rensing's injuries occurred.

* * *

"As noted above, the financial aid agreement provided that in the event of an injury of such severity that it prevented continued athletic participation, 'Indiana State University will ask you to assist in the conduct of the athletic program within the limits of your physical capabilities' in order to continue receiving aid. The sole assistance actually asked of Rensing was to entertain prospective football recruits when they visited the University's Terre Haute campus.

"During the 1975 football season, Rensing participated on the University's football team. In the spring of 1976 he partook in the team's annual three week spring practice when, on April 24, he was injured while he tackled a teammate during a punting drill.

* * *

"The specific injury suffered by Rensing was a fractured dislocation of the cervical spine at the level of 4-5 vertebrae. Rensing's initial treatment consisted of traction and eventually a spinal fusion. During this period he developed pneumonia for which he had to have a tracheostomy. Eventually, Rensing was transferred to the Rehabilitation Department of the Barnes Hospital complex in St. Louis. According to Rensing's doctor at Barnes Hospital, one Franz U. Steinberg, Rensing's paralysis was caused by the April 24, 1976 football injury leaving him 95-100% disabled." (Citations omitted).

* * *

In this petition to transfer, the Trustees argue that there was no contract of hire in this case and that a student who accepts an athletic "grant-in-aid" from the University does not become an "employee" of the University within the definition of "employee" under the Workmen's Compensation Act, Ind. Code § 22-3-6-1(b), (Burns Supp.1982). On the other hand, Rensing maintains that his agreement to play football in return for financial assistance did amount to a contract of employment.

* * *

Here, the facts concerning the injury are undisputed. The contested issue is whether the requisite employer-employee relationship existed between Rensing and the Trustees so as to bring him under the coverage of our Workmen's Compensation Act. Both the Industrial Board and the Court of Appeals correctly noted that the workmen's compensation laws are to be liberally construed. *Prater v. Indiana Briquetting Corp.*, (1969) 253 Ind. 83, 251 N.E.2d 810. With this proposition as a starting point, the specific facts of this case must be analyzed to determine whether Rensing and the Trustees come within the definitions of "employee" and "employer" found in the statute, and specifically whether there did exist a contract of employment. IND. CODE § 22-3-6-1, *supra*, defines the terms "employee" and "employer" as

follows:

> (a) 'Employer' includes the state and any political subdivision, any municipal corporation within the state, any individual, firm, association or corporation or the receiver or trustee of the same, or the legal representatives of a deceased person, using the services of another for pay.
>
> (b) The term 'employee' means every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer.

The Court of Appeals found that there was enough evidence in the instant case to support a finding that a contract of employment did exist here. We disagree.

It is clear that while a determination of the existence of an employee-employer relationship is a complex matter involving many factors, the primary consideration is that there was an intent that a contract of employment, either express or implied, did exist. In other words, there must be a mutual belief that an employer-employee relationship did exist. (Citations omitted.) It is evident from the documents which formed the agreement in this case that there was no intent to enter into an employee-employer relationship at the time the parties entered into the agreement.

In this case, the National Collegiate Athletic Association's (NCAA) constitution and bylaws were incorporated by reference into the agreements. A fundamental policy of the NCAA, which is stated in its constitution, is that intercollegiate sports are viewed as part of the educational system and are clearly distinguished from the professional sports business. The NCAA has strict rules against "taking pay" for sports or sporting activities. Any student who does accept pay is ineligible for further play at an NCAA member school in the sport for which he takes pay. Furthermore, an institution cannot, in any way, condition financial aid on a student's ability as an athlete. NCAA Constitution, Sec. 3-1-(a)-(1); Sec. 3-1-(g)-(2). The fundamental concerns behind the policies of the NCAA are that intercollegiate athletics must be maintained as a part of the educational program and student-athletes are integral parts of the institution's student body. An athlete receiving financial aid is still first and foremost a student. All of these NCAA requirements designed to prohibit student-athletes from receiving pay for participation in their sport were incorporated into the financial aid agreements Rensing and his parents signed.

Furthermore, there is evidence that the financial aid which Rensing received was not considered by the parties involved to be pay or income. Rensing was given free tuition, room, board, laboratory fees and a book allowance. These benefits were not considered to be "pay" by the University or by the NCAA since they did not affect Rensing's or the University's eligibility status under NCAA rules. Rensing did not consider the benefits as income as he did not report them for income tax purposes. The Internal Revenue Service has ruled that scholarship recipients are not taxed on their scholarship proceeds and there is no distinction made between athletic and academic scholarships. *Rev. Rul.* 77- 263, 1977-31 I.R.B. 8.

As far as scholarships are concerned, we find that our Indiana General Assembly clearly has recognized a distinction between the power to award financial aid to students and the power to hire employees since the former power was specifically granted to the Boards of Trustees of state educational institutions with the specific limitation that the award be reasonably related to the educational purposes and objectives of the institution and in the best interests of the institution and the state. Ind. Code § 20-12-1-2(h) (Burns 1975).

* * *

In addition to finding that the University, the NCAA, the IRS and Rensing, himself, did not consider the scholarship benefits to be income, we also agree with Judge Young's conclusion that Rensing was not "in the service of" the University. As Judge Young stated:

> Furthermore, I do not believe that Rensing was 'in the service of' the Trustees. Rensing's participation in football may well have benefited the university in a very general way. That does not mean that Rensing was in the service of the Trustees. If a student wins a Rhodes scholarship or if the debate team wins a national award that undoubtedly benefits the school, but does not mean that the student and the team are in the service of the school. Rensing performed no duties that would place him in the service of the university." *Rensing v. Indiana State University, supra,* at 90.

Courts in other jurisdictions have generally found that such individuals as student athletes, student leaders in student government associations and student resident-hall assistants are not "employees" for purposes of workmen's compensation laws unless they are also employed in a university job in addition to receiving scholarship benefits. *Marshall v. Regis Educational Corp.*, (10th Cir.1981) 666 F.2d 1324; *Bobilin v. Board of Education,* (D. Hawaii 1975) 403 F. Supp. 1095; *Van Horn v. Industrial Accident Commission,* (1963) 219 Cal. App. 2d 457, 33 Cal. Rptr. 169; *State Compensation Insurance Fund v. Industrial Commission,* (1957) 135 Colo. 570, 314 P.2d 288.

All of the above facts show that in this case, Rensing did not receive "pay" for playing football at the University within the meaning of the Workmen's Compensation Act; therefore, an essential element of the employer-employee relationship was missing in addition to the lack of intent. Furthermore, under the applicable rules of the NCAA, Rensing's benefits could not be reduced or withdrawn because of his athletic ability or his contribution to the team's success. Thus, the ordinary employer's right to discharge on the basis of performance was also missing. While there was an agreement between Rensing and the Trustees which established certain obligations for both parties, the agreement was not a contract of employment. Since at least three important factors indicative of an employee-employer relationship are absent in this case, we find it is not necessary to consider other factors which may or may not be present.

* * *

For all of the foregoing reasons, transfer is granted; the opinion of the Court of Appeals is vacated and the Industrial Board is in all things affirmed.

COLEMAN v. WESTERN MICHIGAN UNIVERSITY

336 N.W.2d 224 (MI Ct. App. 1983)

Per Curiam.

Plaintiff, a former Western Michigan University scholarship football player, appeals by leave of this Court the WCAB's decision denying him compensation for an injury received during the course of football practice. We affirm.

The WCAB found the following facts, which are undisputed on appeal:

> A talented high school athlete, plaintiff was contacted by defendant and offered an annual, renewable scholarship if he could make the football team. The scholarship consisted of full tuition, room and board and books for the school year. Plaintiff accepted and played football for two seasons in 1972 and 1973. He held no part-time job for defendant while going to classes, studying and attending football practices and games. After his 1974 injury, he continued to receive his scholarship in full for the remainder of that school year. The following fall, however, that scholarship was reduced due to cutbacks in the university's scholarship program and due to team contribution. Plaintiff had to leave the university because he could not financially afford to continue there.

It is undisputed that plaintiff was injured and that his injury was disabling, in that he was thereafter no longer able to play football. The parties stipulated that, if plaintiff were entitled to compensation, it would be limited to four semesters, the remainder of his college tenure at the time of the injury. In a decision issued April 17, 1979, the hearing referee denied compensation, finding that plaintiff "was not an employee of defendant" but rather "a scholarship-student athlete". On November 4, 1981, the WCAB affirmed based on its application of the "economic reality" test for determining the existence of an employer-employee relationship, *Askew v. Macomber*, 398 Mich. 212, 247 N.W.2d 288 (1976); *McKissic v. Bodine*, 42 Mich. App. 203, 201 N.W.2d 333 (1972), lv. den. 388 Mich. 780 (1972). The WCAB found no employment relationship between the parties.

The question before this Court is whether plaintiff, a student athlete, was an "employee" within the meaning of the Worker's Disability Compensation Act, which defines "employee" as follows:

* * *

"(1) As used in this act, 'employee' means:

"(b) Every person in the service of another, under any contract of hire, express or implied * * *."

M.C.L. § 418.161(1)(b); M.S.A. § 17.237(161)(1)(b).

The case requires application of the "economic reality" test for determining the existence of an employment relationship. Askew v. Macomber, supra. Askew set forth certain factors which this Court must consider in determining whether there existed an "expressed or implied contract for hire" within the meaning of the foregoing provision. These factors include: (1) the proposed employer's right to control or dictate the activities of the proposed employee; (2) the proposed employer's right to discipline or fire the proposed employee; (3) the payment of "wages" and, particularly, the extent to which the proposed employee is dependent upon the payment of wages or other benefits for his daily living expenses; and (4) whether the task performed by the proposed employee was "an integral part" of the proposed employer's business. *See Askew, supra*, 398 Mich. at pp. 217-218, 247 N.W.2d 288. None of the foregoing factors is by itself dispositive. Each factor must be considered in turn, and all of them then taken into account in determining the existence of an employment relationship.

Concerning the first two Askew factors, i.e., the employer's right to control the activities of the employee and to discipline the employee for unsatisfactory performance, the WCAB observed:

> Although defendant did direct plaintiff in the performance of his football activities and had the right to discipline or suspend him from the team, it could not then revoke his scholarship. Per testimony provided by both plaintiff and defendant's athletic director, even had plaintiff been removed from the team early on in the school year, his scholarship would continue until the end of that school year.

In reaching the conclusion that defendant's right to "discipline" plaintiff was limited, the WCAB properly noted evidence in the record which reveals that, even if defendant decided to remove plaintiff from the football team during a particular academic year, defendant could not revoke plaintiff's scholarship aid for that year. Instead, each time a scholarship was granted, it was effective for an entire academic year, regardless of plaintiff's performance during the football season.

As to the limits on defendant's "right to control" plaintiff's activities, plaintiff suggests that defendant had a great deal of control over plaintiff's activities as a football player. It is observed, however, that such control applied to the sports activity whether or not an athlete had the benefit of a scholarship. Plaintiff's scholarship did not subject him to any extraordinary degree of control over his academic activities. The degree of defendant's control over this aspect of plaintiff's activities was no greater than that over any other student. Moreover, the record suggests that the parties contemplated a primary role for plaintiff's academic activities and only a secondary role for plaintiff's activities as a football player. Plaintiff recognized that "you are a student first, athlete second".

We agree with plaintiff that, under the third Askew factor, the scholarship constituted "wages" within the meaning of *Morgan v. Win Schuler's Restaurant*, 64 Mich. App. 37, 234 N.W.2d 885 (1975), defining wages as items of compensation which are measurable in money or which confer an economic gain upon the employee. In return for his services as a football player, plaintiff received certain items of compensation which are measurable in money, including room and board, tuition and books. Plaintiff was in fact dependent on the payment of these benefits for his living expenses. *See McKissic v. Bodine, supra*. Plaintiff testified directly that he could not have met all of his expenses without scholarship aid. When his scholarship was not renewed, plaintiff pursued his education elsewhere. The "payment of wages" factor weighs in favor of the finding of an employment relationship.

We finally consider the fourth factor of the "economic reality test", namely, whether the task performed by the proposed employee is an integral part of the proposed employer's business. In its opinion, the WCAB emphasized its factual finding that the primary function of the defendant university was to provide academic education rather than conduct a football program:

> We do not find that any express or implied contract existed between plaintiff and defendant University so as to bring plaintiff's claim within the Act. Per plaintiff's testimony, his purpose at the university was to further his education. In order to be able to financially accomplish this, he played football under defendant's athletic program. He testified that he had never entertained the hope of becoming a professional athlete. It was understood that, in order to have his scholarship renewed each year, plaintiff had to attend practices and games and otherwise fulfill the requirements of a university football player. The record just does not support the inference that plaintiff considered himself an 'employee' for defendant university.
>
> * * *
>
> "Neither can we find that the 'work performed,' (playing football), was an integral part of defendant's 'business,' (education). Defendant, per testimony provided by Mr. Hoy, also offered scholarships to other students for participation in the band and debating team. Not all of the players on defendant's football team received a full scholarship such as plaintiff had." (Emphasis added.)

The term "integral" suggests that the task performed by the employee is one upon which the proposed employer depends in order to successfully carry out its operations. Plaintiff misplaces his reliance on *Moore v. Fleischman Yeast Co.*, 268 Mich. 668, 256 N.W. 589 (1934) (janitor employee of sales office); *Glick v. H.A. Montgomery Co.*, 22 Mich.App. 678, 177 N.W.2d 724 (1970), lv. den. 383 Mich. *41 788 (1970) (part-time electrician employee of chemical manufacturer); *Rys v. A.S.D. Parishes Credit Union*, 1973 WCABO 3091 (mason employee of credit union). Each of these cases is distinguishable from this case because each employee in question performed a function essential to the operations of the employer. The mason, the janitor or the electrician who builds, cleans or maintains an employer's factory or office performs a function essential to the smooth and efficient operation of that employer's business. In this case, however, plaintiff's football playing was not essential to the business of the defendant university, which plaintiff himself recognizes "as education and research". The record supports the conclusion that defendant's academic program could operate effectively even in the absence of the intercollegiate football program. Defendant aptly notes that "the football season lasts for only a small portion of the academic year", and contrasts this with the fact that "the greater part of the school year is devoted exclusively to obtaining a regular college education".

In summary, the first and second factors of the "economic reality" test demonstrate that defendant had at least some right to control the activities of plaintiff and to discipline plaintiff for nonperformance, but these rights were substantially limited. The third factor, i.e., the "payment of wages", favors the finding of an employment relationship. The fourth factor, concerning whether the employee's duties were integral to the employer's business, however, weighs heavily against the finding of an employment

relationship.

* * *

Recently, an Indiana appellate court issued a decision on the subject of a scholarship football player's eligibility for workers' compensation benefits. *Rensing v. Indiana State University Bd. of Trustees*, 437 N.E.2d 78 (Ind.App.1982). In *Rensing*, the Indiana Court of Appeals found that a college scholarship football player who had been rendered a quadriplegic during the course of a spring football practice was an "employee" of the university and, therefore, entitled to benefits. The Court of Appeals decision was reversed by the Indiana Supreme Court in *Rensing v. Indiana State University Bd. of Trustees, Ind.*, 444 N.E.2d 1170 (1983). In a well-reasoned opinion, the Supreme Court concluded that an "athlete receiving financial aid is still first and foremost a student". *Rensing, supra*, p. 1173. The court specifically agreed with the dissenting conclusion of Judge Young of the Indiana Court of Appeals:

> "'Furthermore, I do not believe that Rensing was "in the service of" the Trustees. Rensing's participation in football may well have benefited the university in a very general way. That does not mean that Rensing was in the service of the Trustees. If a student wins a Rhodes scholarship or if the debate team wins a national award that undoubtedly benefits the school, but does not mean that the student and the team are in the service of the school. Rensing performed no duties that would place him in the service of the university.' Rensing v. Indiana State University, *supra*, at 90." *Rensing, supra*, p. 1174.

Upon reviewing the record and the relevant law, we conclude that the WCAB did not err in finding that our plaintiff was not an "employee" of defendant within the meaning of the act.

Affirmed.

Questions & Notes

1. The NCAA recently agreed to allow scholarship student athletes the right to work at part-time jobs when not "playing" for their respective schools. Would the fact that Rensing held a part-time job in the cafeteria changed the outcome of this case? Is the policy underlying the worker's compensation law somehow affected if the athlete is otherwise employed?

2. Is it easier for an athlete to receive worker's compensation if he is playing in a non-team sport? Is it preferable for such an athlete to seek recovery under such a statue or better instead to look for relief elsewhere?

3. List the pros and cons of the potential availability of worker's compensation recovery for professional athletes. Are the same arguments applicable for amateurs?

4. Other interesting sports related cases have involved participants who fit neither the role of college or professional sports participant. *See* e.g. *Munday v. Churchill Downs, Inc.*, 600 S.W.2d 487 (Ky. Ct. App. 1980) (involving "freelance jockey" claim to worker's compensation); *Connery v. Liberty Northwest Insurance Corp.*, 929 P.2d 222 (MT. 1996) (ski instructor involved in accident on slopes); *Hallau v. Orlando Magic*, 682 So. 2d 1235 (Fl. Ct. App. 1996) (student intern injured while working for the team).

5. What effect does the College Letter of Intent have on the reasoning of the judges in the college cases, if any?

6. Was there factual evidence to support the court's claim that Rensing was first and foremost a student? Must the status of student and employee be mutually exclusive? Does your IRS tax status determine whether you are on employee or not outside the sports world?

7. Can each of the "economic reality" test factors used in Coleman, be supported by evidence to indicate that college football players are in fact employees of the university? Is the determination sensitive to the sport engaged in and thus self-checking, allaying fears that lawmakers have regarding an opening of the proverbial floodgates?

MILES v. MONTREAL BASEBALL CLUB

379 So. 2d 1325 (Ct. Ap. 1st Dist. FL (1980))

Per Curiam.

Appellant, a professional baseball player in the Montreal Expos' organization, was assigned in 1977 to the Expos' West Palm Beach farm club. He had signed a standard player contract requiring him, among other things, to cooperate with and participate in the club's promotional activities. In August 1977, team members were told a party would be held and the sports media would attend for interviews and pictures. There is competent, substantial evidence to support the judge of industrial claims' finding that Manager Felipe Alou's announcement of the press party constituted a directive that the players be there. Appellant went to the party but was not interviewed. He and several other players spent part of the time diving into the Intercoastal Waterway; during one such dive, he hit bottom and suffered paralysis as well as other injuries. The judge of industrial claims found that appellant was injured in an accident arising out of and in the course of his employment but denied benefits because § 440.02(1)(c)3, Florida Statutes (1977), excludes professional athletes from workers' compensation coverage.

We need not consider appellant's argument that the statutory exclusion of professional athletes violates equal protection, because there is another ground for reversal of the judge of industrial claims' order. We find coverage in this case by analogizing its facts to those of a line of Florida cases dealing with the exemption, contained in § 440.02(1)(c)2, Florida Statutes (1977), of agricultural laborers.

In *Miranda v. Southern Farm Bureau Casualty Insurance Company*, 229 So.2d 232, 235 (Fla.1970), the Supreme Court held that a field foreman, responsible for transporting and supervising farm workers, was covered by Chapter 440:

> '. . . (i)t is the character of labor performed by the employee that must determine its (the agricultural labor exemption) application rather than the character of employer's business.'

Claimant in another case had been hired to repair and erect new buildings and tenant houses on a farm. His employer sought to evoke the agricultural exemption, but the court rejected that proposition:

> . . . it never was the intent of the agricultural labor exclusion under the Florida Workmen's Compensation Law to exempt farmers as a class or agriculture as an industry, but merely to exempt the kind of work or labor particularly associated with ordinary farming operations performed On a farm, such as plowing, harrowing, planting, fertilizing, cultivating, harvesting, preparation of farm products for market (e. g., washing and packing, (sic)), feeding livestock, milking cows, bottling milk, repairing fences, and the like.
>
> *Thomas Smith Farms, Inc. v. Alday*, 182 So.2d 405, 411 (Fla.1966). (Emphasis in the original.)

Appellant was a professional baseball player and, had he been injured while playing baseball, he

could not have received Chapter 440 benefits. The press party he was required to attend was not, however, "the kind of work or labor particularly associated with" playing professional baseball, but was an additional activity imposed upon him by the employer and to the employer's substantial benefit. *See City of Daytona Beach v. Mathias,* IRC Order 2-2983 (June 16, 1976), cert. denied, 350 So.2d 458 (Fla.1977).

Because of our disposition of this case, we need not address appellant's last point, that the employer waived the statutory exclusion and was estopped to assert it by virtue of having taken out a workers' compensation insurance policy.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALBRECHT v. The INDUSTRIAL COMMISSION (Chicago Bears Football Club)

648 N.E.2d 923 (IL App. Ct. 1995)

Opinion By: COLWELL

Claimant, Ted Albrecht, appeals the trial court's affirmance of the Industrial Commission's decision which affirmed the arbitrator's finding that claimant was not entitled to a wage-loss differential pursuant to section 8(d)1 of the Workers' Compensation Act (Act) (820 ILCS 305/8(d)1 (West 1992)). Claimant appeals, alleging that the trial court erred in applying section 8(d)2 of the Act and that the trial court was required to award compensation to claimant under section 8(d)1 of the Act since the elements of that paragraph were established. The issue of whether a wage-loss differential award under section 8(d)1 is available to professional athletes is one of first impression in Illinois.

The record indicates that claimant was a first round draft choice of the Chicago Bears Football Club (Bears) in 1977. Claimant played as an offensive lineman for five seasons from 1977 through 1981. On April 2, 1982, claimant sustained an L5-S1 disc herniation and an L4-L5 bulging disc after performing "leap frog" exercises at the Bears training camp. Dr. Henry Apfelbach, an orthopedic surgeon, treated claimant between April 1982 and May 1983. Although Dr. Apfelbach released claimant to resume his previous job, he gave claimant a 50% chance of achieving further success as a professional football player due to claimant's back surgery and the inactive period following the operation. Claimant was on injured reserve for the 1982 season. He was paid a salary but did not play. Claimant's earnings were $130,000 for 1982, his last year as a professional football player.

Claimant resumed practicing with the Bears at the training camps in 1983 but soon became aware that he was too slow and stiff from his injury to be physically capable of satisfactory performance. Claimant decided to voluntarily resign from professional football. Thereafter, he began a travel service business. Claimant also worked as a sportscaster. He earned approximately $80,000 in 1983, $80,000 in 1984, $87,000 in 1985, and $36,000 in 1986. The evidence indicates that the other Bears offensive linemen who played during this period were paid considerably more than claimant's earnings.

On June 28, 1991, the arbitrator awarded claimant temporary total disability benefits for 67 4/7 weeks and found claimant was permanently disabled to the extent of 50% under section 8(d)2 of the Act. The arbitrator acknowledged that claimant was "forced to change careers" due to his injury but nonetheless determined that claimant was not entitled to a wage-loss differential award under section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 1992)). The arbitrator noted that claimant has "good executive skills ambition and the willingness to work hard to make his business succeed and his side jobs to prove lucrative. Because his earning [sic], except for a drop in 1986, show a steady rise beginning in 1983, 1984 and 1985 * * * and in the Arbitrator's view, will continue to show an increase an award under (d-1) of § 8 makes little sense." The arbitrator determined that the only way to fairly judge claimant's earnings was to compare claimant's 1982 earnings with those he earned in later years. The arbitrator concluded that "[u]sing other

lineman's earnings as comparable is unfair because no player is guaranteed selection to the team even if he is healthy." Claimant appealed the denial of the section 8(d)1 wage differential award and the Bears appealed the award of 50% loss of man as a whole under section 8(d) 2 of the Act.

On January 29, 1993, the Commission affirmed that portion of the arbitrator's decision denying an award under section 8(d)1 of the Act. The Commission reduced the arbitrator's award from 50% man as a whole to 30% man as a whole under section 8(d)2 of the Act.

Claimant filed a complaint for review in the circuit court regarding the Commission's refusal to provide a section 8(d)1 wage differential award. The trial court confirmed the Commission's decision. In its memorandum decision, the trial court noted that the usual trade contemplated for an award under section 8(d)1 is that which can span the lifetime of a claimant. The trial court referred to testimony at the arbitrator's hearing from members of the Bears organization which indicated that the average playing time of an offensive lineman is less than 10 years. The trial court stated that "[f]rom the moment (claimant) started playing football, (claimant) was in a position of temporary employment, not a career where he could anticipate continued employment as long as he desired." The trial court concluded that any presumption that "but for" his injury claimant could have continued playing football is not applicable. The trial court also found that claimant failed to prove an impairment of earning capacity. The court noted that claimant's line of work would have been over before the time of hearing and his earning capacity as a football player would have ended. The court concluded that "[w]here no evidence exists that Petitioner would have continued in his usual and customary line of employment, earning his pre-injury wages, an award of wage differential is not appropriate."

The sole issue on appeal is whether the trial court's refusal to apply section 8(d)1 to the facts of this case was error as a matter of law. We conclude that a wage-loss differential award should have been entered in favor of claimant as a matter of law.

* * *

In order to qualify for a wage differential award under section 8(d)1, claimant must prove (1) partial incapacity which prevents him from pursuing his "usual and customary line of employment," and (2) an impairment of earnings. (820 ILCS 305/8(d)1 (West 1992).) The purpose of this section is to compensate the injured employee for his reduced earning capacity, and if the injury does not reduce his earning capacity, he is not entitled to such compensation. (Citations omitted.) The wage differential is to be calculated on the presumption that, but for the injury, the employee would be in the full performance of his duties. (Citations omitted.) The award is to be based "on the difference between the 'average amount' the employee would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of injury and the 'average amount' he is earning or is able to earn in some suitable employment after his injury." (Citations omitted.) Thus, claimant here must show that, but for his injury, he would have continued his professional football career as an offensive lineman with the Bears after 1983.

Respondent argues that claimant cannot prove how long he could have continued playing professional football or how much he would have earned without engaging in speculation. Respondent contends that the competitive nature and physical demands of the sport dictated that claimant's employment as a Bear was of a temporary nature in that it was dependent on claimant's ability to excel over other players competing for his job. The record indicates that Ted Phillips, contract negotiator for the Bears, testified at the arbitration hearing that the player salary level depended mainly on performance level and where one ranks in relation to other players on the team. Jim Finks, general manager for the Bears during claimant's career, stated in an affidavit that claimant signed contracts year to year with the Bears and that such contracts were contingent on claimant's success in making the football team. Finks stated that not every player is guaranteed to make the team on any given year. He also averred that the average career length of a National Football League (NFL) offensive lineman is less than 10 years.

It is well settled that liability under the Act cannot be premised on speculation or conjecture but

must be based solely on the facts contained in the record. (*Fritz Electric Co.*, 165 Ill. App.3d at 560, 116 Ill. Dec. 309, 518 N.E.2d 1289.) However, we may not base our decision solely on the evidence submitted by the Bears organization since that would require impermissible speculation that claimant's career would not have extended beyond 1983 due to the nature of the sport when evidence in the record indicates otherwise. Claimant acknowledges that he, like many workers, was an at-will employee and thus was not guaranteed employment from year to year. However, the record shows that claimant, a first-round draft choice, started every game from his first season in 1977 up to the time of his injury. It is further acknowledged that there are offensive linemen in the NFL, and specifically with the Bears, who have been successfully playing professional football for more than the ten-year average averred to by Jim Finks.

* * *

We reject the trial court's finding that the position of professional football player is "beyond the realm of the skilled worker contemplated" by those cases that have awarded a wage-loss differential under section 8(d)1 of the Act. (Citations omitted.) The trial court in the instant case noted that there was never a possibility here of claimant's employment extending to his retirement from the work force. However, the text of section 8(d)1 does not speak to situations of shortened work expectancy and there is no indication that this paragraph was intended to exclude employees in these circumstances. Indeed, it is more common in the work force today for an employee to change job positions several times over his career, whereas the practice of a trade spanning the lifetime of an employee is less common. We conclude that professional football players are skilled workers contemplated under the statute and that any shortened work expectancy in claimant's career would not preclude him from a wage-loss differential award under section 8(d)1 beginning in 1983 when he started his travel business.

* * *

The evidence indicates that claimant's earnings were approximately $80,000 in 1983, $80,000 in 1984, $87,000 in 1985, and $36,000 in 1986. These amounts are considerably less than claimant's salary of $130,000 for his final season with the Bears in 1982. The evidence clearly shows an impairment in claimant's earning capacity after his injury in 1982. Claimant's earnings in the years after his injury did not even come close to his final 1982 salary with the Bears. We note that the evidence indicates that the salaries of claimant's fellow linemen increased dramatically after 1983, although we will not speculate as to what amount claimant would have earned in the years after 1983. We conclude that claimant has shown an impairment in his earning capacity and is eligible for wage-loss benefits under section 8(d)1. The calculation of claimant's wage-loss differential award is to be determined from 1983 when he began his business and not the date of the 1988 hearing. Claimant's award is to be based on the difference between his 1982 salary of $130,000 and the amounts he actually earned in the years after his injury in 1982.

Accordingly, we reverse the Commission and remand this cause in order for the Commission to enter an award pursuant to section 8(d)(1) of the Act consistent with the evidence herein.

Reversed and remanded with directions.

ELLIS v. ROCKY MOUNTAIN EMPIRE SPORTS, INC., (d/b/a/ the Denver Broncos, and John Ralston)

602 P. 2d 895 CO. Ct. App. Div. I (1979)

VAN CISE, Judge

Plaintiff, Clarence Ellis, appeals from the summary judgements entered on motions of defendants Rocky Mountain Empire Sports, Inc. (the Broncos) and John Ralston. We affirm.

Plaintiff was a football player. After graduating from Notre Dame in 1972, he was a first round draft pick of the Atlanta Falcons in the National Football League (NFL), and played free safety for three years. He was then traded to the Denver Broncos in May 1975. A month before the trade, Ellis had injured his knee while playing basketball. After coming to Denver, the knee was surgically repaired and Ellis began a rehabilitation program under the guidance of the Bronco organization.

Ellis then reported to the Bronco pre-season training camp in Palo Alto, California. He there continued his rehabilitation program. On August 1, 1975, Ellis engaged in a contact practice drill with the other players and re-injured his knee. He was unable to play during the 1975 football season, and, after failing to pass the team physical examination in the spring of 1976, he was placed on waivers.

Ellis commenced this action in August 1977 against the Broncos, John Ralston (the head coach at the time of his injury), Dr. Leidholt (the team physician), and Denver Orthopedic Clinic, P.C. . .

* * *

The Broncos and Ralston moved for summary judgements as to all counts applicable to them, on the grounds, among others: (1) That all the claims pertaining to the Broncos were barred by reason of the failure of Ellis to comply with the mandatory arbitration requirements of his contract; and (2) that Ellis' personal injury claims against both defendants were barred by reason of the Colorado Workmen's Compensation Act. The trial court granted these motions on the grounds stated, and entered judgements accordingly. On appeal, Ellis claims error in each of the above rulings.

II. Applicability of Workman's Compensation Act

In this opinion, we are viewing the Workman's Compensation Act as it existed on August 1, 1975, the date of the injury. Some articles and sections were repealed and numerous amendments were made by the General Assembly effective September 1, 1975, and thereafter. Those amendments are not applicable to this case. (Citations omitted.)

The parties concede that the Broncos were "employers" within the Act, § 8-41-105, C.R.S.1973, that Ellis and Ralston were both "employees," § 8-41-106, C.R.S.1973, and that the Broncos had complied with all pertinent provisions of the Act. Also, there is no dispute that the injury occurred in the course of and within the scope of Ellis' employment.

[6] Section 8-42-102, C.R.S.1973, provided:

> An employer who has elected to comply and has complied with the provision of articles 40 to 54 of this title, (shall not be) subject to any other liability for the death of or personal injury to an employee, except as provided in said articles.

Section 8-43-103, C.R.S.1973, provided that an employee who has not "opted out" was subject to the provisions of the Act. Ellis had not opted out. Section 8-43-104,C.R.S.1973, provided that if the employee did not opt out, he surrendered his "rights to any method, form, or amount of compensation or determination thereof or to any cause of action, action at law, suit in equity, or statutory or common law right, remedy, or proceeding for or on account of such personal injuries or death of such employee other that as provided in said articles. . . . " Unless otherwise provided in the Act, neither the employer, *See Alexander v. Morrison-Knudsen Co.*, 166 Colo. 118, 444 P.2d 397 (1968), nor a fellow employee, *See*

*Sieck v. *170 Trueblood*, 29 Colo. App. 432,485 P.2d 134 (1971); *Nelson v. Harding*, 29 Colo. App. 76, 480 P.2d 851 (1970), was subject to a separate action for an injury sustained by an employee acting within the course of his employment. The employee's only remedy was a claim for workmen's compensation. *Hilzer v. MacDonald*, 169 Colo. 230,454 P.2d 928 (1969).

Ellis seeks to avoid this result, and contends that the Act did not apply to intentional torts, even when they occurred in the course of employment. Thus, he asserts that his intentional tort claims against Ralston and the Broncos contained in counts 1 and 2, which at oral argument were revealed to be intentional infliction of emotional distress and outrageous conduct, are not limited to the remedies specified in the Act. We do not agree.

The basic principles set forth above are not changed because of the nature of the incident causing injury. Contrary to Ellis' argument, intentional torts are covered under the Act, and compensation awards may be made for injuries suffered from intentional acts of co-employees. (Citations omitted)

We therefore hold that Ellis' exclusive remedy for his negligence and intentional tort claims is as provided for under the Workmen's Compensation Act, and he is barred from bringing this common law actin for his injury. The trial court properly dismissed the claims against Ralston.

Judgement affirmed.

Questions and Notes

1. How would you sum up the comparable treatment of professional athletes regarding worker's compensation law based on the three professional sports cases?

2. Does the Florida courts ruling in Miles hold more positive or negative implications for future application?